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COMMERCIAL DECISIONS

AFFECTING THE

BANKER AND MERCHANT

FROM THE

DECISIONS OF THE HIGHEST COURTS OF THE SEVERAL STATES.

By J. S. McMASTER

Examiner New York State Bank Department

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EXAMINER N. Y. STATE BANK DEPARTMENT.

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CHECK—See CERTIFIED CHECK; DRAFT OR SPECIAL FUND — Continued.
word "First" and inserting the word "Beaumont," held that the latter bank was liable in paying the two checks on which payment had been stopped at the First National Bank, the payee having altered the name of the bank on which they were drawn. 207a, No. 822, p. 215.

A. drew his check, on a bank in Kansas City, to the order of B., the cashier of bank in Harrison, and delivered the same to C. with instructions to deposit the same to the credit of A. in the bank at Harrison. C. presented the check to the Harrison bank and wrongfully received and retained the money thereon. Held that the Harrison bank was liable to A. for the amount of the check. 151a, No. 809, p. 145.

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Where a seller was delivering goods, under what he claimed was a valid contract, and the buyer's agent repudiated the contract and said that future deliveries would be received only at a less stated price, and the seller insisted on his contract and said that he would enforce it, that he would simply credit any payments made at less than the contract price, and sue for the balance: Held, that receipt and collection of checks enclosed in monthly statements which stated "to check in full," did not preclude the buyer from enforcing his contract. 327a.

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Where a bank simply credits the account of depositor with a check drawn on another bank, and the account remains good for the amount of the check until the bank hears that the maker declares that it was procured from him by fraud, the bank is not thereby a bona fide holder. 343a.

Where a depositor in the "First National Bank" drew a check on such bank, payable to the order of the "First National Bank," such paid check is, prima facie, a receipt from the bank to the depositor, and, unexplained, it acknowledges the payment to the bank by the depositor of the amount named in the check. No. 848, p. 353.

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CHECK—See CERTIFIED CHECK; DRAFT OR SPECIAL FUND—Continued.

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On the 27th day of February the attorneys of a debtor gave their individual check for the debtor's note, and the note was surrendered. At the request (although not as a condition) of the attorneys, the check was not presented for pay until March 2d, when it was paid. In bankruptcy litigation it was held that the debtor's note was paid February 27th. It was stated that if the check had been that of the debtors, that the note would not have been paid until March 2d, the day the check was actually paid. No. 847, p. 350.

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* * * left in the possession of said bank." Ives & Son held for collection a draft of $1,500, belonging to W. & Co., which Ives & Son sent to the bank for collection and credit. Before the draft was paid Ives & Son failed: Held, that the owners of the draft were entitled to it free from any lien of the bank. No. 843, p. 319.

A note, in Missouri, provided for payment of attorney's fees in case of collection by process of law. The State courts of Missouri declare such note non-negotiable. The U. S. Court sitting in that State refused to follow such decisions, and declare such note negotiable, and payments on it, or collateral to it, governed by the rule applicable to negotiable instruments. 338a, No. 852, p. 369.

Where the maker of a note for $225 deposited with his creditor, as collateral, a note made by a third party for $500, and the creditor did not use due diligence in collecting the $500 note, whereby it became worthless, held, that the creditor was liable to the maker of the $225 note for the difference between the two notes, and the maker of the $225 note was released therefrom. 372a.

A trustee under a will was directed to pay over the net income of the estate to a beneficiary. He had power under the will to change the investments and to execute transfers without any order of the court. He executed his note as trustee, and assigned as collateral to it certain securities of the estate. He used the proceeds of the note in paying taxes against the estate, and in payments to the beneficiary: Held, that the note was not a charge against the estate; that the estate was entitled to the return of the pledged securities. 323a.

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Where a bank held deed of land as collateral for a specified note of borrower, held that the provisions in the usual

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COLLATERAL — See PLEDGE — Continued.

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Holder of collateral who did not use ordinary diligence in collecting same, held liable for its value where it appeared that but for his negligence the collateral would have been collected. 18a, No. 788, p. 59.

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COLLECTIONS:

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Bank held negligent in not promptly inquiring for indorsed check lost in mail, and in not having it protested by copy or description; payee who indorsed duplicate check incurred no liability. 299a, No. 841, p. 314.

COLLECTIONS — Continued.

Bill of lading attached to draft received for collection; delivery of the bill of lading before payment of the draft. Measure of damages — the consignee being insolvent and the goods arriving in damaged condition. 271a.

Where a bank, known by its officers to be insolvent, received for collection a check on another bank which was paid, and the collecting bank sent in payment of the collection its own worthless draft, held that the owner of the collected check was a preferred creditor of the insolvent collecting bank. No. 850, p. 363.

The Bank of America held a collateral note of Ives & Son, which note stated that the bank should have "a lien upon all the property or securities * * * left in the possession of said bank." Ives & Son held for collection a draft of $1,500, belonging to W. & Co., which Ives & Son sent to the bank for collection and credit. Before the draft was paid Ives & Son failed. Held, that the owners of the draft were entitled to it free from any lien of the bank. No. 843, p. 319.

A collecting bank held not to have had notice, either from the indorsement of the draft, or from the letter enclosing it, that its correspondent held the draft for collection only; hence it could credit the amount collected to the debit balance due it from its correspondent. 345a.

Payees of check received in payment of debt, held negligent in presenting it for payment, and hence liable for loss of the amount. 329a, No. 853, p. 377.

COMMON CARRIER: See CARRIER OF GOODS.

Rule as to duty of carrier to notify consignee of arrival of goods. Duty of consignee, and time given him to remove the goods. 114a.

Held by a divided court in the Court of Appeals of New York, that a street car corporation is liable in substantial damages to one who has been grossly insulted by a conductor in the employ of the company. 42a.

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CONDITIONAL SALES: See SALES.

Where property is sold under the condition that the title to the property shall remain in the vendor until the purchase price is paid, and the vendor brings an action against the purchaser for the purchase price, he thereby loses his title to the goods. 33a.

Where by statute governing conditional sales, a prescribed form of sale being directed in case the seller retakes the property, it is provided that the buyer and seller may waive such form of sale; held that such waiver could not be made previous to default on the part of the buyer. Hence such waiver inserted in notes given for purchase price of the property was of no effect. 199a.

Certain form of conditional sale note held to allow the holder to apply payments made to "use, wear, and tear; to sell the property and apply the proceeds to hold the buyer for the balance." 285a.

Where machinery for a flouring mill was sold — the title to remain in the sellers until paid for, — held, that it lost its character as personal property and thus its right of removal, and became real estate by subsequent dealings between the parties whereby the sellers took a mortgage on a leasehold interest in the real estate and on the machinery, and inclosed and sold the property as an entirety. 291a.

Where machinery, bought under conditional sale agreement that the title was to remain in the seller until paid for, was placed in a mill on which there was a real-estate mortgage: Held, that the seller's lien or title was subject to the lien of the real-estate mortgage. 392a, No. 845, p. 328.

CONFLICT OF LAWS:

A certain guaranty held to cover only payment of one bill of goods. Where a guaranty was not binding until accepted and it was executed in one State, by a resident thereof, and sent to be accepted and become operative in another State; held that it would be governed by the laws of the latter State. 151a.

CONFLICT OF LAWS — Continued.

Note made, indorsed, and discounted in Indiana, but payable in Pennsylvania: Maker's liability governed by law of Pennsylvania: General rule as to indorser's liability. 155a.

Where a bond was executed in Kentucky, and secured by mortgage on lands there, but was payable in Minnesota; held that the validity of the lien of the mortgage would be goverened by the laws of Kentucky. 169a.

Where a certificate of deposit issued by an Illinois bank was transferred in a gaming transaction; held, by the Illinois courts that it would be void in a bona fide purchaser's hands, regardless of its being transferred in a State where such title would be good. Contrary rule by Colorado court. 252a.

Where a bill of exchange, drawn on parties in Austria, was executed and negotiated in New York, the liability of the drawers was held by an intermediate court to be governed by the laws of New York, and failure to protest the bill for non-payment released the drawers. (The Court of Appeals of New York, 84 N. Y., 367; 138 N. Y., 494, apparently hold a contrary view as to which law governed.) 313a.

A note, in Missouri, provided for payment of attorney's fees in case of collection by process of law. The State courts of Missouri declare such note non-negotiable. The U. S. court sitting in that State refused to follow such decisions, and declare such note negotiable, and payments on it, or collateral to it, governed by the rule applicable to negotiable instruments. 338a, No. 852, p. 369.

CONSIDERATION: See SALES.

A contract by which A. agrees to sell goods and B. agrees to buy them, may be good without other consideration than the mutual promises; but if A. reserves the right under such contract to cancel it at will the contract is void and A. cannot enforce it even if he tenders the goods. 168a, No. 814, p. 163.

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CONSIDERATION — See SALES — Continued.

Where a promoter represents to a subscriber that property can be purchased for a certain sum, and that sum includes commissions to the promoter, the purchaser may be relieved from his subscription or from a note given therefor. 36a.

A promise by a bankrupt after his discharge in bankruptcy to pay a debt from which he has been discharged is good and can be enforced even if not founded on any new consideration. Not so, if there has been a composition in bankruptcy. No. 800, p. 109.

Where a consideration is stated in a guaranty, held that notice of acceptance is not necessary. 40a.

Money loaned with knowledge that it is to be used for illegal or immoral purposes can be recovered if the lending contract and the lender are disconnected from this illegal contract. 40a.

The payee of an accommodation note transferred it before maturity as collateral for purchases yet to be paid. Held, that the transferee could hold it for credit extended to the payee after the maturity of the note. Unless such note is shown to have been misappropriated by the accommodated party the makers may not set up "want of consideration" against one who has acquired it in good faith and for value, even if it was so acquired after maturity. No. 846, p. 347.

CORPORATE NOTE:

Where the seal of the corporation was affixed to the face of the note signed William S. Reed, Prest., Mt. Carmel Lgt. & Power Co.," it was held on appeal that the presence of the seal, together with certain writing on the back of the note, made it the note of the corporation and not of Reed. 7a, No. 779, p. 18.

Where a note was signed by directors of a corporation who simply signed their individual names with the affix of "Directors of Thedford Irrigation & Power Co.," held that with the note in the hands of the payee it could be reformed so as to show who were the real makers as understood by all of the parties at the time of its execution 5a, No. 778, p. 25.

CORPORATE NOTE — Continued.

CORPORATION:

Right of certain stockholders of a national bank to bring an action against the directors for losses sustained by reason of careless or illegal investments made by such directors. No. 803, p. 120.

Executive officers and managing agents of a corporation held personally liable for funds collected by the corporation which should have been remitted but which were retained by the corporation. Such officers not liable for certain wrongful acts of subordinates not brought to their notice. Election of remedies. No. 797, p. 94.

While the rule is general that no managing agent of a corporation except the cashier of a bank possesses implied power to bind it by issuing, accepting or indorsing on its behalf negotiable instruments, held, that under certain urgent circumstances it could not be said as a matter of law that this rule was not subject to exceptions. Some such exceptions stated. No. 799, p. 105.

Powers of president of a corporation in the conduct of his business and his authority to bind it by his statements defined. 39a

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CORPORATION — Continued.
the parties at the time of its execution. 5a, No. 778, p. 25.
President of a bank or other corporation, who is also a stockholder or director, held not to be entitled to compensation for services as such president unless there was an express contract for such services. 148a.
Where the charter or articles of incorporation of a corporation are public records: Held that a provision in them creating a lien on any stockholder's shares for debts due the company is valid and enforceable regardless of the liens or ownership of innocent third parties. Such a lien created by a by-law is subject to the liens of third parties who have no knowledge of it. 158a.
Held, that although a stockholder may buy at a discount for his own use the debts of the corporation, a director may not. Certain election of a stockholder as director, and his action thereunder, held not to constitute him a director. 169a.
An officer who had authority to endorse paper in the name of the corporation and discount the same, so indorsed notes received from customers and advanced the money on them from his private funds. Held that the corporation was not bound by the indorsement. 197a, No. 820, p. 201.
Bank that accepted check of a corporation, signed by its treasurer, in payment of his individual note held by the bank: Held that it must make the amount good to the corporation although four years had elapsed since the check was regularly returned to the corporation with other vouchers. 200a, No. 821, p. 212.
Instances where president of a bank, who was also a director in an electric light company, assured another director of the company that if he would indorse a note of the company to be discounted at the bank, the bank would not hold him liable. Such promise good under slightly different circumstances. 289a.

CORPORATION — Continued.
Certain guaranty of a corporation held to be void, it being beyond its power to execute such a guaranty. 249a.
Rule as to implied powers of the secretary of a corporation. 372a.
Corporation held liable for its unauthorized note executed in its name by its defaulting president, the corporation having had the benefit of this particular note. 385a.

CREDIT: See DEPOSIT.
Credit of proceeds of note to a depositor did not constitute bank bona fide holder, although the credit was largely reduced before the bank heard that the note was procured by fraud, the bank not explaining how the credit was reduced. 232a.

DAMAGES: See SALES.
Rule as to damages where buyer refuses to take goods he has agreed to purchase. 164a, No. 817, p. 813.
A person injured by joint trespassers, who settles with one settles as to all. 203a.
Rule of damages where broker makes unauthorized sale of principal's stock held on margin. 273a.
Bill of lading attached to draft received for collection; delivery of the bill of lading before payment of the draft. Measure of damages — the consignee being insolvent and the goods arriving in damaged condition. 271a.

DEED:
The recording of a deed by the grantor the property being claimed as a gift by the grantee — held not to be conclusive evidence of a gift where the grantor retained the deed. 41a.
In many States where a deed is executed in blank, no one has authority to fill in the blanks unless his authority is in writing. 48a.

DELIVERY: See SALES.
Rule as to when an order for goods or machinery is accepted. When it can be revoked and how. Rule as to what

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DELIVERY — See SALES — Continued.
constitutes delivery of property when it is in the presence of buyer and seller. No. 796, p. 88.
Where a buyer writes to seller "ship goods by American Express," a delivery to the express company is a delivery to the buyer, and the seller is relieved of any responsibility for loss or damage to the goods. 25a.
Delivery of goods to a carrier held to be a delivery to the buyer even if no route has been designated by the buyer, unless there was a specific agreement that the delivery was to be made otherwise and at a specific place. 153a, No. 810, p. 148.
Where the seller agreed to sell and deliver to the buyer goods of different standards, "terms cash on delivery;" and the seller shipped the goods with a bill of lading for them attached to a sight draft, with no special offer of inspection of the goods, the buyer was not bound to receive them and such tender of performance by the seller was not good. 190a.
Where articles, yet to be produced, sold to be delivered later at the depot, are subsequently identified, marked and paid for by the buyer, the title passes to the buyer, and if the property is destroyed by fire the loss is the buyer's, although the seller is yet under contract to deliver at the depot. 305a.
Certain delivery of a check held to constitute a valid gift causa mortis. 262a, No. 839, p. 299.
Where an agent to loan and collect money for a principal in a distant State, with power to re-invest and to change investments, died, leaving in his papers his note payable to the principal, with no further or other evidence of delivery to or ownership in the principal: Held, that the principal had title to and could collect the note from the estate. 355a.

DEMAND NOTE:
Liability under negotiable instruments law of indorser of demand note on which payment was not demanded for over four months. Rule as to pleading and proof in such cases. 217a.

DEMAND;
"All notice of presentment, dishonor and protest," held by an intermediate appellate court in New York too insufficient to hold indorser, for the reason that it did not specifically waive "demand." Provision of Negotiable Instruments Law on that point. 309a.

DEPOSIT:
The rule that a payment applies to the oldest item in an account, held not to apply where there have been several sets of sureties for the officer in whose name the account is kept. 68a.
A bank cannot charge to a depositor's account, without his consent, an item on which he is simply a surety or a guarantor. 19a, No. 789, p. 62.
Where a firm of commission merchants were known to a bank to be insolvent, the bank, under the circumstances, was held not to be guilty of negligence in allowing the firm to deposit proceeds of sales of other people's property and check against it indiscriminately; but it could not charge against such deposits its own claims against the depositors. 12a, No. 782, p. 34.
Where a bank fails to apply on a note a deposit to the credit of the maker of the note, a surety on the note is only released to the extent of the deposit. Where a bank held two notes of such maker, both due at the same time and for a like amount, it may apply one-half of such deposit to each note. 204a.
A. drew his check on a bank in Kansas City, to the order of B., the cashier of bank in Harrison, and delivered the same to C., with instructions to deposit the same to the credit of A. in the bank at Harrison. C. presented the check to the Harrison bank and wrongfully received and retained the money thereon. Held that the Harrison bank was liable to A. for the amount of the check. 151a, No. 809, p. 145.
Certificate of deposit representing husband's money, issued payable to either husband or wife; payment to wife after death of husband; liability of bank; gift. 172a.
Rule as to presumption of a trust where

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DEPOSIT — Continued.
the owner of money deposits it in a bank to his credit as trustee for another. 295a.
Credit of proceeds of note to a depositor did not constitute bank bona fide holder, although the credit was largely reduced before the bank heard that note was procured by fraud, — the bank not explaining how the credit was reduced. 232a.
D. E. Taylor opened an account in a bank in the name of "Mrs. D. E. Taylor." The signature card showing authorized signatures to be recognized in connection with the account read "Mrs. D. E. Taylor per C. E. Taylor." C. E. Taylor died: Held that the bank was warranted in refusing to pay the money to Mrs. D. E. Taylor — or on her check. 294a.
A deposit made in a Pennsylvania bank in the name of "Henry and Catherine Klenke," the parties being husband and wife, was held to make the survivor the owner of the whole fund. The same ruling was applied where the deposit was to Henry or Catherine Klenke. Form used by this bank in opening joint accounts. No. 851, p. 366.
Where a bank simply credits the account of depositor with a check drawn on another bank, and the account remains good for the amount of the check until the bank hears that the maker declares that it was procured from him by fraud, the bank is not thereby a bona fide holder. 343a.

DIRECTORS:
Right of certain stockholders of a national bank to bring an action against the directors for losses sustained by reason of careless or illegal investments made by such directors. No. 803, p. 120.
Where a bank held as collateral stock of a coal company and sold the stock and bid it in — on non-payment of the debt — and ran the coal company for four years at a loss, held, that the directors were personally liable for the losses incurred in running the business. 1190.

DIRECTOR: See CORPORATION.
Held, that although a stockholder may buy at a discount for his own use the debts of the corporation, a director may not. Certain election of a stockholder as director, and his action thereunder, held not to constitute him a director. 169a.

DRAFT: See BILLS AND NOTES.

DRAFT ON SPECIAL FUND:
Where a bill of exchange drawn on parties in Austria was executed and negotiated in New York, the liability of the drawers was held by an intermediate court to be governed by the laws of New York, and failure to protest the bill for nonpayment released the drawers. (The Court of Appeals of New York, 84 N. Y. 367; 138 N. Y. 494, apparently hold a contrary view as to which law governed.)

DRUMMER: See SALES.
A traveling salesman has no implied authority to sell his samples, and a sale made in violation of such rule held not to give purchaser title to the goods. 212.

DUPLICATE CHECK:
Bank held negligent in not promptly inquiring for indorsed check lost in mail, and in not having it protested by copy or description; payee who indorsed duplicate check incurred no liability. 299a, No. 841, p. 314.
Where a payee indorsed a check which was good, but which was lost by a subsequent holder, and some time later the maker of the check issued a duplicate, which was marked "duplicate," which was not good, and which was indorsed by the payee of the original check — held that the payee was not liable as indorser — the original check not having been protested. 377a.

ELECTION OF REMEDIES:
Executive officers and managing agents of a corporation held personally liable for funds collected by the corporation which should have been remitted but

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ELECTION OF REMEDIES -- Continued.

which were retained by the corporation. Such officers not liable for certain wrongful acts of subordinates not brought to their notice. Election of remedies. No. 797, p. 94.

EXTENSION OF TIME OF PAYMENT:

Retiring partner held to have become a mere surety as to firm debts which the remaining partner assumed and agreed to pay; and where a creditor with knowledge of the facts extended time of payment of such firm debts and note, the retiring partner was thereby released. 15a, No. 784, p. 43.

Alteration made in date of note by the maker and payee held to have released the surety although there was a printed provision in the note that time of payment might be extended. 58a.

An agreement to extend time of payment to the principal party to a note, pleaded as a release by the surety must set out a valid consideration. Query, as to whether the negotiable instruments law has not changed the rule heretofore existing as to the release of certain parties to a note by the extension of the time of its payment. 111a.

D. signed as surety a note for others, a fact which was known to the bank that discounted it. The note contained this printed clause: "It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof." Held that D. was not released by an extension of time of payment of the note without his consent. 145a.

Certain clause as to extension of time of payment in note, held not to make it non-negotiable, although so held in other courts. In Texas a note, to order, may retain its negotiable advantages even if assigned with indorsement. 162a, No. 812, p. 153.

Sureties on contractor's bond for materials, which were incidentally sold on thirty days' time, held to be released to the amount of a thirty-day note which the sellers took of the contractor, thus extending the time of payment of that much of the account. 138a.

EXTENSION OF TIME OF PAYMENT — Continued.

EXTENSION OF TIME:

While a note given for an antecedent debt does not discharge the debt, unless it is so agreed by the parties, it acts as more than collateral to the debt; it extends the time of payment of the debt until the maturity of the note. 365a.

FIXTURES:

The rule existing in some States to the effect that where a tenant having, under his lease, a right to remove certain fixtures, renews his lease, without reserving again the right to remove the fixtures, thereby loses such right, held, on appeal, not to be the rule in Pennsylvania. No. 802, p. 117.

Where, under a lease, right was given to remove fixtures during the term of the lease, and such right was not exercised and the tenant continued under a new lease reserving similar rights: Held, that fixtures placed on the premises during the first term, and not then removed, belonged to the landlord. 143a.

Where machinery, bought under conditional sale agreement that the title was to remain in the seller until paid for, was placed in a mill on which there was a real-estate mortgage: Held, that the seller's lien or title was subject to the lien of the real-estate mortgage. 392a, No. 845, p. 328.

Where machinery for a flouring mill was sold — the title to remain in the sellers until paid for — held, that it lost its character as personal property and thus its right of removal, and became real estate by subsequent dealings between the parties whereby the sellers took a mortgage on a leasehold interest in the real estate and on the machinery, and foreclosed and sold the property as an entirety. 291a.

Fixtures placed in mortgaged building

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FIXTURES — Continued.
under agreement between seller and the owner of the building that the seller may remove them if not paid for — cannot be removed without consent of the owner of the mortgage. 229a.

F. O. B.
Where a sale is made "f. o. b." it is understood — and such understanding may not be changed by evidence as to what that term means — that the seller is to find and furnish cars and place the goods in good condition thereon, having done so the title to the goods passes to the buyer, and under the general rule the latter, as between the buyer and seller, is then liable for loss or damage thereto. 164a, No. 817, p. 183.

FORGERY:
The drawer of a draft forged the signature of the payee to the draft, and also the signature of the payee to a bill of sale indorsed on the draft, and then procured the money from a bank. The drawees paid the draft and on discovering the forgery and fraud sued the bank and recovered — not by reason of the forged indorsement of the draft — but by reason of the forgery of the bill of sale. Rule where the drawer of a draft forges the payee's indorsement. 247a, No. 836, p. 285.

FORMS:
D. signed as surety a note for others, a fact which was known to the bank that discounted it. The note contained this printed clause: "It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof." Held that D. was not released by an extension of time of payment of the note without his consent. 145a.
Where one who ordered a cash register from the manufacturer did not countermand the order, but did refuse to accept the machine after it was shipped: Held, notwithstanding that the usual

FORMS — Continued.
remedy for the buyer where the seller countermands an order or refuses to accept the goods is an action for damages — that in this case the buyer could recover the whole contract price. Form for relief in cases where order is countermanded. 177a.
Bona fide payment to stranger presenting depositor's book before latter's death — held good. Such payments after his death — bad. By-law to cover the latter case. 255a, No. 837, p. 289.
A deposit made in a Pennsylvania bank in the name of "Henry and Catherine Klenke," the parties being husband and wife, was held to make the survivor the owner of the whole fund. The same ruling was applied where the deposit was to Henry or Catherine Klenke. Form used by this bank in opening joint accounts. No. 851, p. 366.

FRAUD:
Where a promoter represents to a subscriber that property can be purchased for a certain sum, and that sum includes commissions to the promoter, the purchaser may be relieved from his subscription or from a note given therefor. 36a.

GAMING CONTRACT:
Money loaned with knowledge that it is to be used for illegal or immoral purposes can be recovered if the lending contract and the lender are disconnected from this illegal contract. 40a.
Where a certificate of deposit issued by an Illinois bank was transferred in a gaming transaction; held, by the Illinois courts that it would be void in a bona fide purchaser's hands, regardless of its being transferred in a State where such title would be good. Contrary rule by Colorado court. 252a
Where a gaming contract for dealing in cotton has been closed out by a broker, and the profits are held by the broker, the principal may maintain an action for their recovery. 383a.

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GIFT:

Certain loan of money with instructions to pay it to another after the death of the lender, held to be ineffectual as a gift. No. 793, p. 77.

Where one who held stock in a corporation, represented by certificates of stock, made and delivered a written assignment of his interest in the corporation with the intention of making a gift, but retained the certificates and drew dividends on the stock, held, that there was no gift. 76a.

The recording of a deed by the grantor — the property being claimed as a gift by the grantee — held not to be conclusive evidence of a gift where the grantor retained the deed. 41a.

Certain transactions and entries in relation to a savings bank account and book held to constitute a gift. 104a.

Certificate of deposit, representing husband's money, issued payable to either husband or wife; payment to wife after death of husband; liability of bank; gift. 172a.

D. E. Taylor opened an account in a bank in the name of "Mrs. D. E. Taylor." The signature card showing authorized signatures to be recognized in connection with the account read "Mrs. D. E. Taylor per C. E. Taylor." C. E. Taylor died. Held, that the bank was warranted in refusing to pay the money to Mrs. D. E. Taylor — or on her check. 2904a.

An account in a savings bank in name of "A" was changed to "A or P." Payment was made to "P" after knowledge of death of "A." Bank protected in such payment, solely by reason of other evidence of gift from "A" to "P." 282a.

Validity of order changing separate savings bank accounts to joint accounts held to be dependent on whether it was filed at bank before death of one of the parties. 263a. No. 840, p. 308.

Certain delivery of a check held to constitute a valid gift causa mortis. 262a, No. 839, p. 299.

GIFT — Continued.

Certain gift of certificates of stock held void for the reason that control of the property did not pass from the donor during her lifetime, although the certificates were assigned and delivered to a third party. 416a.

GOOD WILL:

Good will of business as an asset on dissolution of partnership, 296a.

GUARANTY:

Certain guaranty of goods to be purchased held to require acceptance and notice thereof to the guarantors in order to bind them; but the purchaser in this case held to be the agent of the guarantors, and notice to the purchaser was notice to the guarantors. 54a.

Where a consideration is stated in a guaranty, held that notice of acceptance is not necessary. 40a.

Statement of the president of a bank as to the genuineness of the signature to a note which the bank was asked to obtain, held not to bind the bank. 8a, No. 781, p. 29.

A writing reading "Please let the bearer L., have whatever he wants at any time, and I will see that it is paid for," is a guaranty that requires notice of acceptance and notice of default. 17a, No. 787, p. 53.

One who signed certain described papers held to be a surety, not guarantor, and thus not released by extension of time of payment or excess of credit given the principal. Difference defined between surety and guarantor. 17a, No. 786, p. 29.

Where, after the execution of a lease and a guaranty by a surety of its performance on the part of the tenant, the landlord and the tenant added a provision to the lease that in case the premises were rendered untenantable by reason of fire the lease should terminate, held, that the surety was released. 105a.

Surety released for reason of release of certain attachments, by the creditor, against property of the debtor. 161a.

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GUARANTY — Continued.

A certain guaranty held to cover only payment of one bill of goods. Where a guaranty was not binding until accepted and it was executed in one State, by a resident thereof, and sent to be accepted and become operative in other State: Held, that it would be governed by the laws of the latter State. 151a.

Sureties on contractor's bond for materials, which were incidentally sold on thirty days' time — held to be released to the amount of a thirty-day note, which the sellers took of the contractor, thus extending the time of payment of that much of the account. 138a.

Certain guaranty of a corporation held to be void, it being beyond its power to execute such a guaranty, 249a.

Guaranty of note held void because it did not state a consideration. 288a, No. 834, p. 262.

Mortgage, given as surety for any balance due by third party on open account, was released by reason of creditor taking note of debtor payable one day after date for amount of such balance. 223a, No. 832, p. 256.

Certain payments made, generally, by a debtor, held by reason of their application by the creditor to have paid a certain account for the payment of which the creditor had a bond — thus releasing the surety. Right of creditor to readjust payment. Form to be used in avoidance of release of surety. 220a, No. 831, p. 253.

An agreement having been reached as to the terms of a five-year lease, the owners of the property sent duplicate five-year lease to the lessee, and the latter executed one copy and returned it with a written guaranty of performance by a third party written on the lease. The lease was never signed by the owners — but they retained it, and the lessee went into possession and paid rent for more than a year. In an action against the guarantor on account of non-payment of rent, held, that the guarantor was not liable, the

GUARANTY — Continued.

lease which he guaranteed not having gone into effect. 235a.

Where the maker of a note for $225 deposited with his creditor, as collateral, a note made by a third party for $500, and the creditor did not use due diligence in collecting the $500 note, whereby it became worthless: Held, that the creditor was liable to the maker of the $225 note for the difference between the two notes, and the maker of the $225 note was released therefrom. 372a.

The payee of note "to order" sold it without indorsement, telling the purchasers "that the note was perfectly good — as good as gold — and would be paid by the makers when due." Held, that payee was liable as guarantor of the note. 366a.

Where a certain written general guaranty to a bank covered "renewals" of certain notes of the principals, on which they appeared as makers. Held, that notes of other parties, indorsed by such principals, could not be construed as "renewals" of the notes of the principals. No. 849, p. 359.

Bond of bank cashier held to cover defalcations only during the first year of his service, and payments made in future years on such defalcations, being applied to oldest items of such defalcations, the defalcations covered by the bond were paid, and the surety discharged. 325a, No. 854, p. 381.

HIRING CONTRACT:

A contract to give an employee permanent employment; not enforceable unless the employee fixes the period of his services before commencing work. 286a.

Holder in due course: See bona fide holder.

INDORSER:

A partnership engaged in the insurance and loan business is a non-trading partnership and there is no implied power in one partner to bind the other by indorsing a note payable to the firm. 52a.

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INDORSER — Continued.

Placing one's name on the face of a note with the words "indorser" affixed to it, did not constitute him an indorser. No. 795, p. 85.

One who was neither payee nor indorsee of a note who placed her name on the back before delivery, held, in the absence of an agreement to the contrary to be a co-maker. 4a, No. 777, p. 15.

A surviving partner has no power after dissolution to sign or indorse or renew a note on the firm name. Where dissolution is by the death of a partner his estate is not liable for future debts even if no notice of his death or of the dissolution of the firm is given. 30a

An indorsement "Pay to any bank or banker," held to be equivalent to an indorsement for collection and thus destroying the negotiability of the instrument — regardless of the nature of any snbsequent indorsement. 135a, No. 804. p. 123.

Two persons who signed a note, as president and treasurer, to the order of blank payee, and then before negotiating it wrote their names on the back thereof; held to be co-makers and not entitled to notice of protest as indorsers. 140a, No. 806, p. 136.

Where a bank fails to apply on a note a deposit to the credit of the maker of the note, a surety on the note is only released to the extent of the deposit. Where a bank held two notes of such maker, both due at the same time and for a like amount, it may apply one-half of such deposit to each note. 204a.

Note made, indorsed, and discounted in Indiana, but payable in Pennsylvania: Maker's liability governed by law of Pennsylvania. General rule as to indorser's liability. 155a.

Note secured by mortgage held to be a negotiable instrument in spite of non-negotiable clauses in mortgage, alleged uncertainty of time of payment, transfer by assignment instead of indorsement, no consideration, and as a negotiable instrument good in hands of third party who had not lost

INDORSER — Continued.

her rights by making the payee her agent. 176a, No. 816, p. 175.

An officer who had authority to indorse paper in the name of the corporation and discount the same, so indorsed notes received from customers and advanced the money on them from his private funds. Held, that the corporation was not bound by the indorsement. 197a, No. 820, p. 201.

Instance where president of a bank, who was also a director in an electric light company, assured another director of the company that if he would indorse a note of the company to be discounted at the bank, the bank would not hold him liable. Such promise good under slightly different circumstances. 289a.

Indorser, before inception of note, which was not protested for non-payment, held liable as joint maker. Different rule where negotiable instruments law is in force. 281a.

Where a payee indorsed a check which was good, but which was lost by a subsequent holder, and some time later the maker of the check issued a duplicate, which was marked "duplicate," which was not good, and which was indorsed by the payee of the original check. Held, that the payee was not liable as indorser, the original check not having been protested. 377a.

"All notice of presentment, dishonor and protest." Held, by an intermediate appellate court in New York too insufficient to hold indorser, for the reason that it did not specifically waive "demand." Provision of Negotiable Instruments Law on that point. 309a.

Rule as to title of a bona fide holder of a stolen negotiable instrument. 257a, No. 838, p. 295.

Where a certificate of deposit issued by an Illinois bank was transferred in a gaming transaction; held, by the Illinois courts that it would be void in a bona fide purchaser's hands, regardless of its being transferred in a state where such title would be good

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INDORSER — Continued.

Contrary rule by Colorado court. 252a.

Where commercial paper names several persons as payees, the indorsement of each is required to transfer the paper by indorsement. The indorsement of one transfers no interest whatever in the paper. 252a.

Certain town warrants, purchased by a bank in good faith, held to be non-negotiable instruments, and the bank ordered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt. 239a, No. 835, p. 279.

Liability under negotiable instruments law of indorser of demand note on which payment was not demanded for over four months. Rule as to pleading and proof in such cases. 217a.

Bank held negligent in not promptly inquiring for indorsed check lost in mail, and in not having it protested by copy or description; payee who indorsed duplicate check incurred no liability. 299a, No. 841, p. 314.

The drawer of a draft forged the signature of the payee to the draft, and also the signature of the payee to a bill of sale indorsed on the draft, and and then procured the money from a bank. The drawees paid the draft and on discovering the forgery and fraud sued the bank and recovered — not by reason of the forged indorsement of the draft, but by reason of the forgery of the bill of sale. Rule where the drawer of a draft forges the payee's indorsement. 247a, No. 836, p. 285.

INTEREST.

By the laws of Missouri interest may be compounded not oftener than once a year. The outside legal rate of interest there is 8 per cent. A national bank there held a note bearing 7 per cent. interest. It compounded the interest oftener than once a year, but even then the interest charged was not equivalent to 8 per cent. Held that the note was usurious and subject to

INTEREST — Continued.

the penalty attached to national banks that charge more than the legal rate of interest. 208a.

Where a note reads "with 4% interest from date until paid," it will draw the legal rate of interest after maturity. 395a.

LANDLORD AND TENANT:

The rule existing in some States to the effect that where a tenant having, under his lease, a right to remove certain fixtures, renews his lease without reserving again the right to remove the fixtures, thereby loses such right, held, on appeal, not to be the rule in Pennsylvania. No. 802, p. 117.

Where, under a lease right was given to remove fixtures during the term of the lease, and such right was not exercised and the tenant continued under a new lease reserving similar rights: Held, that fixtures placed on the premises during the first term, and not then removed, belonged to the landlord. 143a.

Where a landlord agreed to keep the premises in repair, and both he and the tenant knew of a defective walk on the premises, he was not liable to the tenant for damages sustained thereby. The tenant's precautionary remedy was to repair the walk and charge the cost to the landlord. An action in tort dies with the defendant and recovery is barred. 153a, No. 811, p. 150.

Where a tenant had a license to pass over a porch adjoining the premises he leased, and his wife was injured by reason of defects in such porch: Held that the "license" was not a "right," and that the landlord was not liable for damages by reason of the injury. 182a.

Liability of landlord for injury to tenant in certain case. 260a.

An agreement having been reached as to the terms of a five-year lease, the owners of the property sent a duplicate five-year lease to the lessee, and the latter executed one copy and returned it with a written guaranty of performance

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LANDLORD AND TENANT — Cont'd.
by a third party written on the lease. The lease was never signed by the owners, but they retained it, and the lessee went into possession and paid rent for more than a year. In an action against the guarantor on account of non-payment of rent, held that the guarantor was not liable, the lease which he guaranteed not having gone into effect. 235a.
Liability to third party who was injured by reason of defects existing when the tenant went into possession, the tenant having agreed to keep the premises in repair. 395a.
Failure of landlord to repair premises, as agreed in lease, held not to excuse tenant from failure to pay rent. Remedy of tenant. 400a.
Tenant, in certain case, held liable for injury sustained by third parties. Term of certain tenancy. 410a.

LAW OF PLACE (See CONFLICT OF LAWS):
Note made, indorsed, and discounted in Indiana, but payable in Pennsylvania: Maker's liability governed by law of Pennsylvania: General rule as to indorser's liability. 155a.

LEASE:
The rule existing in some States to the effect that where a tenant having, under his lease, a right to remove certain fixtures, renews his lease, without reserving again the right to remove the fixtures, thereby loses such right, held, on appeal, not to be the rule in Pennsylvania. No. 802, p. 117.
Where, under a lease, right was given to remove fixtures during the term of the lease, and such right was not exercised, and the tenant continued under a new lease, reserving similar rights: Held, that fixtures placed on the premises during the first term, and not then removed, belonged to the landlord. 143a.
Where a tenant had a license to pass over a porch adjoining the premises he leased, and his wife was injured by reason of defects in such porch: Held, that the "license" was not a "right,"

LEASE — Continued.
and that the landlord was not liable for damages by reason of the injury. 182a.
An agreement having been reached as to the terms of a five-year lease, the owners of the property sent a duplicate five-year lease to the lessee, and the latter executed one copy and returned it with a written guaranty of performance by a third party written on the lease. The lease was never signed by the owners, but they retained it, and the lessee went into possession and paid rent for more than a year. In an action against the guarantor on account of non-payment of rent, held, that the guarantor was not liable, the lease which he guaranteed not having gone into effect. 235a.
Tenant, in certain case, held liable for injury sustained by third parties. Term of certain tenancy. 410a.
Failure of landlord to repair premises, as agreed in lease, held not to excuse tenant from failure to pay rent. Remedy of tenant. 400a.
Liability to third party who was injured by reason of defects existing when the tenant went into possession, the tenant having agreed to keep the premises in repair. 395a.

LETTERS:
Rule as to how far one is bound by adverse statements contained in letters which he fails to contradict or answer. 246a.

LIEN:
Fixtures placed in mortgaged building under agreement between seller and the owner of the building that the seller may remove them if not paid for, cannot be removed without consent of the owner of the mortgage. 229a.
Rule as to when a renewal note and mortgage operates as extinguishment of the original debt and mortgage. 353a.
Where machinery, bought under conditional sale agreement that the title was to remain in the seller until paid for, was placed in a mill on which

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LIEN—Continued.

there was a real-estate mortgage: Held, that the seller's lien or title was subject to the lien of the real-estate mortgage. 392a, No. 845, p. 328.

LIMITATION OF ACTIONS:

Where there was no agreement or direction as to the application of payments on an open running account, the law would apply them so as to cancel the items of indebtedness incurred first in point of time, and a note given to settle the unpaid balance, and a judgment on such note, would be deemed to represent the items of indebtedness last incurred. 149a.

A bank holding an indorsed note on which it had a second judgment against real estate of the maker, sold the real estate and, under an order of the court, the proceeds of the sale were paid to the bank, the first judgment being declared fraudulent. The bank indorsed the proceeds of the sale on the note, and the indorsers paid the balance and the note was delivered to them. The owner of the first judgment appealed from the decision declaring her judgment fraudulent, and she succeeded, and the bank had to make over to her the money it received from the sale and had indorsed on the surrendered note. The bank then sued the indorsers of the surrendered note for this amount and won on appeal. 331a.

Certain credits, from sale or collection of collaterals held by payee of note, and indorsed by him on the note, held not to affect the running of the statute of limitations as to the maker. 370a.

MASTER AND SERVANT:

Rule as to damages where servant has been discharged before end of term. No. 792, p. 72.

Rule as to damages where servant is discharged before end of term for which he was hired. 28a.

A contract to give an employee permanent employment, not enforceable unless the employee fixes the period of his services before commencing work. 286a.

MISSOURI:

By the laws of Missouri interest may be compounded not oftener than once a year. The outside legal rate of interest there is 8 per cent. A national bank there held a note bearing 7 per cent. interest. It compounded the interest oftener than once a year, but even then the interest charged was not equivalent to 8 per cent. Held, that the note was usurious and subject to the penalty attached to national banks that charge more than the legal rate of interest. 208a.

MUNICIPAL WARRANTS:

Certain town warrants, purchased by a bank in good faith, held to be non-negotiable instruments, and the bank ordered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt. 239a, No. 835, p. 279.

MORTGAGE:

Note secured by mortgage held to be a negotiable instrument in spite of non-negotiable clauses in mortgage, alleged uncertainty of time of payment, transfer by assignment instead of indorsement, no consideration, and as a negotiable instrument good in hands of third party, who had not lost her rights by making the payee her agent. 176a, No. 816, p. 175.

Certain provisions in note held not to destroy its negotiability, and payment to the payee was made at the peril of the payor. Payee held not to be the agent of owner with authority to collect principal before it was due. 167a, No. 813, p. 160.

Where a bond was executed in Kentucky, and secured by mortgage on lands there, but was payable in Minnesota, held, that the validity of the lien of the mortgage would be governed by the laws of Kentucky. 169a.

A maker of a note secured by mortgage on real estate sold the real estate to another who assumed the debt. The latter paid interest and payment of principal at times sufficient to save

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MORTGAGE — Continued.

the debt from the bar of the statute of limitations; but the debt would have been so barred but for these payments. Held, that the maker of the note was released, 266a.

Mortgage, given as surety for any balance due by third party on open account, was released by reason of creditor taking note of debtor payable one day after date for amount of such balance. 223a, No. 832, p. 256.

Fixtures placed in mortgaged building under agreement between seller and the owner of the building that the seller may remove them if not paid for, cannot be removed without consent of the owner of the mortgage. 229a.

Where machinery for a flouring mill was sold — the title to remain in the sellers until paid for — held, that it lost its character as personal property and thus its right of removal, and became real estate by subsequent dealings between the parties whereby the sellers took a mortgage on a leasehold interest in the real estate and on the machinery, and forclosed and sold the property as an entirety. 291a.

Where machinery, bought under conditional sale agreement that the title was to remain in the seller until paid for, was placed in a mill on which there was a real-estate mortgage: Held, that the seller's lien or title was subject to the lien of the real-estate mortgage. 392a, No. 845, p. 328.

A note, in Missouri, provided for payment of attorney's fees in case of collection by process of law. The State courts of Missouri declare such note non-negotiable. The U. S. Court sitting in that State refused to follow such decisions, and declare such note negotiable, and payments on it or collateral to it governed by the rule applicable to negotiable instruments. 338a, No. 852, p. 369.

Rule as to when a renewal note and mortgage operates as extinguishment of the original debt and mortgage. 353a.

NATIONAL BANK (See INTEREST):

A national bank has no power to buy stock in another bank. 150a.

NEGOTIABLE INSTRUMENTS:

Ordinary coupon bonds, payable to bearer, held to be negotiable instruments and an innocent party taking them for value from a thief took good title to them. 16a, No. 785, p. 46.

An indorsement "Pay to any bank or banker," held to be equivalent to an indorsement for collection and thus destroying the negotiability of the instrument regardless of the nature of any subsequent indorsement. 135a, No. 804, p. 123.

Certain clause as to extension of time of payment in note, held not to make it non-negotiable, although so held in other courts. In Texas a note, to order, may retain its negotiable advantages even if assigned without indorsement. 162a, No. 812, p. 153.

Note secured by mortgage held to be a negotiable instrument in spite of non-negotiable clauses in mortgage, alleged uncertainty of time of payment, transfer by assignment instead of indorsement, no consideration, and as a negotiable instrument good in hands of third party who had not lost her rights by making the payee her agent. 176a, No. 816, p. 175.

Certain provisions in note held not to destroy its negotiability, and payment to the payee was made at the peril of the payor. Payee held not to be the agent of owner with authority to collect principal before it was due. 167a, No. 813, p. 160.

Certain note held to be negotiable and collectible in third party's hands, who by her actions in collecting interest notes had not constituted the payee her agent. Payment of interest coupon notes to original payee of principal note did not protect maker in paying principal to such payee. 201a, No. 823, p. 217.

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NEGOTIABLE INSTRUMENTS LAW:

An agreement to extend time of payment to the principal party to a note, pleaded as a release by the surety, must set out a valid consideration. Query, as to whether the negotiable instruments law has not changed the rule heretofore existing as to the release of certain parties to a note by the extension of the time of its payment. 111a.

Two persons who signed a note, as president and treasurer, to the order of blank payee, and then before negotiating it wrote their names on the back thereof; held to be co-makers and not entitled to notice of protest as indorsers. 140a, No. 806, p. 136.

Indorser, before inception of note, which was not protested for non-payment, held liable as joint maker. Different rule where negotiable instruments law is in force. 281a.

Certain delivery of a check held to constitute a valid gift causa mortis. 262a, No. 839, p. 299.

Rule, under negotiable instruments law, as to the enforcement, by a bona fide holder, of an altered instrument. 257a, No. 838, p. 295.

Rule as to title of a bona fide holder of a stolen negotiable instrument. 257a, No. 838, p. 295.

Liability under negotiable instruments law of indorser of demand note on which payment was not demanded for over four months. Rule as to pleading and proof in such cases. 217a.

Where a bill of exchange drawn on parties in Austria was executed and negotiated in New York, the liability of the drawers was held by an intermediate court to be governed by the laws of New York, and failure to protest the bill for non-payment released the drawers. (The Court of Appeals of New York, 84 N. Y., 367; 138 N. Y., 494, apparently hold a contrary view as to which law governed.) 313a.

Where personal service of notice of protest was sought to be made on a corporation conducting a hotel, leaving the notice at the cashier's window was held not to be sufficient notice. Rule in such cases. 381a.

NEGOTIABLE INSTRUMENTS LAW — Continued.

The Bank of America held a collateral note of Ives & Son, which note stated that the bank should have "a lien upon all the property or securities * * * left in the possession of said bank." Ives & Son held for collection a draft of $1,500 belonging to W. & Co., which Ives & Son sent to the bank for collection and credit. Before the draft was paid Ives & Son failed: Held that the owners of the draft were entitled to it free from any lien of the bank. No. 843, p. 319.

The payee of note "to order" sold it without indorsement, telling the purchasers "that the note was perfectly good — as good as gold — and would be paid by the makers when due." Held, that payee was liable as guarantor of the note. 366a.

NON-NEGOTIABLE INSTRUMENTS:

Where the payee and indorser of a promissory note struck out the provision for the payment of attorney's fees, held that the makers were thereby released. In South Carolina a provision to pay exchange makes a note non-negotiable, but this is not so as to a provision to pay attorney's fees. 2a, No. 776, p. 11.

Placing the words "non-negotiable or transferable" on the face of a note made it non-negotiable, but the statement "This note is not transferable nor to be used as collateral without the written consent of principal and indorsers, and if so used shall be absolutely void" could not prevent one taking title to it by assignment. No. 795, p. 85.

Placing one's name on the face of a note with the words "indorser" affixed to it, did not constitute him an indorser. No. 795, p. 85.

A note, in Missouri, provided for payment of attorney's fees in case of collection by process of law. The State courts of Missouri declare such note non-negotiable. The U. S. Court sitting in that State refused to follow such decisions, and declare such note

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NON-NEGOTIABLE INSTRUMENTS — Continued.

negotiable, and payments on it, or collateral to it, governed by the rule applicable to negotiable instruments. 338a, No. 852, p. 369.

A trustee under a will was directed to pay over the net income of the estate to a beneficiary. He had power under the will to change the investments and to execute transfers without any order of the court. He executed his note, as trustee, and assigned as collateral to it certain securities of the estate. He used the proceeds of the note in paying taxes against the estate, and in payments to the beneficiary. Held, that the note was not a charge against the estate, that the estate was entitled to the return of the pledged securities. 323a.

Note held non-negotiable as not being payable to bearer or naming a payee, nor leaving a blank for the name of of a payee. 188a, No. 819, p. 195.

Certain town warrants, purchased by a bank in good faith, held to be non-negotiable instruments, and the bank offered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt: 239a, No. 835, p. 279.

NON-NEGOTIABLE NOTE:

Note held to be non-negotiable by reason of provision for payment of attorney's fees. 341a.

NOTES (See BILLS AND NOTES):

NOTICE:

Bank that accepted check of a corporation, signed by its treasurer, in payment of his individual note held by the bank: Held that it must make the amount good to the corporation although four years had elapsed since the check was regularly returned to the corporation with other vouchers. 200a, No. 821, p. 212.

Certain partnership formed to carry on the plumbing business, held to be a trading partnership; hence one partner could bind the firm by signing the firm name to a note. Certain notice of dissolution held ineffectual as to holder of note. 275a.

NOTICE — Continued.

A collecting bank held not to have had notice, either from the indorsement of the draft, or from the letter enclosing it, that its correspondent held the draft for collection only; hence it could credit the amount collected to the debit balance due it from its correspondent. 345a.

Although a bank may in some cases recover back money represented by the cashier's check, used to pay his individual debts, it may lose such right where it has formerly known or should have known of such practices. 113a.

Certain guaranty of goods to be purchased held to require acceptance and notice thereof to the guarantors in order to bind them; but the purchaser in this case held to be the agent of the guarantors, and notice to the purchaser was notice to the guarantors. 54a.

Certain guaranty of goods to be purchased held to require acceptance and notice thereof to the guarantors in order to bind them; but the purchaser in this case held to be the agent of the guarantors, and notice to the purchaser was notice to the guarantors. 54a.

Where a consideration is stated in a guaranty, held that notice of acceptance is not necessary. 40a.

A surviving partner has no power after dissolution to sign or indorse or renew a note on the firm name. Where dissolution is by death of a partner his estate is not liable for future debts even if no notice of his death or of the dissolution of the firm is given. 30a.

OFFICER:

An officer who had authority to indorse paper in the name of the corporation and discount the same, so indorsed notes received from customers and advanced the money on them from his private funds. Held, that the corporation was not bound by the indorsement. 197a, No. 820, p. 201.

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OFFICER—Continued.

Bank that accepted check of a corporation, signed by its treasurer, in payment of his individual note held by the bank: Held, that it must make the amount good to the corporation although four years had elapsed since the check was regularly returned to the corporation with other vouchers. 200a, No. 821, p. 212.

President of a bank, or other corporation, who is also a stockholder or director, held not to be entitled to compensation for services as such president unless there was an express contract for such services. 148a.

Instance where president of a bank, who was also a director in an electric light company, assured another director of the company that if he would indorse a note of the company to be discounted at the bank, the bank would not hold him liable: Such promise good under slightly different circumstance. 289a

Although a bank may in some cases recover back money represented by the cashier's check, used to pay his individual debts, it may lose such right where it has formerly known or should have known of such practices. 113a.

Where a bank held as collateral stock of a coal company, and sold the stock and bid it in, on non-payment of the debt, and ran the coal company for four years at a loss, held, that the directors were personally liable for the losses incurred in running the business. 119a.

While the rule is general that no managing agent of a corporation except the cashier of a bank possesses implied power to bind it by issuing, accepting or indorsing on its behalf negotiable instruments, held, that under certain urgent circumstances it could not be said as a matter of law that this rule was not subject to exceptions. Some such exceptions stated. No. 799, p. 105.

Powers of president of a corporation in the conduct of its business, and his authority to bind it by his statements, defined. 39a.

Executive officers and managing agents

OFFICER—Continued.

of a corporation held personally liable for funds collected by the corporation which should have been remitted, but which were retained by the corporation. Such officers not liable for certain wrongful acts of subordinates not brought to their notice. Election of remedies. No. 797, p. 94.

Statement of the president of a bank as to the genuineness of the signature to a note which the bank was asked to obtain, held not to bind the bank. 8a, No. 781, p. 29.

Rule as to implied powers of the secretary of a corporation. 372a.

ORAL GUARANTY:

The payee of note "to order" sold it without indorsement, telling the purchasers "that the note was perfectly good — as good as gold — and would be paid by the makers when due." Held, that payee was liable as guarantor of the note. 366a.

PAROL EVIDENCE:

Where a sale is made "f. o. b." it is understood — and such understanding may not be changed by evidence as to what that term means — that the seller is to find and furnish cars and place the goods in good condition thereon; having done so the title of the goods passes to the buyer, and under the general rule the latter, as between the buyer and seller, is then liable for loss or damage thereto. 164a, No. 817, p. 183.

PARTNERSHIP:

Where on the death of one partner his estate received a secret bonus for withdrawing their objection to a sale which the surviving partners were willing to make: Held, that this bonus must, on being known to the other partner, be turned in as a firm asset. 137a, No. 805, p. 127.

Good-will of business as an asset on dissolution of pertnership. 296a.

Certain partnership formed to carry on the plumbing business, held to be a trading partnership; hence one part-

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PARTNERSHIP — Continued.
ner could bind the firm by signing the firm name to a note. Certain notice of dissolution held ineffectual as to holder of note. 275a.
Definition: What dealings may constitute the partnership relation. 242a.
Upon the dissolution of a firm, the partner succeeding to the business has the exclusive right to the use of the firm name. 241a.
Certain town warrants, purchased by a bank in good faith, held to be non-negotiable instruments, and the bank ordered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt. 239a, No. 835, p. 279.
Chattel mortgage made by two partners was recorded where property was located and where one partner resided, but was not recorded where the other partner resided: Held void as to creditors. 226a, No. 833, p. 260.
Where a firm sold out its business, and the purchasers assumed the debts of the old firm, the purchasers became the principal debtors as to the debts of the old firm, and the latter sureties. 378a.
A partnership engaged in the insurance and loan business is a non-trading partnership and there is no implied power in one partner to bind the other by indorsing a note payable to the firm. 52a.
A surviving partner has no power after dissolution to sign or indorse or renew a note on the firm name. Where dissolution is by the death of a partner, his estate is not liable for future debts even if no notice of his death or of the dissolution of the firm is given. 30a.
Surviving partner held without power to bind the deceased partner's estate by a note in the firm name, but he may pledge the firm assets in order to borrow money. 28a.
Retiring partner held to have become a mere surety as to firm debts which the remaining partner assumed and agreed to pay; and where a creditor with knowledge of the facts extended time of payment of such firm debt and note, the retiring partner was thereby released. 15a, No. 784, p. 43.
The rule in New York, Michigan and Minnesota that where on the dissolution of a firm one of two partners agrees with his copartner to assume and pay the partnership debts, that the retiring partner thus becomes a surety and that the creditor must take notice of the changed relation, does not hold in Iowa, and it seems not in Ohio, West Virginia, Alabama and Texas. 14a, No. 783, p. 40.

PASS BOOK.
Bank that accepted check of a corporation, signed by its treasurer, in payment of his individual note held by the bank: Held, that it must make the amount good to the corporation although four years had elapsed since the check was regularly returned to the corporation with other vouchers. 200a, No. 821, p. 212.

PAYEE:
Where a depositor in the "First National Bank" drew a check on such bank, payable to the order of the "First National Bank," such paid check is, prima facie, a receipt from the bank to the depositor, and, unexplained, it acknowledges the payment to the bank by the depositor of the amount named in the check. No. 848, p. 353.
Note held non-negotiable as not being payable to bearer or naming a payee, nor leaving a blank for the name of a payee. 188a, No. 819, p. 195.
Where commercial paper names several persons as payees the indorsement of each is required to transfer the paper by indorsement. The indorsement of one transfers no interest whatever in the paper. 252a.

PAYMENT.
Although a bank may in some cases recover back money represented by the cashier's check, used to pay his individual debts, it may lose such right where it has formerly known or should

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PAYMENT — Continued.

have known of such practices. 113a.

Where bank wrongfully refused to pay depositor's check, a verdict for $500 damages was held not to be excessive. 50a.

Applying the deposit in a bank, by the bank, to the indebtedness of an insolvent, held not to be a preference under the bankrupt law. The payment to a bank, by the insolvent, of his notes discounted by the bank for third parties, held to be a preference. No. 798, p. 99.

The rule that a payment applies to the oldest item in an account, held not to apply where there have been several sets of sureties for the officer in whose name the account is kept. 68a.

Where payment had been stopped on a check and it was paid by mistake to a bona fide holder, held that there could be no recovery by the bank from the holder. 7a, No. 780, p. 22.

A bank cannot charge to a depositor's account, without his consent, an item on which he is simply a surety or a guarantor. 19a, No. 789, p. 62.

Where a firm of commission merchants were known to a bank to be insolvent, the bank, under the circumstances, was held not to be guilty of negligence in allowing the firm to deposit proceeds of sales of other people's property and check against it indiscriminately; but it could not charge against such deposits its own claims against the depositors. 12a, No. 782, p. 34.

Where a collecting bank presented to a commission house a draft drawn on it, and accepted its check in payment therefor, it could not, as against the interest of the owner of the draft, surrender the check the next day to the commission house and take back the draft and protest it. The collecting bank could so protest the draft, in the interest of the owner, if the check was worthless, even if the makers refused to surrender the draft. 135a, No. 804, p. 123.

Where there was no agreement or direction as to the application of payments on an open running account, the law

PAYMENT — Continued.

would apply them so as to cancel the items of indebtedness incurred first in point of time, and a note given to settle the unpaid balance, and a judgment on such note would be deemed to represent the items of indebtedness last incurred. 149a.

A. drew his check, on a bank in Kansas City, to the order of B., the cashier of a bank in Harrison, and delivered the same to C. with instructions to deposit the same to the credit of A. in the bank at Harrison. C. presented the check to the Harrison bank and wrongfully received and retained the money thereon. Held, that the Harrison bank was liable to A. for the amount of the check. 151a, No. 809, p. 145.

Right of holder of check to maintain an action against the bank on which it is drawn for refusing to pay it, the check being good. 214a, No. 824, p. 824.

Certain provisions in note held not to destroy its negotiability, and payment to the payee was made at the peril of the payor. Payee held not to be the agent of owner with authority to collect principal before it was due. 167a, No. 813, p. 160.

Where a depositor in a "First National Bank" issued two checks thereon, and then stopped their payment and opened an account in the "Beaumont National Bank," which paid checks which the depositor had altered by drawing a line through the word "First" and inserting the word "Beaumont:" Held, that the latter bank was liable in paying the two checks on which payment had been stopped at the First National Bank, the payee having altered the name of the bank on which they were drawn. 207a, No. 822, p. 215.

Certificate of deposit, representing husband's money, issued payable to either husband or wife; payment to wife after death of husband; liability of bank; gift. 172a.

Note secured by mortgage held to be a negotiable instrument in spite of non-negotiable clauses in mortgage, alleged uncertainty of time of payment, trans-

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PAYMENT — Continued.
fer by assignment instead of indorsement, no consideration, and as a negotiable instrument good in hands of third party who had not lost her rights by making the payee her agent. 176a, No. 816, p. 175.
Where the maker and the indorsee of a lost check notified the bank not to pay it, but it did pay it to a bona fide holder: Held, that the indorsee could not recover of the bank. 181a, No. 818, p. 190.
Where a contract provided that the seller should, during a period of three years, make and deliver goods every sixty days — payments to be made therefor every sixty days — refused to make a sixty-day payment: Held, to excuse the seller in breaking the whole contract and collecting the price for goods already delivered. 183a.
Certain note held to be negotiable and collectible in third party's hands, who by her actions in collecting interest notes had not constituted the payee her agent. Payment of interest coupon notes to original payee of principal note did not protect maker in paying principal to such payee. 210a, No. 823, p. 217.
A person injured by joint trespassers who settles with one settles as to all. 203a.
A savings bank held liable, in a certain case, for payments made to third person who wrongfully obtained possession of and presented depositor's pass book. Degree of care required of depositor in caring for pass book. 191a.
Bank that accepted check of a corporation, signed by its treasurer, in payment of his individual note held by the bank: Held, that it must make the amount good to the corporation although four years had elapsed since the check was regularly returned to the corporation with other vouchers. 200a, No. 821, p. 212.
Where articles, yet to be produced, sold to be delivered later at the depot, are subsequently identified, marked and paid for by the buyer, the title passes

PAYMENT — Continued.
to the buyer, and if the property is destroyed by fire the loss is the buyer's although the seller is yet under contract to deliver at the depot. 305a.
An account in a savings bank in name of "A" was changed to "A or P." Payment was made to "P" after knowledge of death of "A." Bank protected in such payment, solely by reason of other evidence of gift from "A" to "P." 282a.
A maker of a note secured by mortgage on real estate sold the real estate to another who assumed the debt. The latter paid interest and payment of principal at times sufficient to save the debt from the bar of the statute of limitations; but the debt would have been so barred but for these payments: Held, that the maker of the note was released. 266a.
Validity of order changing separate savings bank accounts to joint accounts held to be dependent on whether it was filed at bank before death of one of the parties. 263a, No. 840, p. 308.
Bona fide payment to stranger presenting depositor's book before latter's death — held good: such payments after his death — bad. By-law to cover the latter case. 255a, No. 837, p. 289.
D. E. Taylor opened an account in a bank in the name of "Mrs. D. E. Taylor." The signature card showing authorized signatures to be recognized in connection with the account read "Mrs. D. E. Taylor per C. E. Taylor." C. E. Taylor died: Held, that the bank was warranted in refusing to pay the money to Mrs. D. E. Taylor — or on her check. 294a.
Certain payments made, generally, by a debtor, held by reason of their application by the creditor to have paid a certain account for the payment of which the creditor had a bond, thus releasing the surety. Right of creditor to readjust payment. Form to be used in avoidance of release of surety. 220a, No. 831, p. 253.
The drawer of a draft forged the signature of the payee to the draft, and also

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PAYMENT—Continued.
the signature of the payee to a bill of sale indorsed on the draft, and then procured the money from a bank. The drawees paid the draft and on discovering the forgery and fraud sued the bank and recovered, not by reason of the forged indorsement of the draft, but by reason of the forgery of the bill of sale. Rule where the drawer of a draft forges the payee's indorsement. 247a, No. 836, p. 285.

A seller agreed to deliver to the buyer 450 dozen axes, the buyer to pay at a certain time after shipment. The seller shipped a portion of the goods and demanded payment for that shipment, the buyer demanding all of the goods ordered. Held, that the seller had violated his contract and the buyer was entitled to damages. Certain conditions held not to constitute "unavoidable contingencies" mentioned in acceptance of the order, and which might excuse delay. No. 844, p. 325.

A bank holding an indorsed note on which it had a second judgment against real estate of the maker, sold the real estate and, under an order of the court, the proceeds of the sale were paid to the bank, the first judgment being declared fraudulent. The bank indorsed the proceeds of the sale on the note, and the indorsers paid the balance, and the note was delivered to them. The owner of the first judgment appealed from the decision declaring her judgment fraudulent, and she succeeded, and the bank had to make over to her the money it received from the sale and had indorsed on the surrendered note. The bank then sued the indorsers of the surrendered note for this amount and won, on appeal. 331a.

Where a seller was delivering goods, under what he claimed was a valid contract, and the buyer's agent repudiated the contract and said that future deliveries would be received only at a less stated price, and the seller insisted on his contract and said that he would enforce it, that he would simply credit any payments

PAYMENT—Continued.
made at less than the contract price, and sue for the balance: Held, that receipt and collection of checks enclosed in monthly statements which stated "to check in full," did not preclude the buyer from enforcing his contract. 327a.

Bond of bank cashier held to cover defalcations only during the first year of his service, and payments made in future years on such defalcations, being applied to oldest items of such defalcations, the defalcations covered by the bond were paid, and the surety discharged. 325a, No. 854, p. 381.

Payees of check received in payment of debt, held negligent in presenting it for payment, and hence liable for loss of the amount. 329a, No. 853, p. 377.

Where a bank, known by its officers to be insolvent, received for collection a check on another bank which was paid, and the collecting bank sent in payment of the collection its own worthless draft: Held, that the owner of the collected check was a preferred creditor of the insolvent collecting bank. No. 850, p. 363.

A note, in Missouri, provided for payment of attorney's fees in case of collection by process of law. The State courts of Missouri declare such note non-negotiable. The U. S. Court sitting in that State refused to follow such decisions, and declare such note negotiable, and payments on it, or collateral to it, governed by the rule applicable to negotiable instruments. 338a, No. 852, p. 369.

A collecting bank held not to have had notice, either from the indorsement of the draft, or from the letter enclosing it, that its correspondent held the draft for collection only; hence it could credit the amount collected to the debit balance due it from its correspondent. 345a.

Rule as to when a renewal note and mortgage operates as extinguishment of the original debt and mortgage. 353a.

While a note given for an antecedent debt does not discharge the debt,

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PAYMENT — Continued.
unless it so agreed by the parties, it acts as more than collateral to the debt; it extends the time of payment of the debt until the maturity of the note. 365a.
Where a gaming contract for dealing in cotton has been closed out by a broker, and the profits are held by the broker, the principal may maintain an action for their recovery. 383a.
Where a depositor in the "First National Bank" drew a check on such bank, payable to the order of the "First National Bank," such paid check is, prima facie, a receipt from the bank to the depositor, and, unexplained, it acknowledges the payment to the bank by the depositor of the amount named in the check. No.848, p. 353.
On the 27th day of February the attorneys of a debtor gave their individual check for the debtor's note, and the note was surrendered. At the request (although not as a condition) of the attorneys the check was not presented for payment until March 2d, when it was paid. In bankruptcy litigation it was held that the debtor's note was paid February 27th. It was stated that if the check had been that of the debtors that the note would not have been paid until March 2d, the day the check was actually paid. No. 847, p. 350.
A memorandum on a note stating that if it is not paid at the owner's death, then. under certain conditions, the makers were not to pay it, held void. 375a.
Certain credits, from sale or collection of collaterals held by payee of note, and indorsed by him on the note, held not to affect the running of the statute of limatations as to the maker. 370a.

POWER:
While the rule is general that no managing agent of a corporation except the cashier of a bank possesses implied power to bind it by issuing, accepting or indorsing on its behalf negotiable

POWER — Continued.
instruments, held, that under certain urgent circumstances it could not be said as a matter of law that this rule was not subject to exceptions. Some such exceptions stated. No. 799, p. 105.

PLEDGE (See COLLATERAL):
A pledge of a certificate of stock is not valid if the certificate is not delivered. 40a.
Certain sale of pledged stock, which the agreemeet provided could be sold at private sale, was subsequently agreed between the parties to be sold at public sale, Such sale being void by reason of the manner in which it was held, the pledgor was held to be entitled to have the value of the stock made good to him. 21a, 87a.
Holder of collateral who did not use ordinary diligence in collecting same, held liable for its value where it appeared that but for his negligence the collateral would have been collected. 18a, No. 788, p. 59.
Where a bank held deed of land as collateral for a specified note of borrower, held, that the provisions in the usual form of collateral note (taken in a subsequent transaction with the same party) to the effect that the bank should have a lien on all other property and securities of the debtor in the bank's possession, would not give the bank a lien on the land for the payment of the last collateral note. 10a, No. 801, p. 113.
Where the maker of a note for $225 deposited with his creditor, as collateral, a note made by a third party for $500, and the creditor did not use due diligence in collecting the $500 note, whereby it became worthless: Held, that the creditor was liable to the maker of the $225 note for the difference between the two notes, and the maker of the $225 note was released therefrom. 372a.

PRESENTATION:
"All notice of presentment, dishonor and protest," held, by an intermediate appellate court in New York too

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PRESENTATION — Continued.
insufficient to hold indorser, for the reason that it did not specifically waive "demand." Provision of Negotiable Instruments Law on that point. 309a.

PRESIDENT (See OFFICER; CORPORATION):
President of a bank, or other corporation, who is also a stockholder or director, held not to be entitled to compensation for services as such president unless there was an express contract for such services. 148a.

PRINCIPAL AND AGENT (See AGENCY; DRUMMER):

PROMISE:
Guaranty of note held void because it did not state a consideration. 228a, No. 834, p. 262.
The payee of note "to order" sold it without indorsement, telling the purchasers "that the note was perfectly good — as good as gold — and would be paid by the makers when due." Held that payee was liable as guarantor of the note. 366a.

PROMISSORY NOTE: See BILLS AND NOTES.

PROMOTER:
Where a promoter represents to a subscriber that property can be purchased for a certain sum, and that sum includes commissions to the promoter, the purchaser may be relieved from his subscription or from a note given therefor. 36a.

PROTEST:
Placing one's name on the face of a note with the words "indorser" affixed to it, did not constitute him an indorser. No. 795, p. 85.
Two persons who signed a note, as president and treasurer, to the order of blank payee, and then before negotiating it wrote their names on the back thereof; held to be comakers and not entitled to notice of protest as indorsers. 140a, No. 806, p. 136.

PROTEST — Continued.
Where a collecting bank presented to a commission house a draft drawn on it, and accepted its check in payment therefor, it could not, as against the interest of the owner of the draft, surrender the check the next day to the commission house and take back the draft and protest it. The collecting bank could so protest the draft, in the interest of the owner, if the check was worthless even if the makers refused to surrender the draft. 135a, No. 804, p. 123.
Bank held negligent in not promptly inquiring for indorsed check lost in mail, and in not having it protested by copy or description; payee who indorsed duplicate check incurred no liability. 299a, No. 841, p. 314.
Indorser, before inception of note, which was not protested for non-payment, held liable as joint maker: Different rule where negotiable instruments law is in force. 281a.
"All notice of presentment, dishonor and protest," held, by an intermediate appellate court in New York, too insufficient to hold indorser, for the reason that it did not specifically waive "demand." Provision of Negotiable Instruments Law on that point. 309a.
Where personal service of notice of protest was sought to be made on a corporation conducting a hotel, leaving the notice at the cashier's window, was held not to be sufficient notice. Rule in such cases. 381a.
Where a bill of exchange, drawn on parties in Austria, was executed and negotiated in New York, the liability of the drawers was held by an intermediate court to be governed by the laws of New York, and failure to protest the bill for non-pamyent released the drawers. (The Court of Appeals of New York, 84 N. Y. 367; 138 N. Y. 494, apparently hold a contrary view as to which law governed.) 313a.
Where a payee indorsed a check which was good, but which was lost by a subsequent holder, and some time

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PROTEST — Continued.
later the maker of the check issued a duplicate, which was marked "duplicate," which was not good, and which was indorsed by the payee of the original check, — held that the payee was not liable as indorser, — the original check not having been protested. 377a.

RATIFICATION:
Corporation held liable for its unauthorized note executed in its name by its defaulting president, — the corporation having had the benefit of this particular note. 385a.
Contract made on Sunday held incapable of ratification. 241a.

RECEIPT:
Where a depositor in the "First National Bank" drew a check on such bank, payable to the order of the "First National Bank," such paid check is, prima facie, a receipt from the bank to the depositor, and, unexplained, it acknowledges the payment to the bank by the depositor of the amount named in the check. No. 848, p. 353.

RECORD:
Chattel mortgage made by two partners was recorded where property was located, and where one partner resided, but was not recorded where the other partner resided: Held void as to creditors. 226a, No. 833, p. 260.

RENEWAL:
Rule as to when a renewal note and mortgage operates as extinguishment of the original debt and mortgage. 353a.
Where a certain written general guaranty to a bank covered "renewals" of certain notes of the principals, on which they appeared as makers: Held, that notes of other parties, indorsed by such principals, could not be construed as "renewals" of the notes of the principals. No. 840, p. 359.

RELEASE: See GUARANTY; SURETY; INDORSER.
A person injured by joint trespassers, who settles with one settles as to all. 203a.

SALES:
Where property is sold under the condition that the title to the property shall remain in the vendor until the purchase price is paid, and the vendor brings an action against the purchaser for the purchase price, he thereby loses his title to the goods. 33a.
Where in a contract for sale of coal it is provided that the contract is "subject to strikes, accidents or other causes," held, that shortage of cars was a legal excuse for non-delivery. 34a.
Certain notice required by a warranty held to have been waived by the seller acting on a different notice. 35a.
Where a promoter represents to a subscriber that property can be purchased for a certain sum, and that sum includes commissions to the promoter, the purchaser may be relieved from his subscription or from a note given therefor. 36a.
Delivery to a common carrier is usually delivery to the purchaser of goods. 38a.
Rule as to measure of damages where a saw mill bought on a warranty as to its output failed to come up to such warranty. No. 791, p. 66.
The words "Quality guaranteed" used in a written contract for the sale of binder twine, held to have a fixed and certain meaning and to imply that it was fit for the uses for which binder twine is used, and hence oral evidence was not admissible to show that the twine was to be of a different quality. 61a.
Where a party buys a machine, and on trial ascertains that it is defective and so notifies the seller, but continues to use the machine for even a short period, he affirms the sale and may not return the machine, but he may sue for damages. 49a.
Rule as to when an order for goods or machinery is accepted. When it can

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SALES — Continued.

be revoked and how. Rule as to what constitutes delivery of property when it is in the presence of buyer and seller. No. 796, p. 88.

Acceptance of an order by mail is complete when the seller deposits notice of acceptance addressed to the buyer in the post-office. The contract of sale is then complete. No. 796, p. 88.

Placing the words "non-negotiable or transferable" on the face of a note made it non-negotiable, but the statement "this note is not transferable nor to be used as collateral without the written consent of principal and indorsers, and if so used shall be absolutely void" could not prevent one taking title to it by assignment. No. 795, p. 85.

Certain affirmative statement as to the condition of property held to constitute a warranty. No. 790, p. 64.

The seller of a threshing outfit made written warranty of it on the agreement that if there was any defect in it by a given time, notice should be given the seller by registered letter. Defect was noticed before the buyer gave his notes for the purchase price and the general agent of the seller said that he would make it all right. Held, that this dispensed with the technical notice by mail. No. 794, p. 79.

Where a memorandum contained a statement excusing prompt delivery on account of strikes, accidents or other causes, shortage of cars excused prompt delivery. 34a.

Where under a conditional sale contract the title of the property is to remain in the seller until the debt is paid, and the seller may retake the property on non-payment of the debt, held, that if the seller brings an action on the debt he thereby releases his conditional sale lien. 33a.

Where the seller takes bills of lading in his own name and indorses them to the seller and delivers the goods to a proper common carrier with freight paid — if such is the contract — the delivery to the carrier is delivery to the buyer. Rule as to damages where

SALES — Continued.

buyer refuses to accept manufactured goods. 26a.

Where a buyer writes to seller "ship goods by American Express," a delivery to the express company is a delivery to the buyer, and the seller is relieved of any responsibility for loss or damage to the goods. 25a.

Certain sale of pledge stock which the agreement provided could be sold at private sale, was subsequently agreed between the parties to be sold at public sale. Such sale being void by reason of the manner in which it was held. The pledgor was held to be entitled to have the value of the stock made good to him. 21a, 87a.

Where a certain offer of sale was made by letter, held, that the reply did not bind the sellers, as it was accompanied by qualifying conditions. Rule in such cases. 301a.

A certain sale of grain held not to be by sample, without warranty, title to pass immediately, acceptance without objection precluded damages by reason of faulty condition. Rule in such cases. No. 828, p. 243.

A buyer gave his worthless check dated one day ahead for a car load of lumber, and procuring a non-negotiable bill of lading therefor assigned it with a draft to a bank that paid value therefor. Held, that the bank got good title or lien on the lumber. No. 825, p. 225.

Where articles, yet to be produced, sold to be delivered later at the depot, are subsequently identified, marked and paid for by the buyer, the title passes to the buyer, and if the property is destroyed by fire the loss is the buyer's, although the seller is yet under contract to deliver at the depot. 305a.

Where machinery for a flouring mill was sold — the title to remain in the sellers until paid for — held, that it lost its character as personal property, and thus its right of removal, and became real estate by subsequent dealings between the parties whereby the sellers took a mortgage on a leasehold interest in the real estate and on the

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SALES — Continued.

machinery, and foreclosed and sold the property as an entirety. 291a.

Certain form of conditional sale note held to allow the holder to apply payments made to "use, wear and tear;" to sell the property and apply the proceeds; to hold the buyer for the balance. 285a.

Where goods ordered were to be manufactured and delivered like sample, acceptance of part of the goods with knowledge that they were defective did not preclude buyer from offsetting damages by reason of the defects. No. 829, p. 248.

Rule as to implied warranty where the seller is also the manufacturer. To whom does the term "manufacturer" apply? 279a.

Rule of damages where broker makes unauthorized sale of principal's stock held on margin. 273a.

Where goods, bought without inspection by buyer, were sold under a printed contract that they could be exchanged if they did not prove satisfactory, and that no claim for defect in quality could be made until such exchange privilege had been availed of, held that if the goods were worthless they could be returned and the contract annulled. 272a.

Where a contract called for the delivery and acceptance of "about 5,000 tons" of coal, and 4,634 tons has been delivered, the buyer could not refuse to accept the difference — 366 tons — on the ground that the contract was completed. 259a.

Certain town warrants, purchased by a bank in good faith, held to be non-negotiable instruments, and the bank ordered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt. 239a, No. 835, p. 279.

Fixtures placed in mortgaged building under agreement between seller and the owner of the building that the seller may remove them if not paid for, cannot be removed without consent of the owner of the mortgage. 229a.

SALES — Continued.

Where on the death of one partner his estate received a secret bonus for withdrawing their objection to a sale which the surviving partners were willing to make: Held, that this bonus must, on being known to the other partner, be turned in as a firm asset. 137a, No. 805, p. 127.

Sureties on contractor's bond for materials, which were incidentally sold on thirty days' time — held to be released to the amount of a thirty-day note, which the sellers took of the contractor, thus extending the time of payment of that much of the account. 138a.

Where an agent was given money with which to make purchases, and he bought them on the credit of his principal: Held, that the principal was not bound thereby. 142a, No. 808, p. 142.

A traveling salesman has no implied authority to sell his samples, and a sale made in violation of such rule held not to give purchaser title to the goods. 212a.

Delivery of goods to a carrier held to be a delivery to the buyer even if no route has been designated by the buyer, unless there was a specific agreement that the delivery was to be made otherwise and at a specified place. 153a, No. 810, p. 148.

Rule as to damages where buyer refuses to take goods he has agreed to purchase. 164a, No. 817, p. 813.

Where a sale is made "f. o. b." it is understood — and such understanding may not be changed by evidence as to what that term means — that the seller is to find and furnish cars and place the goods in good condition thereon, having done so the title to the goods passes to the buyer, and under the general rule, the latter, as between the buyer and seller, is then liable for loss or damage thereto. 164a, No. 817, p. 183.

Certain contract by which a seller agreed in writing to sell A. all of certain goods he wanted: Held void although A. subsequently ordered the goods, as A. did not at the time agree to buy any goods. 165a.

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SALES — Continued.

A contract by which A. agrees to sell goods and B. agrees to buy them, may be good without other consideration than the mutual promises; but if A. reserves the right under such contract to cancel it at will the contract is void and A. cannot enforce it even if he tenders the goods. 168a, No. 814, p. 163.

Rule where articles are to be manufactured to the full satisfaction of the buyer. 174a.

Where a manufacturer of engines made a written order to a forge company for "one steel piston rod, 21 x 42 — rough turn to figures," and the forge company turned the rod from a steel billet which it used ordinary skill and care in purchasing for that purpose, and the rod broke after a week's use, from hidden defects in the steel, held that the forge company was not liable. 175a, No. 815, p. 168.

Where one who ordered a cash register from the manufacturer did not countermand the order but did refuse to accept the machine after it was shipped: Held, nothwithstanding that the usual remedy for the buyer where the seller countermands an order or refuses to accept the goods in an action for damages — that in this case the buyer could recover the whole contract price. Form for relief in cases where order is countermanded. 177a.

Where a contract provided that the seller should, during a period of three years, make and deliver goods every sixty days — payments to be made therefor every sixty days — refused to make a sixty-day payment, held to excuse the seller in breaking the whole contract and collecting the price for goods already delivered. 183a.

Where the seller agreed to sell and deliver to the buyer goods of different standards, "terms cash on delivery;" and the seller shipped the goods with a bill of lading for them attached to a sight draft, with no special offer of inspection of the goods, the buyer was not bound to receive them, and such tender of performance by the seller was not good. 190a.

SALES — Continued.

Except where the purchase price of goods is payable irrespective of their delivery, if the buyer countermands the order before delivery the seller cannot maintain an action for the price of the goods. His remedy is for damages for breach of the contract. 203a.

Where by statute governing conditional sales — a prescribed form of sale being directed in case the seller retakes the property — it is provided that the buyer and seller may waive such form of sale: Held, that such waiver could not be made previous to default on the part of the buyer. Hence such waiver inserted in notes given for purchase price of the property was of no effect. 199a,

Where an article is sold, the seller knowing that it is to be used for a certain purpose, the seller impliedly warrants that the article will serve the purpose. This rule applied to the sale of a butcher's refrigerator. Payment of part of the purchase price, not a resale of the goods would not change the application of the rule. No. 826, p. 233.

Where a seller was delivering goods, under what he claimed was a valid contract, and the buyer's agent repudiated the contract and said that future deliveries would be received only at a less stated price, and the seller insisted on his contract and said that he would enforce it, that he would simply credit any payments made at less than the contract price, and sue for the balance: Held, that receipt and collection of checks enclosed in monthly statements which stated "to check in full," did not preclude the buyer from enforcing his contract. 327a.

Rule of damages where order for articles yet to be manufactured was countermanded before manufacture was begun. 412a.

A seller agreed to deliver to the buyer 450 dozen axes, the buyer to pay at a certain time after shipment. The seller shipped a portion of the goods and demanded payment for that ship-

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SALES — Continued.
ment, the buyer demanding all of the goods ordered. Held, that the seller had violated his contract and the buyer was entitled to damages. Certain conditions held not to constitute "unavoidable contingencies" mentioned in acceptance of the order, and which might excuse delay. No. 844, p. 325.
Where machinery, bought under conditional sale agreement that the title was to remain in the seller until paid for, was placed in a mill on which there was a real-estate mortgage: Held, that the seller's lien or title was subject to the lien of the real estate mortgage. 392a, No. 845, p. 328.
Various rights of a seller of personal property which remains in his possession for lack of payment. 414a.
Rule as to implied warranty where the buyer orders from the manufacturer a special thing for a special purpose. 415a.

SURETY:
Bond of bank cashier held to cover defalcations, only, during the first year of his service, and payments made in future years on such defalcations, being applied to oldest items of such defalcations, the defalcations covered by the bond were paid, and the surety discharged. 325a, No. 854, p. 381.
Where a firm sold out its business, and the purchasers assumed the debts of the old firm, the purchasers became the principal debtors as to the debts of the old firm, and the latter sureties. 378a.

SAVINGS BANK:
Certain transactions and entries in relation to a savings bank account and book held to constitute a gift. 104a.
A savings bank held liable, in a certain case, for payment made to third person who wrongfully obtained possession of and presented depositor's pass book. Degree of care required of depositor in caring for pass book. 191a.
Rule as to presumption of a trust where

SAVINGS BANK — Continued.
the owner of money deposits it in a bank to his credit as trustee for another. 295a.
An account in a savings bank in name of "A" was changed to "A or P." Payment was made to "P" after knowledge of death of "A." Bank protected in such payment, solely by reason of other evidence of gift from "A" to "P." 282a.
Validity of order changing separate savings bank accounts to joint accounts, held to be dependent on whether it was filed at bank before death of one of the parties. 263a, No. 840, p. 308.
Bona fide payment to stranger presenting depositor's book before latter's death — held good. Such payments after his death — bad. By-law to cover the latter case. 255a, No. 837, p. 289.

SEAL:
Where the seal of the corporation was affixed to the face of a note signed "William S. Reed, Prest., Mt. Carmel Lgt. & Power Co.," it was held on appeal that the presence of the seal, together with certain writing on the back of the note, made it the note of the corporation and not of Reed. 7a, No. 779, p. 18.

SET-OFF:
A bank cannot charge to a depositor's account, without his consent, an item on which he is simply a surety or a guarantor. 19a, No. 789, p. 62.
Where a firm of commission merchants were known to a bank to be insolvent, the bank, under the circumstances, was held not to be guilty of negligence in allowing the firm to deposit proceeds of sales of other people's property and check against it indiscriminately; but it could not charge against such deposits its own claims against the depositors. 12a, No. 782, p. 34.

SIGNATURE:
Statement of the president of a bank as to the genuineness of the signature to a note which the bank was asked to obtain, held not to bind the bank. 8a, No. 781, p. 29.

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STATUTE OF FRAUDS:

Guaranty of note held void because it did not state a consideration. 228a, No. 834, p. 262.

The payee of note "to order" sold it without indorsement, telling the purchasers "that the note was perfectly good — as good as gold — and would be paid by the makers when due:" Held, that payee was liable as guarantor of the note. 366a.

STATUTE OF LIMITATIONS:

A maker of a note secured by mortgage on real estate sold the real estate to another who assumed the debt. The latter paid interest and payment of principal at times sufficient to save the debt from the bar of the statute of limitations; but the debt would have been so barred but for these payments: Held, that the maker of the note was released. 266a.

STOCKHOLDER:

Held, that although a stockholder may buy at a discount for his own use the debts of the corporation, a director may not. Certain election of a stockholder as director, and his action thereunder, held not to constitute him a director. 169a.

Right of certain stockholders of a national bank to bring an action against the directors for losses sustained by reason of careless or illegal investments made by such directors. No. 803, p. 120.

STOLEN NOTE:

Rule as to title of a bona fide holder of a stolen negotiable instrument. 257a, No. 838, p. 295.

STOCKS:

A pledge of a certificate of stock is not valid if the certificate is not delivered. 40a.

Certificate of stock in a national bank stood in the name of "T. H. Amberson, Trustee." Amberson transferred it in payment of his own debt. His son proved that the father stated orally on taking the stock, and subsequently, that he took it in trust for the son:

STOCKS — Continued.

Held, that the son could hold the stock (106 Fed. 558, 161a, vol. 4, McM. Com. Dec. that the son could have held the stock even if the purchaser had without the son's consent paid the father full value for it). 100a.

A national bank has no power to buy a stock in another bank. 150a.

Where the charter or articles of incorporation of a corporation are public records: Held, that a provision in them creating a lien on any stockholder's shares for debts due the company is valid and enforceable regardless of the liens or ownership of innocent third parties. Such a lien created by a by-law is subject to the liens of third parties who have no knowledge of it.

Rule of damages where broker makes unauthorized sale of principal's stock held on margin. 273a.

SUNDAY:

Contract made on Sunday held incapable of ratification. 241a.

SURETY (See GUARANTY):

Where, after the execution of a lease and a guaranty by a surety of its performance on the part of the tenant, the landlord and the tenant added a provision to the lease that in case the premises were rendered untenantable by reason of fire the lease should terminate, held, that the surety was released. 105a.

Any security given to one surety will inure to the benefit of all the sureties. Not so, where the principal is under no moral or legal obligation to pay the debt, or where a stranger to the debt furnishes the security. No. 800, p. 109.

The rule that a payment applies to the oldest item in an account, held not to apply where there have been several sets of sureties for the officer in whose name the account is kept. 68a.

Alteration made in date of note by the maker and payee held to have released the surety although there was a printed provision in the note that time of payment might be extended. 58a.

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SURETY—(See GUARANTY)—Continued
One who signed certain described papers held to be a surety, not guarantor, and thus not released by extension of time of payment or excess of credit given the principal. Difference defined between surety and guarantor. 17a, No. 786, p. 49.
Retiring partner held to have become a mere surety as to firm debts which the remaining partner assumed and agreed to pay; and where a creditor with knowledge of the facts extended time of payment of such firm debt and note, the retiring partner was thereby released. 15a, No. 784, p. 43.
The rule in New York, Michigan and Minnesota that where on the dissolution of a firm one of two partners agrees with his copartner to assume and pay the partnership debts that the retiring partner thus becomes a surety and that the creditor must take notice of the changed relation, does not hold in Iowa, and it seems not in Ohio, West Virginia, Alabama and Texas. 14a, No. 783, p. 40.
Sureties on contractor's bond for materials, which were incidentally sold on thirty days' time—held to be released to the amount of a thirty-day note, which the sellers took of the contractor, thus extending the time of payment of that much of the account. 138a.
Two persons who signed a note, as president and treasurer, to the order of blank payee, and then before negotiating it wrote their names on the back thereof; held to be comakers and not entitled to notice of protest as indorsers. 140a, No. 806, p. 136.
D. signed as surety a note for others, a fact which was known to the bank that discounted it. The note contained this printed clause: "It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof." Held, that D. was not released by an extension of time of payment of the note without his consent. 145a.
Surety released for reason of release of
SURETY—(See GUARANTY)—Continued
certain attachments, by the creditor, against property of the debtor. 161a.
Where a bank fails to apply on a note a deposit to the credit of the maker of the note, a surety on the note is only released to the extent of the deposit. Where a bank held two notes of such maker, both due at the same time and for a like amount, it may apply one-half of such deposit to each note. 204a.
Surety on bond of building contract released for the reason that payments to be made before the completion of the contract exceeded the payments, so to be made, as provided in the contract. 303a.
Instance where president of a bank, who was also a director in an electric light company, assured another director of the company that if he would indorse a note of the company to be discounted at the bank, the bank would not hold him liable. Such promise good under slightly different circumstances. 289a.
A maker of a note secured by mortgage on real estate sold the real estate to another who assumed the debt. The latter paid interest and payment of principal at times sufficient to save the debt from the bar of the statute of limitations; but the debt would have been so barred but for these payments. Held, that the maker of the note was released. 266a.
Certain guaranty of a corporation held to be void, it being beyond its power to execute such a guaranty. 249a.
Guaranty of note held void because it did not state a consideration. 228a, No. 834, p. 262.
Mortgage, given as surety for any balance due by third party on open account, was released by reason of creditor taking note of debtor payable one day after date for amount of such balance. 223a, No. 832, p. 256.
Certain payments made, generally, by a debtor, held by reason of their application by the creditor to have paid a certain account for the payment of

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SURETY—(See GUARANTY)—Continued
which the creditor had a bond, thus releasing the surety. Right of creditor to readjust payment. Form to be used in avoidance of release of surety. 220a, No. 831, p. 253.

At a meeting of the board of directors of a bank a cashier was elected "for one year," and his bond fixed at $20,000, which was executed by him with sureties. At the end of the year the cashier was re-elected "for the ensuing year," and his bond fixed at the same amount, but no new bond was given. Held, reversing the trial court, that the bond did not cover defalcations of the cashier occurring after the first year. No. 827, p. 232.

TENNESSEE:

Where by statute governing conditional sales — a prescribed form of sale being directed in case the seller retakes the property — it is provided that the buyer and seller may waive such form of sail: Held, that such waiver could not be made previous to default on the part of the buyer. Hence such waiver inserted in notes given for purchase price of the property was of no effect. 199a.

TERMS:

Certain form of conditional sale note held to allow the holder to apply payments made to "use, wear and tear;" to sell the property and apply the proceeds; to hold the buyer for the balance. 285a.

TEXAS:

Certain clause as to extension of time of payment in note, held not to make it non-negotiable, although so held in other courts. In Texas a note, to order, may retain its negotiable advantages even if assigned without indorsement. 162a, No. 812, p. 153.

TITLE:

Where property is sold under the condition that the title to the property shall remain in the vendor until the purchase price is paid, and the vendor brings

TITLE—Continued.
an action against the purchaser for the purchase price, he thereby loses his title to the goods. 33a.

Where the seller takes bills of lading in his own name and indorses them to the seller and delivers the goods to a proper common carrier with freight paid — if such is the contract — the delivery to the carrier is delivery to the buyer. Rule as to damages where buyer refuses to accept manufactured goods. 26a.

Where a buyer writes to seller "ship goods by American Express," a delivery to the express company is a delivery to the buyer, and the seller is relieved of any responsibility for loss or damage to the goods. 25a.

Where a sale is made "f. o. b." it is understood — and such understanding may not be changed by evidence as to what that term means — that the seller is to find and furnish cars and place the goods in good condition thereon, having done so the title to the goods passes to the buyer, and under the general rule the latter, as between the buyer and seller, is then liable for loss or damage thereto. 164a, No. 817, p. 183.

Where articles, yet to be produced, sold to be delivered later at the depot, are subsequently identified, marked and paid for by the buyer, the title passes to the buyer, and if the property is destroyed by fire the loss is the buyer's, although the seller is yet under contract to deliver at the depot. 305a.

Where machinery for a flouring mill was sold — the title to remain in the sellers until paid for — held, that it lost its character as personal property, and thus its right of removal, and became real estate by subsequent dealings between the parties whereby the sellers took a mortgage on a leasehold interest in the real estate and on the machinery, and forclosed and sold the property as an entirety. 291a.

Rule as to title of a bona fide holder of a stolen negotiable instrument. 257a, No. 838, p. 295.

Certain town warrants, purchased by a

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TITLE — Continued.

bank in good faith, held to be non-negotiable instruments, and the bank ordered to surrender them to a firm, one member of which had indorsed and transferred them in payment of his individual debt. 239a, No. 835, p. 279.

Credit of proceeds of note to a depositor did not constitute bank bona fide holder, although the credit was largely reduced before the bank heard that note was procured by fraud — the bank not explaining how the credit was reduced. 232a.

Fixtures placed in mortgaged building under agreement between seller and the owner of the building that the seller may remove them if not paid for — cannot be removed without consent of the owner of the mortgage 229a.

The Bank of America held a collateral note of Ives & Son, which note stated that the bank should have "a lien upon all the property or securities * * * left in the possessionof said bank." Ives & Son held for collection a draft of $1,500 belonging to W. & Co., which Ives & Son sent to the bank for collection and credit. Before the draft was paid Ives & Son failed. Held, that the owners of the draft were entitled to it free from any lien of the bank. No. 843, p. 319.

A collecting bank held not to have had notice, either from the indorsement of the draft, or from the letter enclosing it, that its correspondent held the draft for collection only; hence it could credit the amount collected to the debt balance due it from its correspondent. 345a.

Where an agent to loan and collect money for a principal in a distant State, with power to reinvest and to change investments, died, leaving in his papers his note payable to the principal, with no further or other evidence of delivery to or ownership in the principal; held, that the principal had title to and could collect the note from the estate. 355a.

Where machinery, bought under conditional sale agreement that the title was

TITLE — Continued.

to remain in the seller until paid for, was placed in a mill on which there was a real estate mortgage, held, that the seller's lien or title was subject to the lien of the real estate mortgage. 392a, No. 845, p. 328.

TORT.

Where a landlord agreed to keep the premises in repair, and both he and the tenant knew of a defective walk on the premises, he was not liable to the tenant for damages sustained thereby. The tenant's precautionary remedy was to repair the walk and charge the cost to the landlord. An action in tort dies with the defendant and recovery is barred. 153a, No. 811, 150.

TRADE TERM

The words "Quality guaranteed" used in a written contract for the sale of binder twine, held to have a fixed and certain meaning and to imply that it was fit for the uses for which binder twine is used, and hence oral evidence was not admissible to show that the twine was to be of a different quality. 61a.

Where a sale is made "f. o. b." it is understood — and such understanding may not be changed by evidence as to what that term means — that the seller is to find and furnish cars and place the goods in good condition thereon, having done so the title to the goods passes to the buyer, and under the general rule the latter, as between the buyer and seller, is then liable for loss or damage thereto. 164a, No. 817, p. 183.

Where the seller agreed to sell and deliver to the buyer goods of different standards, "terms cash on delivery;" and the seller shipped the goods with a bill of lading for them attached to a sight draft, with no special offer of inspection of the goods, the buyer was not bound to receive them, and such tender of performance by the seller was not good. 190a.

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TRANSFER:

Certificate of stock in a national bank stood in the name of "T. H. Amberson, Trustee." Amberson transferred it in payment of his own debt. His son proved that the father stated orally on taking the stock, and subsequently, that he took it in trust for the son; Held, that the son could hold the stock. 100a.

Where the charter or articles of incorporation of a corporation are public records: Held, that a provision in them creating a lien on any stockholder's shares for debts due the company is valid and enforceable regardless of the liens or ownership of innocent third parties. Such a lien created by a by-law is subject to the liens of third parties who have no knowledge of it. 158a.

TRUSTEE:

Certificate of stock in a national bank stood in the name of "T. H. Amberson, Trustee." Amberson transferred it in payment of his own debt. His son proved that the father stated orally on taking the stock, and subsequently that he took it in trust for the son: Held, that the son could hold the stock. 100a,

A trustee under a will was directed to pay over the net income of the estate to a beneficiary. He had power under the will to change the investments and to execute transfers without any order of the court. He executed his note, as trustee, and assigned as collateral to it certain securities of the estate. He used the proceeds of the note in paying taxes against the estate, and in payments to the beneficiary, held, that the note was not a charge against the estate; that the estate was entitled to the return of the pledged securities. 323a.

Where an agent to loan and collect money for a principal in a distant State, with power to reinvest and to change investments, died, leaving in his papers his note payable to the principal, with no further or other evidence of delivery to or ownership in

TRUSTEE — Continued.

the principal; held, that the principa. had title to and could collect the note from the estate. 355a.

TRUST:

Rule as to presumption of a trust where the owner of money deposits it in a bank to his credit as trustee for another. 295a.

TRUST FUND:

Where a bank, known by its officers to be insolvent, received for collection a check on another bank which was paid, and the collecting bank sent in payment of the collection its own worthless draft; held, that the owner of the collected check was a preferred creditor of the insolvent collecting bank. No. 850, p.363.

USURY:

By the law of Missouri interest may be compounded not oftener than once a year. The outside legal rate of interset there is 8 per cent. A national bank there held a note bearing 7 per cent. interest. It compounded the interest oftener than once a year, but even than the interest was not equivalent to 8 per cent. Held, that the note was usurious and subject to the penalty attached to national banks that charge more than the legal rate of interest. 208a.

WAIVER:

Where by statute governing conditional sales — a prescribed form of sale being directed in case the seller retakes the property — it is provided that the buyer and seller may waive such form of sale: Held, that such waiver could not be made previous to default on the part of the buyer. Hence such waiver inserted in notes given for purchase price of the property was of no effect. 199a.

"All notice of presentment, dishonor and protest," held, by an intermediate appellate court in New York, too insufficient to hold indorser, for the reason that it did not specifically waive "demand." Provision of Negotiable Instruments Law on that point. 309a.

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WARRANTY:

Certain notice required by a warranty held to have been waived by the seller acting on a different notice. 35a.

The words "Quality guaranteed" used in a written contract for the sale of binder twine, held to have a fixed and certain meaning and to imply that it was fit for the use for which binder twine is used, and hence oral evidence was not admissible to show that the twine was to be of a different quality. 61a.

Certain affirmative statement as to the condition of property held to constitute a warranty. No. 790, p. 64.

The seller of a threshing outfit made written warranty of it on the agreement that if there was any defect in it by a given time, notice should be given the seller by registered letter. Defect was noticed before the buyer gave his notes for the purchase price and the general agent of the seller said that he would make it all right: Held, that this dispensed with the technical notice by mail. No. 794, p. 79.

Where a manufacturer of engines made a written order to a forge company for "one steel piston rod, 21x42 — rough turn to figures," and the forge company turned the rod from a steel billet which it used ordinary skill and care in purchasing for that purpose — and the rod broke after a week's use, from hidden defects in the steel — held, that the forge company was not liable. 175a, No. 815, p. 168.

The drawer of a draft forged the signature of the payee to the draft, and also the signature of the payee to a bill of sale indorsed on the draft, and then procured the money from a bank. The drawees paid the draft and on discovering the forgery and fraud sued the bank and recovered, not by reason of the forged indorsement of the draft, but by reason of the forgery of the bill of sale. Rule where the drawer of a draft forges the payee's indorsement. 247a, No. 836, p. 285

Where goods ordered were to be manufactured and delivered like sample, acceptance of part of the goods with knowledge that they were defective did not preclude buyer from offsetting damages by reason of the defects. No. 829, p. 248,

Where goods, bought without inspection by buyer, were sold under a printed contract that they could be exchanged if they did not prove satisfactory, and that no claim for defect in quality could be made until such exchanged privilege had been availed of, held, that if the goods were worthless they could be returned and the contract annulled. 272a

Where an article is sold, the seller knowing that it is to be used for a certain purpose, the seller impliedly warrants that the article will serve the purpose. This rule applied to the sale of a butcher's refrigerator. Payment of part of the purchase price, nor a resale of the goods would not change the application of the rule. No. 826, p. 233.

Rule as to implied warranty where the seller is also the manufacturer. To whom does the term "manufacturer" apply? 279a.

Rule as to implied warranty where the buyer orders from the manufacturer a special thing for a special purpose. 415a.

WILLS:

Certain gift of certificates of stock held void for the reason that control of the property did not pass from the donor during her lifetime, although the certificates were assigned and delivered to a third party. 416a.

A memorandum on a note stating that if it is not paid at the owner's death, then, under certain conditions, the makers were not to pay it, held void. 375a.

WITH EXCHANGE:

Where the payee and indorser of a promissory note struck out the provision for the payment of attorney's fees, held, that the makers were thereby released. In South Carolina a provision to pay exchange makes a note non-negotiable, but this is not so as to a provision to pay attorney's fees. 2a, No. 776, p. 11.

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McMaster's Commercial Decisions

AFFECTING THE

BANKER AND MERCHANT.

FROM THE REPORTS OF THE HIGHEST COURTS OF THE SEVERAL STATES

J. S. McMASTER,

EXAMINER, N. Y. STATE BANK DEPARTMENT.

Certified Check: Certified in Violation of Law: Liability of Bank to Bona Fide Purchaser.

By the statutes of Michigan it is made a crime for any officer or clerk of a bank to certify a check when the amount thereof does not stand to the credit of the drawer on the books of the bank.

An officer of the City Savings Bank of Detroit did so certify a check for F. C. Andrews for $100,000, when his account was already overdrawn, and the check so certified went into the hands of a bona fide purchaser.

The lower courts of Michigan held that the check was void as to the bank, even in the hands of a bona fide purchaser, but the court of last resort, in an exhaustive opinion, held that a bona fide purchaser could enforce the check against the certifying bank.

(See Decision No. 775.)

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Alteration: Note Drawn "With Exchange:" Attorney's Fees: Non-Negotiable Instrument.

$125. UNION, S. C., MAY 22, 1901.

September 1, 1901.....after date, we or either of us promise to pay to the order of CAMP AND CROSS, ONE HUNDRED AND TWENTY-FIVE DOLLARS, at the Banking House of WM. A. NICHOLSON & SON, Bankers, at Union, S. C., value received with interest after maturity at the rate of eight per cent per annum until paid.

We agree in default of payment after maturity to pay ten per cent for attorney's fees for collection.

J. S. HARRIS,
W. C. NELSON,
R. A. HARRIS.

Indorsed.
CAMP AND CROSS.

The payees of the above described note indorsed it and transferred it to T. H. White and M. S. Lewis.

After the transfer Cross, of the firm of Camp and Cross, the indorsers, was informed that the provision in the note providing for attorney's fees rendered it non-negotiable, and he in good faith asked the holders to allow him to take it to the makers and have that provision stricken out. The holders delivered the note to him for the purposes stated, and he, not finding all of the makers, took the responsibility of striking out that provision. This alteration released the makers from liability on the note. The court remarked, in its decision, that in South Carolina a provision in a promissory note to pay cost of exchange would render it non-negotiable, and said in part: "It must be apparent that this whole controversy is mainly hinged upon the determination of the question, were these two notes negotiable or non-negotiable? The decisions of the Supreme Court of this State have not as yet settled what effect the insertion of the words, 'we agree in default of payment after maturity to pay ten per cent. attorneys' fee for collection,' in a note, will have upon it — that is, whether it is still a negotiable note or does it become an unnegotiable note? In the case of Sylvester, Bleckley & Co. v. Alewin et al., 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, this identical question was presented. Two justices — Mr. Justice Gary and Mr. Chief Justice McIver — there held that the note becomes unnegotiable, while Mr. Justice Jones held to the contrary, and Mr. Justice Pope expressed no opinion on this question; holding that a new trial had to be ordered because of the mistake of the trial judge in improperly sus-

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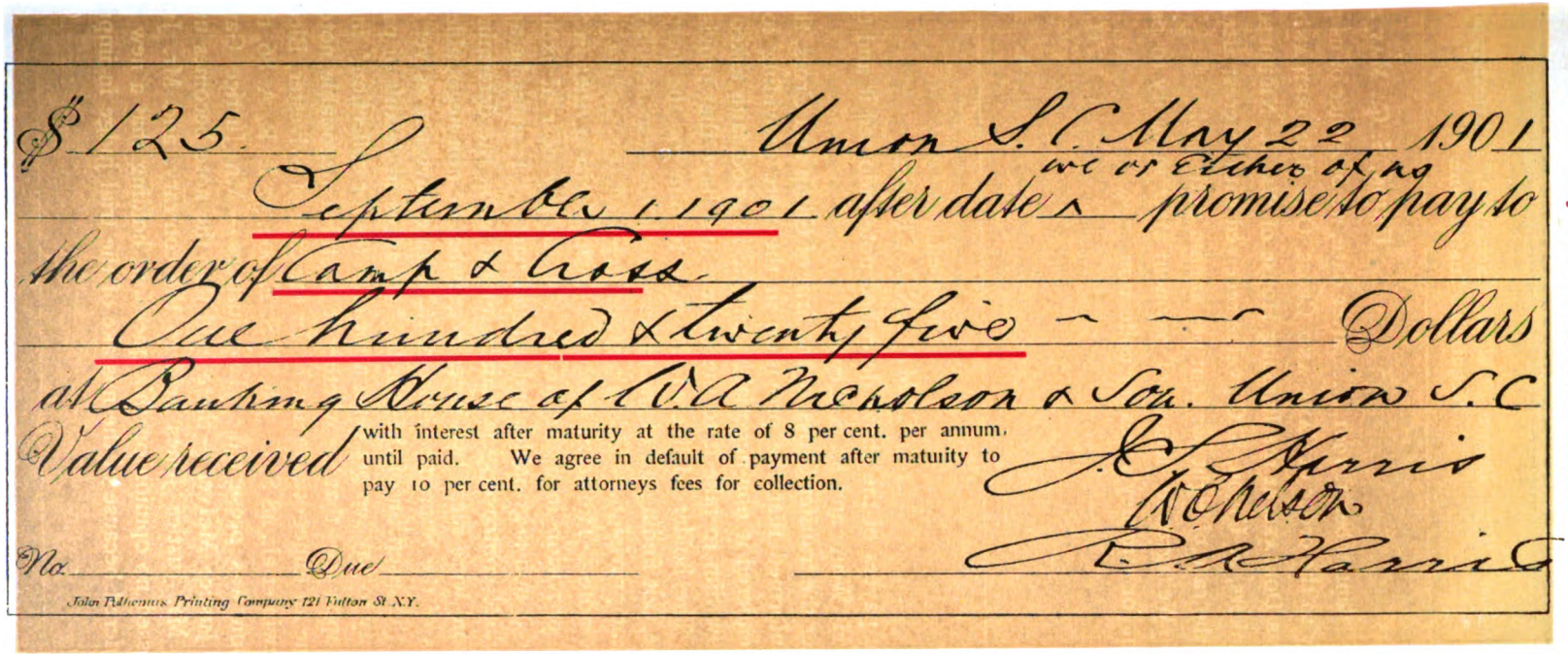

$125. Union S.C. May 22 1901

September 1. 1901 after date we or either of us promise to pay to the order of Camp & Goss

One Hundred & Twenty five ~ ~ ~ Dollars

at Banking House of W.A. Nicholson & Son. Union S.C

Value received with interest after maturity at the rate of 8 per cent. per annum, until paid. We agree in default of payment after maturity to pay 10 per cent. for attorneys fees for collection.

J.C. Harris
W.C. Nelson
R.E. Harris

No. Due

John Tidhenus Printing Company 121 Fulton St. N.Y.

Alteration: Non-Negotiable Instrument: Attorney's Fees: With Exchange.

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Camp. and Cross indorsed this note to T. H. White and M. S. Lewis. A few days thereafter Cross came to White and stated that he had been informed that the provision in the note providing for the payment of attorney's fees made the note non-negotiable. He further said he did not want to have any trouble about this in the future, and that if White and Lewis would turn over the note to him he would take it to the makers and have that provision stricken out. Cross obtained the note and presented to one, only, of the makers, and thereafter he, Cross, erased this provision from the note and returned it to White and Lewis. The note was not paid at maturity, and the holders brought an action against the makers to recover thereon. The makers defended the action on the ground that the erasure mentioned was a material alteration of the instrument, which released all of the makers not consenting thereto. This defense was held, on appeal, to be good. The Court said, on this point, in part:

"The material alteration of a note extinguishes all liability thereon as against parties not consenting. Whatever changes the legal effect of the instrument is a material alteration. The test is not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract — whether it will have the same legal effect and operation as before." The stipulation as to attorney's fees . . . is certainly material in so far as the contract liability of the parties is concerned. To add such words to a contract would certainly be a material change. To strike them out must also be material, if the test is whether the legal effect of the instrument is altered." The Court held the stipulation as to attorney's fees did not make the note a non-negotiable instrument; but it remarked that its Courts (South Carolina) held that a provision in a promissory note for the payment of the cost of exchange will change it to a non-negotiable note. This has been held in Illinois and in some other jurisdictions. There are several states where it is yet held that a stipulation in a promissory note to pay attorney's fees or costs of collection in case of non-payment will make the note non-negotiable.

But the Negotiable Instruments Law provides that such stipulation will not affect the negotiability of an instrument, and it also provides that a provision for the payment of exchange will not make a negotiable instrument non-negotiable. So in States where that law is in force these questions are settled as to paper made, indorsed, negotiated, and made payable in such States. In connection with such instruments it will be remembered that the liability of the drawer of a bill of exchange, and the liability of the indorser and negotiator of a negotiable instrument are governed by the law of the place where their names are affixed and where the instrument is by them negotiated.

McMaster's Com. Cases, Vol. 1905, 48 S. E. 41.

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taining a demurrer. The two decisions of Bank v. Gary, 18 S. C. 282, and Bank v. Strother, 28 S. C. 505, 6 S. E. 313, are in no way decisive of this question. A promissory note is said in 2 Am. & Eng. Ency. 314, to be 'a written engagement by one person to pay another absolutely and unconditionally a certain sum of money at a time specified therein.' These two notes here sued on certainly fill all the requirements of promissory notes down to the words we have already quoted. Do these words change the character of these notes? We think not. The 10 per cent. attorney's fees are not to be paid until after the maturity of the notes. Besides, it has always been held in this State that a provision in a note for the payment of protest fees never alters the character of a promissory note. It is true that it is held in this State that a provision in a promissory note for the payment of the cost of exchange will change it to a non-negotiable note. Why? Because the cost of exchange is an ever varying matter. But look at these words: 'We agree, if this note is not paid at maturity, we will pay ten per cent. attorney's fees.' Are they not definite and certain? Very different are these words from those used in Bank v. Strother, supra, where a provision was inserted in the note to pay 'reasonable attorney's fees and costs.' Nothing could be more uncertain than the words used in the latter case. Now we would use words of no uncertain sound or meaning. We wish to hold a definite and distinct promise to pay five or ten per cent. attorney's fees in an otherwise clear promissory note will not change its character from a promissory note.

"With reference to exceptions alleging error in holding that striking out said provisions for attorneys fees is not a material alteration: The material alteration of a note extinguishes all liability thereon as against parties not consenting. Sanders v. Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743. Whatever changes the legal effect of the instrument is a material alteration. 'The test is not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract — whether it will have the same legal effect and operation after the alteration as before.' Am. & Eng. Ency. Law (2d ed.), 224, 225, and notes. The stipulation as to attorney's fees is not material in so far as the question of negotiability is concerned, but it is certainly material in so far as the contract liability of the parties is concerned. To add such words to a contract would certainly be a material change. To strike them out must also be material, if the test is whether the legal effect of the instrument is altered. In 2 Ency. Law, 238, it is stated: 'Any alteration in the amount of the principal of an instrument conditioned for the payment of money is material, whether such alteration increases or decreases the amount. Thus it has been considered a material alteration of an instrument to insert therein (Monroe v. Paddock, 75 Ind. 422) or erase therefrom (Bank v. Laughlin, 4 N. D. 391,

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61 N. W. 473), a provision for the payment of attorney's fees in the case of suit brought or to change the amount of the fee which is provided for in such clause (Burwell v. Orr, 84 Ill. 465).' See, also, Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; 2 Daniel Neg. Inst. (3d ed.), § 1375; Sanders v. Bagwell, supra."

(See Decision No. 776.)

Indorser.

$1000. ST. LOUIS, *Jan. 2,* 190*0*.

ONE YEAR *after date* WE *promise to pay to the order of* MICHAEL OEXNER,

ONE THOUSAND *Dollars, value received.*

FRED. LOEHR, JR.
WENDLIN OEXNER.

(Signed on the back.)
MRS. EMILY DONK.

This note was not paid at maturity and it was not protested, and in an action brought against Emily Donk the principal question disputed was whether she was an indorser or a co-maker.

The court said in part: "The question is as to the capacity in which Mrs. Donk signed the notes. She signed them both before delivery to the plaintiff, and, as she was neither payee nor indorsee, the presumption is she did so as maker, which presumption could be disproved by showing an agreement was made between her and the plaintiff that she was to be regarded as indorser, and entitled to the rights of one who occupies that status on a promissory note. Otto v. Bent, 48 Mo. 26. Neither of the notes was paid at maturity, and, as demand was not made or notice of dishonor given to the defendant, she stands exonerated from liability if she was an indorser and not a joint maker or surety. The law concerning what must be proven by a party who is prima facie a maker of a promissory note (of which he was neither payee nor indorsee) from having written his name on the back of it before delivery, to clothe himself with the character of an indorser, has been frequently reiterated by the appellate courts of this State. He must show an

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agreement that he was to be liable as indorser instead of as maker; a 'special contract' to that effect, some of the opinions say; others, an 'express understanding.' Otto v. Bent, supra; Boyer v. Boogher, 11 Mo. App. 130; Malting Co. v. Miller, 38 Mo. App. 251. We understand those decisions to mean simply that a positive agreement must be shown to relieve such a signer of the character of maker, and that no agreement of the sort will be implied. The use of the word 'indorser' or 'indorsement,' in a conversation between the parties anterior to the signing of the instrument, is not decisive of the obligation of the party who signed across the back, for both words are used popularly to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term. Rossi v. Schawacker, 66 Mo. App. 67."

(See Decision No. 777.)

Corporate Note.

$84.00. THEDFORD, NEBRASKA, NOV. 20, 1893.

One year after date we promise to pay to the Western Wheeled Scraper Company, or order, at the Thedford Bank of Thedford, Nebraska, Eighty-Four and no-100 Dollars, with interest at seven per cent. per annum, payable annually, for value received, and if action is commenced hereon, attorneys fees for collection.

(Sign officially),

Directors of Thedford Irrigation and Power Co., (Limited). { J. W. MCMILLEN, G. W. MILLER, G. L. MATTHEWS.

In action on this note by the payees it was held, on appeal, to be the note of the individuals signing it and not of the corporation. But it was said that with the note in the hands of the original holders that the note could be reformed so as to show who were the makers as understood by all of the parties at the time of the execution of the note. The court said in part: "But it should be shown that the payee of the note had knowledge, or at least the full means of knowledge, that the makers of the note were promising as agents, duly authorized, of the corporation; for it is well-settled that a man contracting with another cannot shield himself as agent unless he gives notice at the time that he is so, or it be known in some other way to the person with whom he deals. It is undoubtedly true that the modern cases are more liberal than was

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formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting for another who received all the benefits of the consideration for which the note was given. Keidan v. Winegar, 95 Mich. 430, 54 N. W. 501, 20 L. R. A. 705, is a case in point, and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this court had not put itself on record, we should be disposed to follow the modern decisions, but as early as 1886, in Webster v. Wray, 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754, the court, after a full review of the authorities, held that 'no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed;' and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation who had received the benefit of the consideration. This case was followed by Andres v. Kridler, 47 Neb. 585, 66 N. W. 649, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that 'where the pleadings disclose a cause of action against a defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as descriptio personæ.' We think this court is now fully committed to the doctrine that, in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. There was evidence which would fully support a finding that in executing these notes the defendants did not intend to bind themselves personally, and that the plaintiff's agent was not only fully aware of that fact, and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties. Western Wheeled Scraper Company v. Stickleman et al., (Iowa) 98 N. W. 139, and authorities there cited."

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Corporate Note: Seal.

$2500. CHICAGO, MAY 6, 1893.

On or before July 15th, after date, we promise to pay to the order of FLEMING, CADWALLADER & Co., as per agreement on reverse side, TWENTY-FIVE HUNDRED DOLLARS, at Central State Bank, West Lebanon, Inda. Value received, with interest at 6 per cent. per annum.

Mt. Carmel Light and
[SEAL] WILLIAM S. REED,
Water Company, Mt. Carmel, Ill. *Pres. Mt. Carmel Lgt. & Water Co.*

Upon the back of the above note was the following writing: "May 6, 1893. It is understood and agreed between the parties to this contract that this note is to be paid in the first mortgage bonds of the par value of the Mt. Carmel Light and Water Co., Mt. Carmel, Ill., as soon as the bonds can be issued in the regular and legal way without reference to the date of the note."

The holder of this note sued William S. Reed, individually, as maker of the note, and got judgment against him in the trial court and the first appellate court, but on appeal to the Supreme Court of Illinois it was held to be the note of the Mt. Carmel Light and Power Company.

The presence of the seal of the corporation on the face of the note and of the writing on the back were the governing features that allowed Reed to escape liability.

(See Decision No. 779.)

Check: Payment Stopped: Payment.

James Berrall was the owner of a check made payable to his order and drawn on the National Bank of New Jersey. He indorsed the check and it was passed to his credit in the Columbia National Bank of Washington and forwarded to the bank on which it is drawn for payment and it was paid.

It seems that payment had been stopped by the maker of the check, but this fact was overlooked when payment was made. The bank on which the check was drawn had to make good the amount of the check to the drawer, after which they brought an action against Berrall for the amount. The bank won in the lower court but was beaten on appeal. The appellate court held that the bank brought its action

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against the wrong party, but even if that were not so they could not recover. The court said in part: "But even if the want of privity were no obstacle, in our opinion the case shows no ground for recovery, because the money was not paid by mistake within the meaning of the legal rule that permits a recovery. There was no legal obligation on the part of the plaintiff to pay the check, and this aside entirely from the fact that it had received notice to stop payment. We concur in the view expressed by the Supreme Court in Creveling v. Bloomsbury National Bank, 46 N. J. Law, 255, 50 Am. Rep. 417, that the holder of a check has no contract with the bank on which it is drawn and no legal right to exact payment. In this case, therefore, the check was voluntarily paid by the plaintiff to the Washington bank. Since the present controversy arose, the rule of the Creveling Case has been established in statutory form by the general act of 1902 relating to negotiable instruments. (P. L. 1902, p. 614, ch. 184, § 189.) As between the holder of a check and the bank upon which it is drawn the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds, and whether the order for payment evidenced by the check has subsequently been revoked. Therefore, where a bank receives in the ordinary course of business a check drawn upon it, and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed, as between the parties to the payment."

(See Decision No. 780.)

Guaranty: President of Bank held to be Without Authority to Bind the Bank by his Statement as to the Genuineness of the Signatures to a Certain Note.

One William H. Smith applied by mail to the First National Bank of Cuero, Tex., for a loan of $2,000 on his note indorsed by James F. Ray, who was a resident of another county, and who was vice-president of the Commercial National Bank of Beeville.

The Cuero bank prepared a note for $2,000 to the order of Ray, and, after stating the facts in the letter, inclosed it to the Commercial National Bank at Beeville and asked that bank to have it executed by Smith and by Ray.

The Beeville bank inclosed the note by mail to Smith who returned it with the forged signature of Ray. The president of the Beeville bank, in ignorance of the forgery of the signature, inclosed the note to the Cuero bank, saying in the letter, "Inclosed you will find note of Wm. H. Smith properly signed up."

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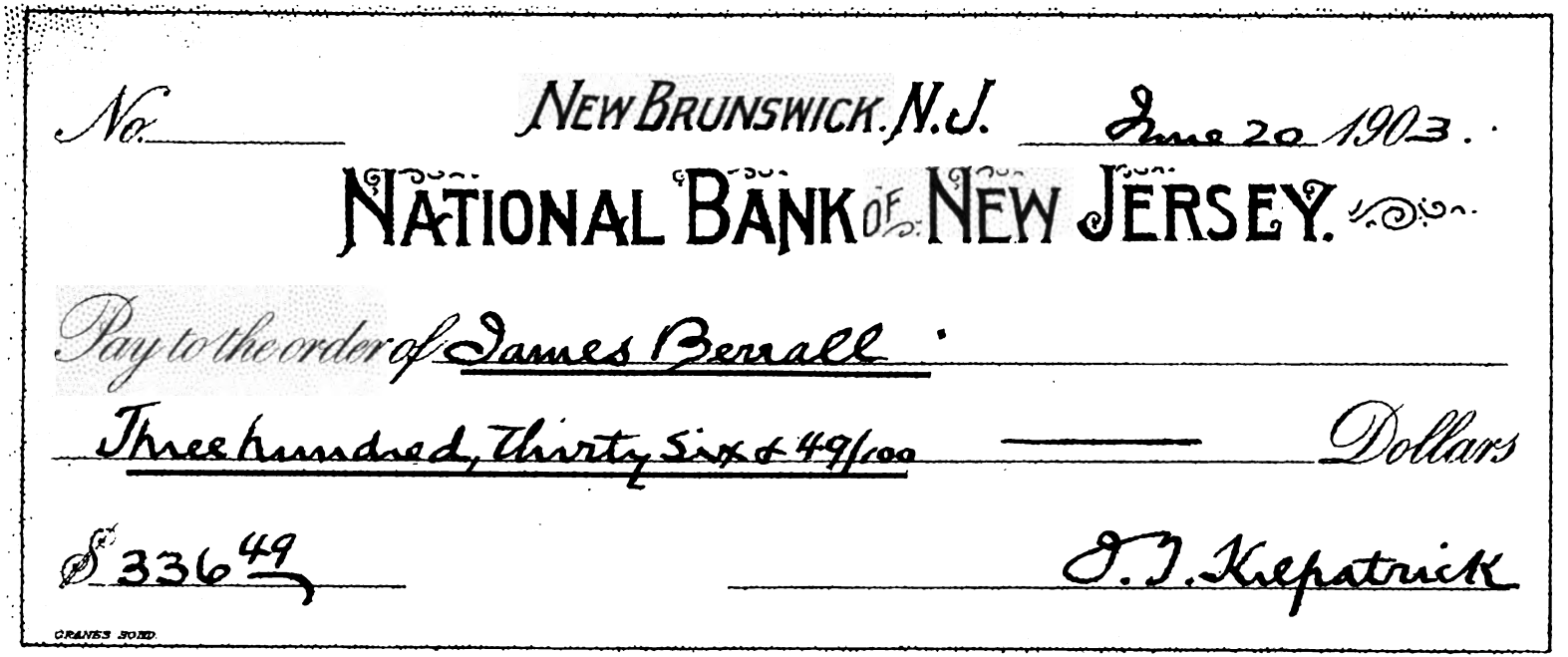

No. _____ New Brunswick, N.J. June 20 1903.

National Bank of New Jersey.

Pay to the order of James Berrall

Three hundred, Thirty Six & 49/100 _____ Dollars

$336 49

J. J. Kilpatrick

CRANES 3080

Check: Payment After Payment Stopped: Indorsement.

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Berrall, the payee of this check, indorsed it and deposited it in the Columbia National Bank of Washington, receiving credit therefor in his account with that bank. This bank then sent the check by mail, for collection, to the bank on which it was drawn, and it was paid in due course of business. The check was paid by mistake of a clerk in the bank on which it was drawn, payment of the same having been stopped by the drawer before the check was presented for payment and paid. Having paid the check of a depositor after he had stopped payment thereon, the bank became liable to the depositor for the amount, and the bank on which the check was drawn made good the amount to the drawer of the check, and then brought an action against Berrall for the amount as money paid by mistake. The bank won in the trial court, but lost on appeal.

The Appellate Court said that the action should have been brought, if at all, against the Columbia National Bank.

But, if it had been so brought, the Court said that there could have been no recovery. On the question as to the action being brought against the wrong party, the opinion reads in part:

"If Berrall had deposited the check in Washington bank for collection for his account . . payment by the New Brunswick bank would have been payment to Berrall. But Berrall did not deposit the check for collection. His indorsement was general, and its purpose was unqualified, for the amount of the check was immediately passed to his credit by the Washington bank. That constituted that bank the owner of the check." On the main question, the Court said in part: "The money was not paid by mistake, within the meaning of the legal rule that permits a recovery. . . . The holder of a check has no contract with the bank on which it is drawn, and no legal right to exact payment. In this case, therefore, the check was voluntarily paid. . . . As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account . . . and whether the order for payment evidenced by the check has subsequently been revoked. Therefore, when a bank receives, in the ordinary course of business, a check drawn upon it, and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to the holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment. The rule . . . has even been extended so far as to require the bank to pass upon the genuineness of the depositor's signature to the check, so that, where it pays out money on a check upon which its depositor's name has been forged, to a bona fide holder for value, it has been held that the bank cannot recover back the money."

McMaster's Com. Cases, Vol. 1905, 58 Atl. 189.

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In an action against the Beeville bank, brought by the Cuero bank for its loss on account of the forgery, the trial court and the first appellate court held that the Beeville bank was liable, but this decision was reversed on appeal to the court of last resort; that court saying in part: "'The business of banking' is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, receiving deposits, buying and selling exchange, coin and bullion, lending money on personal security, and obtaining, issuing, and circulating notes; and to these specified powers, and those necessary to the exercise of the powers expressed, the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation. Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Merchants' Natl. Bank v. Armstrong, (C. C.) 65 Fed. 934; Cooley on Torts, 136. The facts alleged against the plaintiff in error do not show a transaction embraced in the provisions of the law above quoted; on the contrary, it was a matter in which the Beeville bank was not interested in fact; it was a mere courtesy between the officers of the two banks, performed gratuitously by Flournoy, for the accommodation of the officers of the Cuero bank to aid them in making a loan to Smith. If it were held that procuring the signature to a note in order that the Cuero bank might lend money to a third party was within the power and authority of the bank at Beeville, the president of the Beeville bank was not authorized to transact such business for his bank, and did not bind it by the statements he made. Under the National Banking Law the corporation was authorized to elect a board of directors, to which was committed the management and control of the bank, and the board was empowered to select one of its number as president of the bank, of whom it is said: 'It is his duty to preside at the meeting of the board of directors, and he has charge of the litigation of the bank, and other than these he has no power inherent over and beyond another director.' National Bank Act, by Bolles, § 53. The board could have adopted by-laws conferring larger powers upon the president, but the petition does not allege the existence of such by-laws, nor any fact which would extend the authority of the president so as to embrace the act upon which this action rests.

The statement made by Mr. Flournoy that the note returned was signed up by Mr. Ray was without authority of the Beeville bank, therefore not binding upon it. United States v. Bank of Columbus, 21 How. 556, 16 L. Ed. 130; Weckler v. Natl. Bank, 42 Md. 581, 20 Am. Rep. 95; Merchants' Bank v. Marine Bank, 3 Gill (Md.) 96, 48 Am. Dec. 300; Crawford v. Mercantile Co., 67 Mo. App. 39; H. & T. C. R. R. Co. v. McKinney, 55 Tex. 176. United States v. Bank of Columbus, before cited, involved a state of facts much like this case. The cashier of the defendant bank gave to one of its directors, Mr. Minner, a statement

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that he was authorized, on behalf of the bank, to 'contract with the treasury department of the United States for the transfer of money from the east to the south or west for the government,' and upon the faith of the statement of the cashier the secretary of the treasury contracted with the party named for the transfer of $100,000 from New York to New Orleans. Miner received and cashed the draft, but the government did not receive the money at New Orleans. Upon suit by the United States against the bank, the Supreme Court of the United States held that the cashier had no authority to make such representations on behalf of the Columbus bank, and that it was not liable for the loss sustained in consequence of reliance upon the false statement. Crawford v. Mercantile Co. is much like this case. A firm of merchants secured from the cashier of a bank a statement to the effect that the firm was 'solvent and would pay for all that they would buy.' Upon this statement the firm obtained credit, and, having failed in business, it was sought to hold the bank responsible for the loss. The court held that the cashier had no authority to give such statement, therefore the bank was not responsible for the damages. The act of Flournoy, who signed the statement as president of the Beeville bank, was a mere personal transaction of his own, and if any liability was created thereby it rested upon him, individually, and not upon the bank. We do not, however, wish to be understood as intimating that the facts would give a cause of action against Flournoy; that question is not now before us."

(See Decision No. 781.)

Collateral.

A. P. Carr borrowed of the Georgia Railroad Bank $2,200, giving his note therefor. To secure the note Carr had one Dickey, from whom he had just bought some land, execute a deed of the land direct to the bank. The deed was an absolute one without qualifications or reservations, but it was agreed by the bank and Carr that the deed was to be held as collateral for this $2,200 note.

Subsequent to this transaction Carr borrowed $2,250 from the bank and gave it a printed collateral note which stated that he had deposited with the bank "Bill Lading Five Cars Corn as collateral security for the payment of this or any other indebtedness." The note also contained the usual statement, set out below, that the bank should also have a lien "upon all the property or securities at any time into or left in the possession of said bank," etc.

This last note was not paid, and the bank sought to hold the deed of the land mentioned as collateral to this note.

The trial court held that it could, but the appellate court held to the contrary, and said in part: "But there was a subsequent transaction

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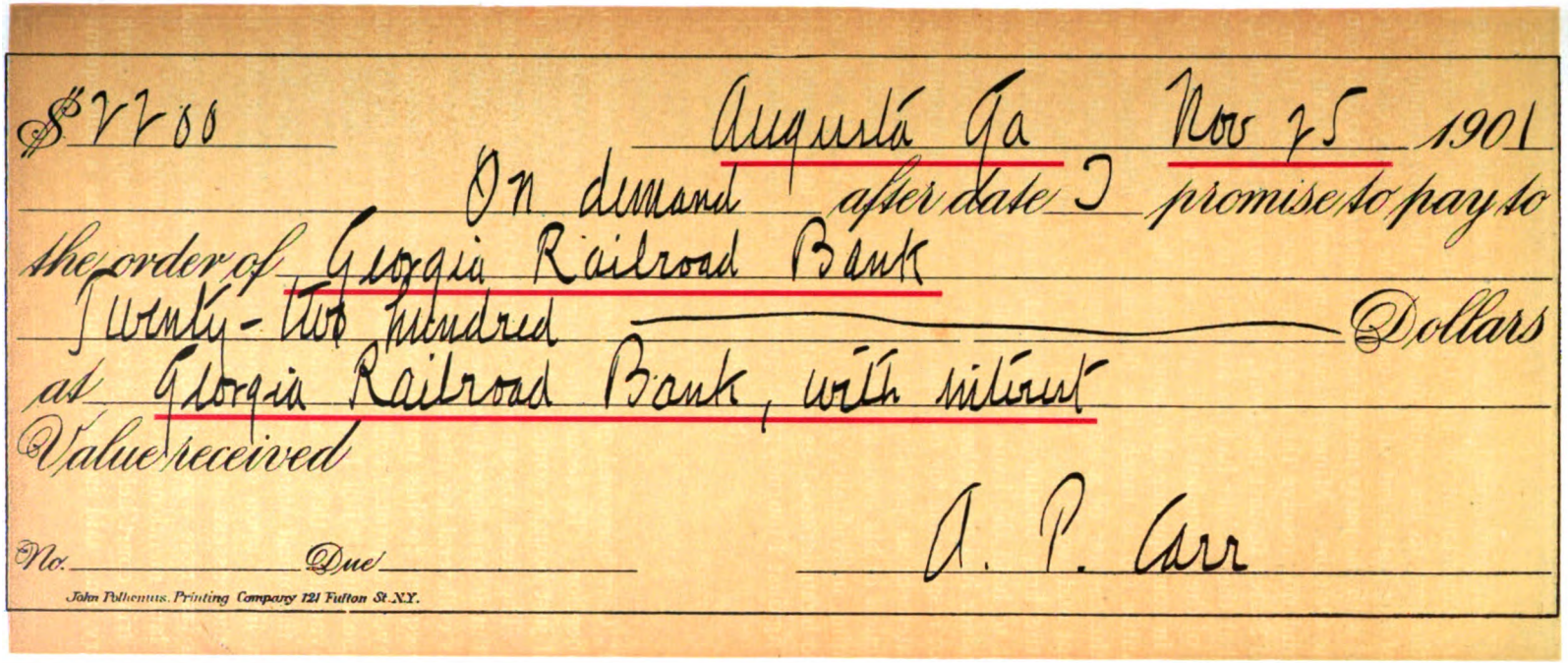

$ 2700 Augusta Ga Nov 25 1901

On demand after date I promise to pay to the order of Georgia Railroad Bank

Twenty-two hundred ——— Dollars

at Georgia Railroad Bank, with without

Value received

No. ——— Due ———

A. P. Carr

John Polhemus Printing Company 121 Fulton St. N.Y.

Collateral Note: Right to Apply Collateral to Other Notes of the Maker.

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Previous to the execution of this note, the maker, Carr, had purchased some land from one Dickey. The Georgia Railroad Bank having agreed to loan Carr some money to pay part of the purchase price. Carr directed Dickey to make the deed direct to the bank, the bank having agreed to hold the deed on the land as collateral to the loan. That loan was paid, and when *this* note was made the bank took a stated instrument from Carr reciting the different steps of the transaction up to that date and reciting that: "The agreement between the bank and myself is that the said deed, described above, shall be held as security until this note of ($2,200) two thousand two hundred dollars, and all renewals thereof and interest on the same, is fully paid." Later, and with this note yet unpaid, Carr borrowed $2,250 of the bank giving it therefor a note executed on a collateral form blank. This $2,250 note recited that the borrower had deposited with the bank Bill Lading Five Cars Corn as collateral security for the payment of this and any other indebtedness of the borrower to the bank. The note also contained this clause: "The undersigned hereby agree to deposit with the said bank such additional security as the said bank may from time to time demand; and also give to said bank a lien for the amount of all liabilities aforesaid, upon all of the property or securities at any time given into or left in possession of the said bank by the undersigned." . . .

Subsequently, Carr conveyed the land mentioned to another, stating in the conveyance that it was made subject to a deed to the Georgia Railroad Bank to secure $2,000. The person holding through this last deed tendered to the Georgia Railroad Bank the balance due on this $2,000 note, and demanded a conveyance of its interest in the land. This the bank refused to do, claiming that under the clause above quoted, in the collateral note for $2,250, it could hold the land as security for a balance yet due on the $2,250 collateral note. The Court held that the land could not be so held, — and said in part:

"The language (the clause referred to in the collateral note) clearly refers to personalty or choses in action capable of physical delivery. . . . Provision is made in the note for the sale of the 'securities' at any broker's board, at public or private sale, without notice — such a provision as is usually made for the sale of personalty or securities received in pledge. A pledge is a bailment of personal property to secure an indebtedness. A pledge cannot be created by a delivery of title deeds.

"A third person paying the purchase money at the instance of the vendee, and taking the title to the land direct from the vendor, holds neither land nor the title pledged. The legal status of the deed from Dickey to Georgia Railroad Bank is that of a security deed. The clause in the note that Carr thereby gives 'to the said bank a lien . . . upon all the property or securities at any time given into or left in possession of the bank' by him cannot create a mortgage on the land because of lack of description of the land."

McMaster's Com. Cases, Vol. 1905, 48 S. E. 420.

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between Carr and the bank. He procured an additional loan of $2,250, and gave the bank his note for this amount. This last note recited that the borrower had deposited with the bank 'Bill Lading Five Cars Corn as collateral security for the payment of this and any other indebtedness.' The note also contained this clause: 'The undersigned hereby agree to deposit with the said bank such additional collateral security as the said bank may from time to time demand; and also hereby give to the said bank a lien for the amount of all liabilities aforesaid upon all the property or securities at any time given into or left in the possession of the said bank by the undersigned, and also upon any balance of the deposit account of the undersigned with the said bank.' This stipulation, the defendant contends, created an obligation on the part of Carr to pay all his indebtedness — both the original indebtedness connected with the purchase of the land from Dickey and the indebtedness evidenced by the note note containing the stipulation — before he could have a conveyance of the land from the bank. The soundness of this contention rests upon the meaning of the clause of the note which we have quoted. The language clearly refers to personalty or choses in action capable of physical delivery. The note was filled out on a printed form, and what follows indicates that the clause relied on could not have been intended to refer to any class of securities except those capable of hypothecation by manual delivery. Provision is made in the note for the sale of the 'securities' at any broker's board, at public or private sale, without notice — such a provision as is usually made for the sale of personalty or securities received in pledge. A pledge is a bailment of personal property to secure an indebtedness. A pledge cannot be created by delivery of title deeds. Civ. Code 1895, 2956; Davis v. Davis, 88 Ga. 191, 14 S. E. 194. A third person paying the purchase money at the instance of the vendee, and taking the title to the land direct from the vendor, holds neither the land nor the title as pledgee. Such a transaction is the equivalent of the vendor's conveyance to the vendee, and a conveyance of the land by the vendee to the person paying the purchase money, as security for the debt. The legal status of the deed from Dickey to the Georgia Railroad Bank is that of a security deed, and the debt thereby secured is the money advanced by the bank to Carr at the time he executed the agreement of November 25, 1901. Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863. No other debt is secured thereby, and nothing in the last note indicates that any additional indebtedness was to be included. The clause in the note that Carr thereby gives 'to the said bank a lien for the amount of all the liabilities aforesaid upon all the property or securities at any time given into or left in possession of the bank' by him, cannot create a mortgage on the land, because of lack of description of the land. We are therefore of the opinion that no contract was created by the last

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note, whereby the additional loan evidenced thereby was to be included in the indebtedness secured by the deed from Dickey to the bank. And Carr or his assignee, upon payment or tender of the amount due on the note for $2,200, will be entitled to a conveyance from the bank of its right and title in and to the land. Accordingly we hold that the petition set out a good cause of action, and that the court erred in sustaining the demurrer and dismissing the petition."

(See Decision No. 801.)

Deposit: Payment.

Tamblin & Tamblin were commission merchants who kept an account at the Interstate National Bank where they deposited money received from the sale of goods consigned to them and against which they drew checks indiscriminately.

They became insolvent, a fact of which the bank had knowledge. Subsequently, but before the fact of their insolvency became public they deposited a check which the bank knew, or should have known, was the proceeds of the sale of other people's property. Against this deposit the bank charged to this account $160.94 which Tamblin & Tamblin owed the bank, and it paid out the balance to third parties on the checks of Tamblin & Tamblin.

Of this deposit, mentioned, $1,604.40 was proceeds of sales of property belonging to W. N. Claxton who was indebted to the bank, and which indebtedness he instructed Tamblin & Tamblin to pay off out of the proceeds of the sale, which they promised to do but did not do.

The bank sued Claxton on his note and the trial court allowed him to set off against it the amount the bank applied to his own indebtedness, $160.94, from the proceeds of the sale of his property, and also the amount that it allowed to be withdrawn by check. The appellate court held that as to this last amount the decision was wrong, and said in part: "The present case is not one in which the deposit was made to the credit of the agents without authority. Their general authority as factors, as well as their long course of dealing with defendant and with the bank, plainly support the conclusion that such deposits were rightfully made. Upon this the bank had the right to rely in receiving the money. That such authority had existed is not questioned, but it is claimed that it was revoked by operation of law upon the facts which had arisen before the deposit in question was made. Authorities are cited to the effect that insolvency of a principal or agent operates a dissolution of the relation, and, in case of the agent, revokes his authority. Mechem on Agency, §§ 263-267; Ewell's Evans on Agency, pp. 92, 401; Audenried v. Betteley, 8 Allen, 302; Hudson v. Granger,

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5 Barn. & Ald. 27; Ex parte Snowball, L. R. 7 Ch. 548; 1 Am. & Eng. Ency. Law, 1227; Story on Agency, §§ 482, 486. Of this Mechem says: 'Mere insolvency or inability of the principal to pay his debts when due would not have this effect. It only results from the operation of the law, when either voluntarily or involuntarily, the principal surrenders and the law assumes control of his affairs.' The cases cited in these various authorities as enforcing the doctrine relied on have been examined, and in all of them the bankruptcy or insolvency referred to was of the character stated by this author. In none of them did any question like that before us arise, all of them involving questions as to rights or titles arising between assignees in bankruptcy or insolvency and others. The proposition that the agency of Tamblin & Tamblin had ceased, or that its character had changed when this deposit was made, does violence to the facts then existing. The business of their customers was still in their charge; cattle were being sold, and money handled uninterruptedly, as always before. The defendant himself still employed and trusted them, and they were engaged in the active transaction of his business committed to their charge. There is no law that we know of which would forbid their employers from so employing them because they were financially embarrassed, or even insolvent, in the sense that they had not assets with which to discharge their liabilities. To say that the bank could not treat with them as still possessing the authority upon which they had always dealt is to ignore the fact that the principal himself so recognized and dealt with them. The bank could neither terminate the agency nor limit its scope. The law might do so, to a large extent, by seizing the estate of the agent, but it had not moved at the time the rights of these parties, inter sese, became fixed. The act of bankruptcy presented itself to the parties as a fact which might or might not be taken advantage of. Bankruptcy declared upon it might affect rights of the bank as between it and those representing the bankrupt estate, but not those of these parties fixed as between themselves before any adjudication. If it be true, as urged, that if this money had remained in the bank and been paid to the assignee in bankruptcy the defendant would have had the right to reclaim it, that does not affect this case. It might be conceded that if there had been no bankruptcy, and the money still remained in the bank, defendant could recover it; but that would not establish his right to recover it after it has been paid away on checks regularly drawn. We, therefore, hold that the deposit made by Tamblin & Tamblin was within their authority, and that they thereby became depositors; and the further questions must depend upon the rules of the law regulating the relation existing between banks and such customers."

(See Decision No. 782.)

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Partnership: Dissolution: Outstanding Firm Notes Assumed by Remaining Partner.

In some States where, on the dissolution of a partnership, one partner agrees with the other to assume the firm debts, the retiring partner becomes a surety of only such debts as are held by creditors who know of this agreement; and if such creditors extend the time of payment of such debts without the consent of the retiring partner, he is thereby released from any liability by reason of the debt.

The following quotation on this subject states the rule in several States: "As members of the partnership both plaintiff and D. R. Magirl were equally bound as principal debtors to the payee of the note. When Magirl took the partnership assets and assumed payment of the partnership debts, then, as between him and the plaintiff, he became liable as the sole principal, and plaintiff became his surety for the payment of said note. This proposition is upheld by all the authorities and is not denied by the appellant. When we advance the next step, and inquire whether this change in the relations existing between the partners affects in any manner their relation to the holder of the note, we find a marked variance of views. The courts of several States — notably New York and Michigan — hold to the view that when a partner retires from a firm under such an agreement, and notice thereof is brought home to the creditor, the latter is bound to recognize the new relations between the members of the late partnership, and any indulgence thereafter shown to the partner assuming the debt which would have the effect to discharge an original surety will operate to discharge the retiring partner from further obligation. Millard v. Thorn, 56 N. Y. 402; Colegrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. See, also, Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Brandt on Suretyship, (2d ed.), § 36; Stearns on Suretyship, p. 24; Baylies on Suretyship, pp. 40, 481; Shumaker on Partnership, 341, 342. The reasoning by which this view is supported is very forcibly stated by Folger, J., in the Colegrove Case, and by Cooley, C. J., in the Smith Case, and the writer of this opinion would be content to accept it as authoritative. The majority of the court prefers to follow the other line of authorities as announcing the sounder principle, and the result arrived at cannot be said to be essentially unjust. It is in accord with the views expressed by many courts and law writers, and is bottomed upon the proposition that the liability of the partners as principal debtors being fixed by the terms of the original contract, it is not competent for them by any agreement between themselves to change the nature of that liability, or impose upon the creditor, without his consent, any new or additional obligation or duty, a neglect of which may work a discharge of one of such debtors from his obligation to pay. The agreement between the partners by

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$1000 Macon Ga. Feb 24. 1899

One year after date we promise to pay to the order of E. H. Garrard

One thousand Dollars

at Exchange Bank, with interest

Value received

Preston Brown

No. Due

John Polhemus Printing Company 121 Fulton St. N.Y.

Partnership Note: Retirement of One Partner:
Surety: Release of Retiring Partner:
Extension of Time.

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On the 27th day of December, 1900, the firm of Preston & Brown was dissolved and all of the debts of the firm were assumed by Brown.

Included in such debts was this note, held by E. H. Garrard. Some time after the dissolution of the firm, this note not being paid, Garrard brought an action on it against both of the former partners. Preston set up as a defense the fact of the dissolution and the agreement of Brown to pay the debts of the firm, and alleged that Garrard knew of this agreement, and, that with knowledge of this agreement, Garrard, thereafter, for a valuable consideration, extended the time of payment of the note in an agreement made with Brown, and without his, Preston's, consent. The trial Court held that if these allegations made by Preston were true, they constituted no defense that would discharge Preston from liability. The Appellate Court held to the contrary, and said in part: "It is well settled that where a partnership is dissolved by the retirement of one of the members, and the continuing partner assumes the payment of the debts of the firm, the retiring partner, as between himself and his co-partner, is no longer a principal debtor, but merely a surety for the latter upon the debts of the firm. . . . Of course, if a creditor is a party to the agreement made between the parties he is bound by it, and must deal with the retiring partner as a surety. All are agreed to this. . . . While a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as the debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and agreement, does anything which would release an ordinary surety (an extension of time of payment to the principal will do this) the retiring partner will be entirely released from his obligation. . . .

Under these decisions mere notice of the dissolution and of the agreement between the partners that the continuing partner was to assume the payment of the firm debts prevented (Garrard) the plaintiff from accepting from the continuing partner, Brown, a new note and (thereby) extending the time of payment of the original indebtedness without the knowledge or consent of the defendant Preston." The rule that creditors of a firm are bound by the changed relations above set forth, although they are not parties to the agreement, does not appear to hold in Iowa, (99 N. W. 193); West Virginia, (34 W. Va. 303); Ohio, (30 Ohio St. 389); Texas, (90 Tex. 110); Alabama, (56 Ala. 493).

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which one of them assumed to pay the entire debt is regarded res inter alios acta as respects the creditor, who is neither benefited nor prejudiced thereby. Barnes v. Boyer, 34 W. Va. 303, 12 S. E. 708; Buchanan v. Clark, 10 Grat. 164; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; 2 Collyer on Partnership, ch. 24, § 596; 1 Collyer on Partnership, ch. 17, § 407; Story on Partnership, § 334; Parsons on Partnership (4th ed.), §§ 296, 313, 324; Shapleigh v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; Hall v. Jones, 56 Ala. 493; White v. Boone, 71 Tex. 712, 12 S. W. 51. The case of Rawson v. Taylor, supra, is like the one at bar so far as the relationship to the parties to the debt is concerned. A partnership had been dissolved and the debts assumed by one of the members. The other member defended against an action upon a partnership note on the ground that by the terms of his withdrawal from the partnership he became a surety only, and that he had been discharged from liability by reason of certain dealings between the creditor and the principal debtor. To this defense the court says: 'When the note was executed and delivered to Mrs. Rawson for a valuable consideration, the liability thereon of each partner became fixed. Their relations to that contract and their liabilities therein could, by an act between themselves, be changed.' It was, therefore, held that, while notice to the creditor of the change in the relations between the debtors might impose upon her the duty of acting in good faith and with reasonable diligence in the management of securities placed in her hands for the payment of her claim, in the preservation of liens, and the applications of payments, it did not impose upon her the obligations attaching to the ordinary relation of creditor and surety. The same conclusion is announced in varying forms, but with unanimity of doctrine, in all of the books last above cited, as well as in many more which are therein referred to."

(See Decision No. 783.)

Partnership: Surety.

It is held in many States that where a partnership is dissolved and one partner assumes and agrees to pay the debts of the firm, that the retiring partner becomes a mere surety on the debts and that the partnership creditors must take notice of the changed relation. And if a creditor with knowledge of this changed relation extends time of payment on the debt he will thereby release the retiring partner.

(See Decision No. 784.)

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Bonds as Negotiable Instruments.

The following quotation is from a decision of the Supreme Court of Pennsylvania: "The bonds were ordinary bonds, payable to bearer, with coupons attached. At a not very remote period in our judicial history such a bond would not have been considered negotiable, as a note or bill of exchange, and the holder would have taken it subject to the burden, if called upon, of proving his title to it, as against one claiming to be the real owner; but at least as early as 1824, in Gorgier v. Mieville, 3 B. & C. 45, such instruments were placed in England on the same plan as notes and bills of exchange and were held negotiable. The distinction between such a negotiable instrument and ordinary goods and chattels, such as horses, pictures, and the like, is that it is valuable only as entitling the holder to receive at some future time a certain sum of money, which is precisely the value of a note or bill of exchange. It is of itself neither useful nor valuable, as other chattels, is but a representative of money, and therefore subject to the same rules which regulate the transfer of money. A learned and conclusive discussion of the whole subject of the negotiability of such instruments by Justice Read, of this court, is given in County of Beaver v. Armstrong, 44 Pa. 63. He gives the history of the decisions both in England and this country, and shows conclusively that by the settled law such bonds are negotiable, and that the title passes by delivery. There has not been the slightest departure, since, at least in this State, from the law as announced in that case.

"It is also settled that a bona fide holder of such an instrument, for value, before maturity, taken in the usual course of business, acquires a good title thereto, even as against him from whom it was stolen. 2 Cook on Corporations, p. 1731, says: 'A bona fide purchaser of a bond which has been stolen takes a good title.' He gives ample authority in his notes supporting this text. Mason v. Frick, 105 Pa. 162, 51 Am. Rep. 191, held to the same rule. In that case, like the one before us, the bond was that of a private corporation, payable to bearer. The plaintiff, Mason, kept it in his safe. The safe was broken open and the bond stolen. The thief transferred it to one Freeman, who knew when he took it that it had been stolen. Freeman pledged it as collateral security for a loan to Frick, the defendant, who took it in good faith. The rule that the bona fide holder of a stolen negotiable security is protected against a claim of the real owner was not even contested by the owner, but it was argued that the bond, being that of a private corporation, was not negotiable, and that the holder took it subject to the equitable rights of the real owner. It was held by this court that the law governing the case was that announced in County of Beaver v. Armstrong, supra, and that the bona fide holder was protected against the claim of the real owner. The same rule was held by Judge Shars-

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wood, sitting in the District Court of Philadelphia (Carpenter v. Rommel, Phila. 34), where the defendant had purchased at the open board of brokers a lot of stolen negotiable railroad bonds."

(See Decision No. 785.)

Surety: Guarantor: Excess of Credit.

R. B. King was a surety for J. K. King on certain notes and a contract set forth in the decision in this case. Excess of credit was given and time of payment was extended on the notes to J. B. King without the consent of R. B. King, and the trial court held that this released R. B. King.

This decision was reversed on appeal, the decision turning on the point whether R. B. King was a surety or guarantor, and the court gave this statement of the difference between a surety and a guarantor — a difference that it is often difficult to distinguish and one that is often of vital importance.

"A surety undertakes to pay the debt of another. A guarantor undertakes to pay if the principal debtor does not or cannot. A surety joins in the contract of the principal and becomes an original party with the principal. The guarantor does not join in the contract of his principal but engages in an independent undertaking. A surety promises to do the same thing the principal undertakes. The guarantor promises that the principal will perform his agreement, and if he does not then he will do it for him."

(See Decision No. 786.)

Guaranty.

Knight & Jillson brought an action against M. J. Stewart on the following writing:

"Indianapolis, Ind., 6/23, 1900.

Knight & Jillson. — Dears Sirs: Please let the bearer, Corrin Larkin, have whatever he wants at any time, and I will see that it is paid for.

M. J. STEWART."

It was held that this was a conditional guaranty requiring notice of acceptance and notice of default of the principal.

The court said of it in part: "In the case of Gaff et al. v. Sims et al., 45 Ind. 262, at page 264, the Supreme Court said: 'The contract of a guarantor, on the other hand, is his own separate contract. It is the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done and not merely an engagement jointly with the

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principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance, and therefore the creditor shall give him notice.' In the case of Wills v. Ross et al., 77 Ind. 1, 40 Am. Rep. 279, at page 5, 77 Ind., 40 Am. Rep. 279, the court used the following language: 'There is a well-recognized and plainly marked distinction between the cases where the proposal is to guaranty the payment of a liability existing at the time and known to the guarantor, and those where the proposal is to guaranty the payment of a debt not incurred, and the character and amount of which are not known to the guarantor. In the first class of cases no notice of acceptance is required for the guaranty becomes at once effective and operative. It is said by the author of a recent work upon this subject that the rule seems to be that if the guaranty is absolute in terms, definite as to amount and extent, notice is dispensed with.' See, also, Baylies, Sureties and Guarantors, p. 195; Brandt, Suretyship, etc., § 164. The converse of the proposition as decided by the case last cited and the two text-writers seems to be equally well settled. In the courts of the United States, and in nearly all of the courts of New England, also Pennsylvania, Ohio, Missouri, Texas, Alabama, Kentucky, and many other States, it is the settled and established rule that notice of acceptance is necessary to complete the obligation of prospective and contingent guaranties."

(See Decision No. 787.)

Collateral: Duty of Creditor as to Their Collection.

The following quotation as to the duty of the creditor to collect notes left with him as collateral is from 80 S. W. 441: "'It is well settled that when a chose in action, such as a bond, or accepted order on a third person, is transferred and delivered to the creditor as collateral security, it is the duty of the pledgee to use reasonable care and diligence to make such collateral available; that he is bound to use proper exertion to render its collection effectual for the purpose for which it was pledged; that, if necessary, he must bring an action against the maker of the collateral; and that, if through his negligence or wrongful act or omission the collateral is lost, he is accountable and liable to the pledgor in the same manner as the pledgee of goods and merchandise is liable to the pledgor if they are lost or destroyed through the pledgee's failure to give them the necessary protection and care.' On page 903, Id., it is said: 'Whether or not the pledgee of collaterals has used due diligence to collect them is a mixed question of law and fact. It is not for the

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court to determine that due diligence has been used. It is the province of the court to instruct the jury what is due diligence, and for the jury to find whether due diligence has been used.' In the case of Noland v. Clark, 10 B. Mon. 239, the rule is thus stated: 'It is said that a person who receives bonds and notes as collateral security for a debt is bound to use due diligence, and, if they are afterwards lost, through his negligence, by the insolvency of the makers, he is charged with the amount.' In the case of Bonta v. Curry, 3 Bush, 678, a note had been assigned as collateral security. Afterwards the assignor, becoming insolvent, made a general assignment for the benefit of his creditors. After the maturity of the collateral, the assignee in bankruptcy demanded of the holder of the collateral that it be turned over to him for collection, and warned him that, if he would neither surrender the note, nor forthwith sue on it, he must take the risk, and would be held responsible for any loss which might result from his persistent inaction. The court said: 'Now, although Vanarsdall's note did not pass to Harris by the deed of trust, and the appellant therefore was not bound to surrender it on the demand made, yet, as a trustee of ordinary faith and prudence, it was his duty, after that notice and warning by the appellee, to proceed without delay to collect the note by legal process; and it seems probable that, had he thus acted, he would have made the whole amount.' Thereupon the judgment holding the assignee liable for laches in regard to the collateral was affirmed. In the case of Sanford v. Lowenthal, 1 Ky. Law Rep. 357, the rule was stated that the assignee of a note held as collateral was required to use due diligence in its collection. In the case of Shindler v. Hayden's Adm'r, 8 Ky. Law Rep. 859, in a well-considered opinion of Judge Ward, wherein a great number of authorities are reviewed and commented upon, it is said: 'Reason and the analogies of the law therefore concur in the rule as stated in Slevin v. Morrow, 4 Ind. 425, that the holder of collateral paper guilty of laches, whereby the assignor is damaged, makes the paper his own and must account to his debtor on the principal debt for the sum which he could have made by pursuing the maker of the collateral paper with ordinary diligence.'"

(See Decision No. 788.)

Deposit: Right of Bank to Charge to Account of Depositor a Check on Which He Is Surety Only.

"The legal question at issue is whether or not the bank had the right to apply the deposit fund of plaintiff toward the payment of the guaranteed check, and set off the check against his deposit account, without his request or permission to do so. The relation of a bank and its depositor is that of debtor and creditor, and it is the duty of the bank

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to pay the checks of its depositor on presentation when he has funds sufficient to his credit. A bank may apply the funds of its depositor in payment of his matured note due to the bank, and set off the debt against his deposit account. Mt. Sterling Nat. Bank v. Green, (Ky.) 35 S. W. 911, 32 L. R. A. 568. But it has no right to apply money of its depositor to the payment of a note on which he is surity of guarantor. In Harrison v. Harrison, (Ind.) 20 N. E. 747, 4 L. R. A., loc. cit. 112, the court said: 'The general rule in keeping the account of a depositor is that, as money is paid in and drawn out a balance may be considered as struck at the date of each payment or entry on either side of the account; and it is the right of the bank, in case the depositor becomes indebted to it by note or otherwise, and the deposit is not specially applicable to a particular purpose, or there is no express agreement to the contrary, to apply a sufficient amount thereof to the payment of any debt due and payable from the depositor to the bank. Second Nat. Bank v. Hill, 76 Ind. 223 (40 Am. Rep. 239); Nat. Mahaiwe Bank v. Peck, 127 Mass. 298 (34 Am. Rep. 368); Commercial Nat. Bank v. Henninger, 105 Pa. 496. This results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exist mutual demands. It is familiar law, however, that mutuality is essential to the validity of a set-off, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal, and the other sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. Watts v. Christie, 11 Beav. 546; Dawson v. Real Estate Bank, 5 Ark. 283; Sefton v. Hargett, 113 Ind. 592 (15 N. E. 513; Morse, Banks, § 326. It follows that, in the absence of a contract giving it the right to do so, the bank could not have applied money due the petitioner, as a depositor, to the payment of the note upon which he was surety, any more than it could have successfully pleaded the note as a set-off in case the petitioner had brought suit to recover the balance due him on deposit.'

"The check was not O'Grady's check, it did not represent his debt, nor was the debt for which it was given due to the bank, but to Hill. There was neither direction nor consent of O'Grady to the bank to apply money to his credit in the bank to the payment of the check; hence its application to that purpose was without authority; and, as the evidence shows plaintiff had money deposited in the bank sufficient to pay the ten-dollar check on the day it was presented, it was the duty of the bank to have paid it. On its refusal to do so a right of action on the case for damages at once accrued to plaintiff. Viets v. National Bank, 101

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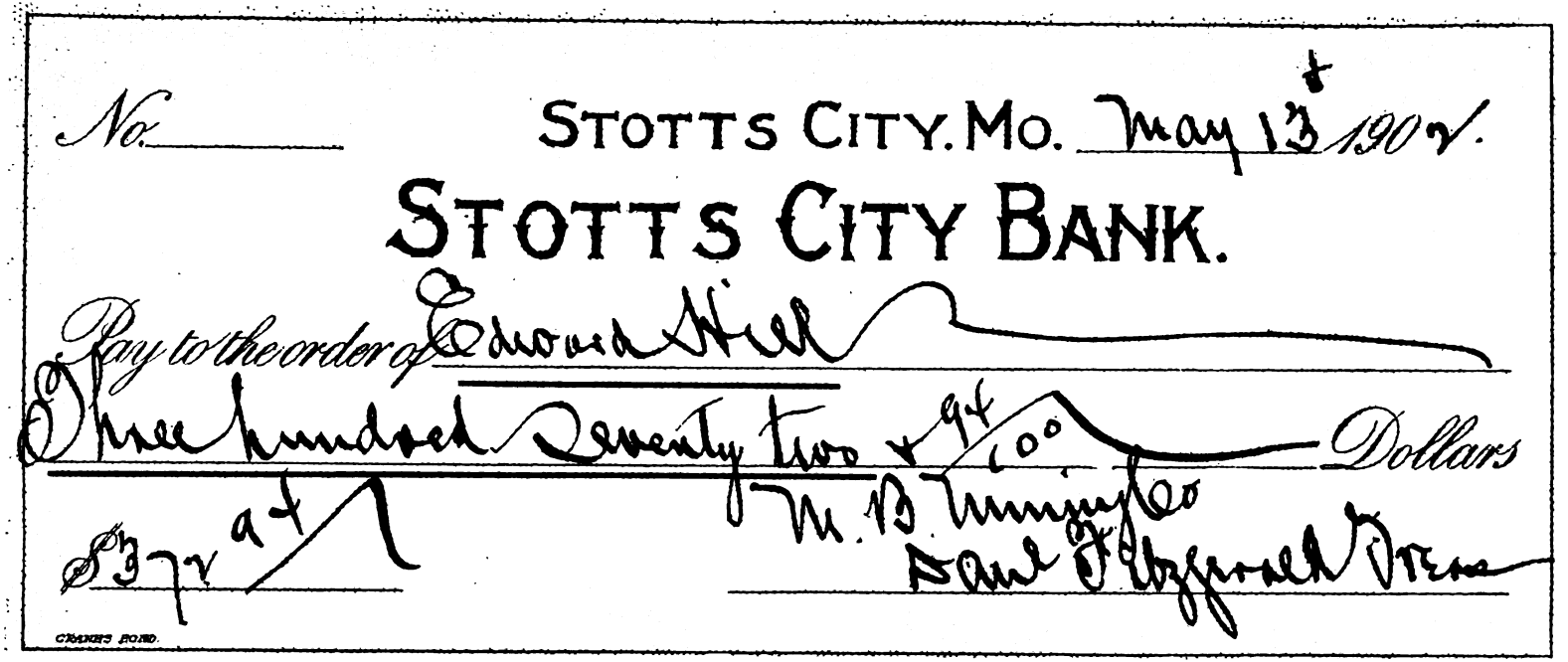

No. _____ STOTTS CITY, MO. May 13th 1907.

STOTTS CITY BANK.

Pay to the order of Edward Hill

Three hundred Seventy two 94/100 Dollars

$372.94

W. B. Tunnyleo
Paul F. Bryant Pres.

CRANE'S BOND.

Right of Bank to Charge Past Due Notes to Account of Surety, or of Partner.

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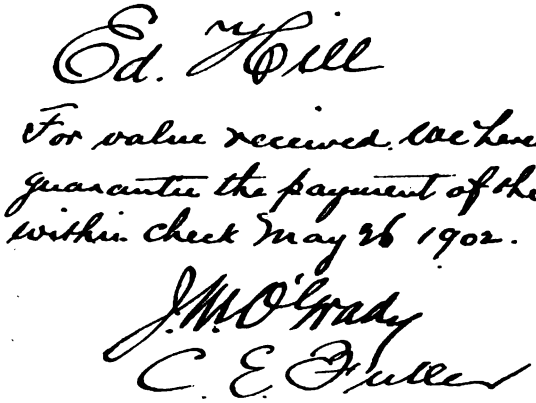

Hill, the holder of this check, presented it to the cashier of the Stotts City Bank and received credit for it, the bank charging it to the account of J. M. O'Grady, one of the guarantors, — the drawers not having any funds in the bank at that time. Subsequently O'Grady drew his check on the bank for ten dollars, payment of which was refused, his balance having been exhausted by this check having been charged to his account. O'Grady afterwards took up this guaranteed check and then sued the bank for damages for the wrongful non-payment of the ten-dollar check. He was beaten in the trial court, but won on appeal, the Court holding that he was entitled to compensatory damages. As to the right of the bank to charge to the account of the depositor an item on which he is secondarily liable, the Court said in part: "A bank may apply the funds of its depositor in payment of his matured note due the bank, and set off the debt against his deposit account. 35 S. W. 911. But it has no right to apply money of its depositor to the payment of a note on which he is security or guarantor. . . . Accordingly it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal, and the other sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. 113 Ind. 592." (15 N. E. 13.) It may be added here that it is the bank's duty to the surety of a note which it owns to charge it, at or after maturity, to the account of the maker, if such account was sufficient at the maturity of the note to pay it. As to the damages that may be recovered from a bank for its wrongful refusal to pay a depositor's check, it has been said: "In such cases the damages, according to the authorities, are not limited to a mere nominal sum, but the plaintiff is entitled to recover general compensatory damages." 139 Ill. 109; 130 Pa. St. 419. A verdict of $500 was sustained in 80 S. W. for refusal to honor the check of student for less than $100. In 139 Ill. 109, a verdict was upheld for $450 for the wrongful dishonor of a check, caused by the mistake of a bookkeeper in charging the checks of another to the account of the plaintiff. "There is something more than a breach of contract in such cases; there is a question of public policy involved; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages."

McMaster's Com. Cases, Vol. 1905, 47 S. E. 618.

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N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Citizens' Nat. Bank v. Importers', etc., Nat. Bank, 44 Hun, 386; Whitaker v. Bank of England, 6 Carr. & P. 700. In such cases the damages, according to the authorities, are not limited to a mere nominal sum, but the plaintiff is entitled to recover general compensatory damages. Rolin v. Stewart, 14 C. B. 595; Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; Patterson v. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Bank of Commerce v. Goos, (Neb.) 58 N. W. 84, 23 L. R. A. 190; Sutherland on Damages, (2d ed.) § 77."

(See Decision No. 789.)

Collateral: Sale.

The following quotation as to the duties of those holding collateral, and who have the option of a public or private sale, and make a public sale, is from a recent decision reported in full in this number: "The plaintiff having pledged his stock as security for a loan made to him by the defendant, we next inquire what were the rights of the defendant upon default by the plaintiff in the payment of the debt? That defendant might sell at a public or private sale is not questioned, but 'the failure to pay the debt at maturity did not vest the property in the pledgee. The pledgee's possession is not regarded as adverse to the pledgor, and does not bar his right to redeem, unless it has continued so long a time as to raise the presumption that the pledgor has relinquished his title in satisfaction of the debt.' White Mts. R. R. v. Iron Co., 50 N. H. 60. While, therefore, the right of defendant to sell is not questioned, the plaintiff had the right to have a fair sale made. As said by this court in Laclede National Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528: 'Such a power (i. e., the power to sell the pledge) given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as other contracts affecting equities of redemption, be construed favorably for the interests of the pledgor so far as consistent with the rights of the pledgee, and a sale must not be forced for barely enough money to secure the payment of the debt;' and adds: 'It devolves upon the pledgee in the exercise of the powers given under the pledge to so conduct the sale as not to sacrifice the securities held by him, and, in the event the pledgee unfairly or unnecessarily prejudices the rights of the pledgor the sale will be set aside.' In that case the referee declared the sale invalid because the printed notice of the sale did not state upon what authority or by virtue of what power the sale was to be made. No reference whatever was made to the pledge or power under which Mott, the agent of the bank, was acting in making the sale, nor

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was any mention made of the ownership of the collaterals, nor was it stated upon what terms the sale would be made — whether for cash or on time. Besides there was nothing in the published notice indicating that the sale of these securities was made in behalf of the bank. All of which this court unanimously approved in that case. The Circuit Court required the bank to account for all the notes purchased by it at such sale, finding in favor of the bank only for the amount remaining due after such accounting, and this court affirmed the judgment of the Circuit Court.

"In view of these just and well-settled principles of equity it must be held that, under the power given the bank, the defendant in this case, to sell at public or private sale, with or without notice, it still remained its duty to make the sale fairly, and with a view to make the securities sell to the advantage of the pledgor, the plaintiff herein, as well as for its own interest. This trust, broad and ample as it was, was not intended as a power of attorney to go through a meaningless form by which plaintiff's stock was to be sacrificed without any regard to fairness. Keeping in view the equitable doctrines announced by Robinson, J., in Laclede National Bank v. Richardson, supra, what were the facts attending this sale? We need notice only the testimony of Wernse, broker employed by the defendant to make the sale, and that of Mr. Baker, the president. Mr. Baker says there was no advertisement whatever informing the public that the stock would be sold, or announcing the terms of the sale, or the authority by which the sale would be made. In fact, there was no attempt whatever by the bank to advertise the sale or to give public notice. Both Mr. Baker and Mr. Marshall, the cashier, testify that they did not notify any one the sale was to be made. Just before noon Mr. Marshall took the stock and started to the Merchants' Exchange, and on his way called upon Mr. Wernse, a broker, and requested him to go with him to the Merchants' Exchange and auction the stock at twelve o'clock. Mr. Marshall was on the exchange for some time before twelve o'clock with Hagan's stock and notes, but did not inform a single person there that the sale was to take place. Wernse, after he came, did not inform any member that the sale was to be made. At noon Wernse mounted a little rostrum or platform on the floor of the exchange and made this announcement: 'We will offer for sale, for cash, to the highest bidder, for the account of whom it may concern, 770 shares of the Hagan Opera House stock, par value $100 per share.' 'I also announced that, unless I know the bidder to be a responsible party, I would require $2,500 or $5,000 in cash or certified check immediately on the bid being closed. I also announced that if any one desired to have small lots put up, that I would put it up in ten-share lots, or any multiple that might be desired.' That was all the announcement made. Asked by the

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Circuit Court if he stated who was the owner of the stock, he answered he did not. He did not know who was the owner. 'Did you state to whom it was pledged?' 'No, sir.' 'Did you state by what authority you were selling?' 'I did not.' Under these circumstances Mr. Marshall, the cashier of the defendant, was the only bidder, and bid $5,000, and it was knocked down to him. Recurring now to Laclede Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528, this court said: 'In the circumstances of the case, we are of opinion that it devolved upon the pledgee in its notice of sale to refer to or state the power and authority under which the sale was to be made; but it is contended by counsel for appellant that, inasmuch as no notice was provided for by the collateral notes, the bank was at liberty to act as it saw fit in this regard, provided some notice was given to the public of the sale. This, as already seen, is not the law. The clause authorizing the sale of the securities in question without notice must, we think, be held to refer to a waiver of notice only so far as the pledgor was concerned, and has nothing whatever to do with a public sale. "The latter, as we have seen, could not be made without some due notice to the public." Otherwise, what could reasonably be anticipated but a sacrifice of the security for want of bidders duly informed upon the subject?' Again, referring to the notice made by Mr. Mott that he would 'sell for the benefit of whom it may concern' — the exact form adopted by Wernse in this case — this court condemned that practice, saying: 'If the advertisement had been in the name of the bank, or so framed as to state upon what authority or by virtue of what power the sale was to be made, the public would thereby have been apprised that the bank was seeking to sell certain securities upon which it had loaned money, and its known financial standing in the community would doubtless have called more bidders together, and resulted in a more advantageous sale.' In that case some notice was attempted, but, because of the failures noted this court held the sale invalid and required the bank to account for the securities. In this case no notice whatever was attempted. It requires little discrimination to see that this was a more unreasonable and unfair exercise of the power conferred to sell at public sale. It cannot be doubted that defendant was attempting to make what it considered would be a compliance with the power to sell at public sale, and it seems to use no one can fail to condemn it as inequitable and unjust to plaintiff, and a ruthless sacrifice of his stock. Moreover, if the bank intended to execute the power to sell at a public sale, as all the evidence tends to show, it was bound to pursue those methods ordinarily adopted in making public sales; and such a sale presupposes a sale at a public place — a place to which the public can have access. Such a place as the Merchants' Exchange, from which the public is barred, is not. The by-laws of the exchange, read in evidence, prohibited any and all per

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sons not members of the exchange from buying or selling on its floors. To hold such a place a public place within the legal or equitable acceptation would be repugnant to all of our customs in conducting such sales, and to all our statutes providing for their conduct. But a public sale also implies a notice to the public in order that purchasers may advise themselves of its terms and the title to the property, and be enabled to bid intelligently. The evidence of the president, cashier, and the broker who cried the sale leave no doubt whatever that they gave no notice of their intention to sell this stock when they did to any one but the pledgor, and he was not a member of the exchange, and could not be present, and, had he been present, could not have bid at the sale. The result was such as can always be anticipated under such circumstances. The stock which the bank took as security for over $20,000 indebtedness sold for $5,000. The Circuit Court was clearly right in setting aside the sale, and we have no doubt whatever of the jurisdiction of a court of equity to avoid such sale. On this ground plaintiff had a firm standing in equity, especially as the bank afterwards asserted title under that sale, and insisted that the equity of redemtion was forever foreclosed. It was necessary for plaintiff to remove this barrier in a court of equity before he could require the bank to account to him for the proceeds of the subsequent sale to Jannopoulo. A court of equity having acquired jurisdiction for one purpose, it is a maxim of equity that it will proceed to do complete justice between the parties, and proceed to a final determination of all matters in issue. 1 Pomeroy's Eq. Juris., § 181, and the cases cited; Keeton v. Spradling, 13 Mo. 321; State of Missouri v. McKay et al., 43 Mo., loc. cit. 598; Real Estate Savings Inst. v. Collonious, 63 Mo. 290. The allegations as to the unfairness of the sale brought the case within the jurisdiction of a court of equity, and, the evidence having fully substantiated the charges in the bill, the Circuit Court properly held that the bank stood in relation to the stock after the sale just as it did before the sale.

"But the bank had the power to sell the stock at private sale, and after it had gone through the form of a sale to itself it still held it as a pledge, and had the power to sell, as it did to Jannopoulo. When charged with having had it issued to Jannopoulo and others on the company's books, but at the same time retaining possession and control of it, it denied it in its answer. On the trial it appeared it had in fact sold it to Jannopoulo for $30,000, and that he was an innocent purchaser for value and without notice. The Circuit Court, under the evidence, found itself unable to decree redemption in kind, but under the prayer for general relief it required the bank to account for the amount of the purchased money, and deducted plaintiff's indebtedness from the $30,000 and gave judgment for plaintiff for the balance."

81 S. W. 171.

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57 Atl. 798.

(Supreme Judicial Court of Maine. March 11, 1904.)

SALES — DELIVERY TO CARRIER — TITLE — INTOXICATING LIQUORS NOT INTENDED FOR UNLAWFUL SALE.

1. Under the settled law of this State, upon an order for the shipment of goods by express C. O. D., the carrier designated in the order acts as agent of the purchaser, and, in the absence of any evidence to the contrary, a delivery to the carrier is deemed a delivery to the purchaser, and title to the goods will pass to the purchaser upon delivery to the carrier.

* * * * * * * * * * * * *

"Rumford Falls, Me., September 3rd, 1903.

"Crigler & Crigler, Covington, Kentucky — Gents: Please ship me C. O. D., by American Express, express prepaid, one gallon of rye whiskey.

"JOHN R. BISHOP,

"Rumford Falls, Maine."

* * * * * * * *

"In the order which the claimant sent to the Kentucky firm he designated the carrier to whom the liquor was to be delivered, and specified that it was to be shipped C. O. D., express paid. Under such circumstances the carrier, in receiving and transporting the liquor, acts as agent of the purchaser. 'The contract stands upon the simple rule of the common law. The seller was entitled to his price, and the buyer to his property, as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property.' State v. Intoxicating Liquors, Moffitt, Claimant, 73 Me. 278. This rule was affirmed in State v. Peters, 91 Me. 31, 39 Atl. 342, and reaffirmed in Greenleaf v. Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

"The law is well established that, in the absence of any evidence to the contrary, such a delivery to a common carrier at the express request of the purchaser will be deemed a delivery to the purchaser himself. Frank v. Hoey, 128 Mass. 263, and Wigton v. Bowley, 130 Mass. 252. The fact that the express charges were prepaid by the seller in accordance with the terms of the order has no tendency to show that he intended to preserve the jus disponendi, and to prevent the property from passing to the vendee. Sawyer Medicine Co. v. Johnson, 178 Mass. 374, 59 N. E. 1022.

"In the case at bar the liquor was sold and delivered, and the title passed to the claimant in Kentucky, and not in Maine."

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MITCHELL v. BAKER.

57 Atl. 760.

(Supreme Court of Pennsylvania. March 7, 1904.)

SALE — TITLE — REFUSAL TO ACCEPT — DAMAGES.

1. Where a manufacturer, under directions from the seller of goods, ships them directly to the purchaser, and the bill of sale is made out in the name of the seller, who indorses it to the purchaser, the title, on indorsement of the bill of lading and delivery of the goods to the carrier, passes to the purchaser.

2. Where a vendor of goods is ready and willing to deliver, on refusal of the purchaser to accept, the measure of damages is the difference between the contract price and the cost of manufacture and delivery.

THOMPSON, J. The contract for the breach of which damages in this suit were claimed was made at Schuylkill Haven, Pa. The selling agent of appellee called upon appellant and offered to sell him 20,000 pounds of a certain kind of yarn. Appellant offered to buy 20,000 pounds of such yarn at a specified price. The selling agent told appellant that he would submit this offer to appellee. This he did, and, appellee having ascertained from the Kingston Mills, in North Carolina, that they would furnish him the amount of yarn that appellant wanted to purchase he sent a sales note on December 11th, as follows: "James E. Mitchell and Co., 122-124 Chestnut Street, Philadelphia, December 6th, 1900, No. 1,059. By Hill. Sold to E. H. Baker, 20,000 lbs. cones, 10's at 17½, 11's at 17¾. Shade 97 steel grey, two cents per pound more. Frt. paid Mill, 63. Price as above. Terms 2 per cent. 10 days. Delivery 1,000 to 1,200 lbs. weekly, beginning March, 1901. Note. It is mutually agreed that if the production of the mill accepting contract be curtailed by strikes or any unavoidable accident, the delivery shall be in proportion to the production. Advise at once if this order is incorrect in any particular, otherwise shall be considered confirmed by you. Respectfully, James E. Mitchell and Co." Appellant did not disaffirm the contract, but, on the contrary, on January 8th stated to the representative of appellee that it was all right. Accordingly appellee had shipped to the appellant from the mills in North Carolina 7,145 pounds of yarn. The bills of lading were in the name of appellee, and by him indorsed to appellant. This yarn remained with the railroad company, and was finally sold upon execution as the property of the appellant. The balance of the 20,000 pounds of yarn contracted for was not forwarded, because the appellant had refused to receive it.

The present suit was to recover for the yarn shipped to Schuylkill Haven, and for damages for the breach of contract in refusing to receive and pay for the balance. The contention of the appellant was that, when the representative of the appellee received the order, it was a conditional one, by which the appellant was to receive and pay for the yarn from time to time as he required it for the trade, and not from 1,000 to 1,200 pounds per week. This was denied by the representative of appellee, and the evidence would scarcely warrant that such was the case; but, whether so or not, the contract was made by the letter of December 11, 1900. That letter is clear and specific, and without conditions. It was accepted by the appellant, and became a binding con-

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tract, in consequence of which appellee entered into a contract by which he agreed to purchase from the Kingston Mills the 20,000 pounds of yarn in question. By his contract, appellant undertook to pay for the yarn in accordance with it, and, as there was not sufficient evidence of any set-off, he was liable to pay the contract price for that which had been shipped from North Carolina, and damages for refusal to receive the balance.

Appellant contended, however, that he was not liable to pay for the former, because it was never delivered to him. This yarn was shipped from North Carolina to Schuylkill Haven, and bills of lading for the same were in the name of appellee, and by him indorsed to appellant. The shipment of this yarn to Schuylkill Haven, and the delivery of the bills of lading, duly indorsed, were a delivery to the appellant, and passed the title to him for the yarn in question. By the delivery to the carrier, and by the indorsement of the bills of lading, the railroad company became the agent of the indorsee, and bound to deliver the goods in question. In Pennsylvania Railroad Company v. Stearn and Spiegel, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626, Mr. Justice Paxson said: "Bills of lading are symbols of property, and, when, properly indorsed, operate as a delivery of the property itself, investing the indorsees with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the person entitled to receive the same. Hieskell v. Farmers' & Mechanics' National Bank, 89 Pa. 155 (33 Am. Rep. 745).

"There could be no delivery except in accordance with the bill of lading. Dows v. National Exchange Bank, 91 U. S. 618 (23 L. Ed. 214); Stollenwerck v. Thacher, 115 Mass. 224." The appellant was therefore liable to pay for the 7,145 pounds of yarn so shipped.

As to the damages, he was liable to pay them for his refusal to receive the balance. Appellee, by reason of the contract with appellant, contracted with the Kingston Mills for the special kind of yarn in question. He was bound to take it, and, having done so, sold it. He sold it for the market prices, and has suffered a loss. It is very manifest that this actual loss is a proper measure for damages. In Puritan Coke Company v. Clark, 24 Pa. 556, 54 Atl. 350, Mr. Justice Dean says: "The law, therefore, is, and ought to be, that in a contract for the delivery of chattels upon a special stipulation as to quality and quantity, where the vendor is ready and willing to deliver, the measure of damages is the difference between the contract price and the cost of manufacture and delivery. When on a resale he receives more than the cost of manufacture, he is entitled to the difference between the price it sold for and the contract price." The learned trial judge cannot, therefore, be convicted of error in directing the jury to find a verdict for appellee in the sum so found.

The assignments of error are not sustained, and the judgment is affirmed.

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FORKED DEER PANTS CO. v. SHIPLEY.

80 S. W. 476.

(Court of Appeals of Kentucky. May 3, 1904.)

MASTER AND SERVANT — DISCHARGE OF SERVANT — ACTION FOR DAMAGES — MEASURE OF DAMAGES — TIME FOR BRINGING ACTION — PRINCIPAL AND AGENT — OSTENSIBLE AUTHORITY — CONTINUANCE.

1. A principal is bound by the acts of his agent within the apparent scope of his authority, although the agent's private instructions may limit his authority more narrowly.

2. It is within the apparent authority of a general manager of a corporation to contract for labor.

3. A by-law of a corporation providing that the general manager thereof shall have general management of the business, with authority to buy and sell, conferred authority to hire labor.

4. A principal is not bound by the agent's contract beyond the limitations of his authority, when the limitations are known to the other party.

5. An employee wrongfully discharged before the end of the term may sue before the expiration of the term for the contract price for the remainder of the term, less what he might have earned elsewhere by reasonable diligence.

6. The denial of a continuance because of illness of an attorney was not an abuse of discretion, where one of the members of the firm to which such attorney belonged was present at the trial.

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"The rule is, where the employee is discharged before the expiration of his contract, he may recover the contract price for the remainder of the term, less what he has earned or might earn by reasonable diligence. He is not required to wait until the end of his term before bringing his suit. He can recover but once, and in that action must be allowed to recover his entire damages. The trial here took place before the end of the year contracted for, and, while it is necessarily somewhat of an approximation as to what she might earn by diligence during the year, this is permissible, and is the most that can be required of her. Lewis v. Scott, 95 Ky. 484, 26 S. W. 192, 44 Am. St. Rep. 251. The court properly so instructed the jury. While there were some unnecessary allegations in the petition, the allegation as to the loss on the breach of the contract and her inability to get other work are sufficiently stated to sustain the verdict."

Partnership: Surviving Partner May Not Bind His Deceased Partner's Estate by a Note in the Firm Name.

The following quotations as to the right of a surviving partner to pledge the firm assets to raise money are from 100 N. W. 24: "In Burchinell v. Koon, (Colo. App.) 46 Pac. 932, the following language is

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used: 'The powers of the surviving partner to deal with the firm assets have been established by a long line of adjudications. His right to sell, mortgage, and dispose of those assets, and apply them to his own discretion and judgment in the payment of debts, has been repeatedly recognized. Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365 (4 Am. St. Rep. 460), Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369 (27 L. Ed. 211); Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. 981 (30 L. Ed. 49); Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095 (12 L. R. A. 146, 21 Am. St. Rep. 686); Patton v. Leftwich, 86 Va. 421, 10 S. E. 686 (6 L. R. A. 569, 19 Am. St. Rep. 902); Bank v. Parsons, 128 Ind. 147, 27 N. E. 486; Krueger v. Speith, 8 Mont. 482, 20 Pac. 664 (3 L. R. A. 291); Smith v. Phelan, 40 Neb. 765, 59 N. W. 562; Roach v. Brannon, 57 Miss. 490; Johnson v. Berizheimer, 84 Ill. 54 (25 Am. Rep. 427). According to the doctrine of all these authorities — and there are practically none to the contrary — the surviving partner is entitled to the possession and control of the joint property of the firm for the purposes of winding up the affairs of the copartnership. To accomplish this, he has a right, according to the settled principles of the law of partnership, to administer the firm affairs, and to dispose of its assets. This power is broad enough to cover the right of sale, and includes the power to mortgage, or to deliver property in payment.'"

* * * * * * * *

The death of a partner puts an end to the copartnership, and there is no longer any power or authority of the surviving partners to carry on for the future a partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof. Story on Partnership, §§ 342, 343; Hall v. Lanning, 91 U. S. 160-170 (23 L. Ed. 271); Farr v. Morrill, 53 Hun, 31-35, 5 N. Y. Supp. 720. It is thus apparent that whilst the note in form would appear to create an obligation of the firm, it is at law unavailable as such for the reason that there was no power in the survivor to make it. But it does not follow but that it is a claim which ought, in justice and equity, to be paid out of the firm's assets. If it is, the preference in the assignment would not be void, for the law will not declare fraudulent that which equity adjudges right and proper. Denton v. Merrill, 43 Hun, 224-229. We must, therefore, consider whether there are equities which will support the claim of the bank to be paid out of such assets. It is apparent that the money borrowed from the bank by the survivor was for the purpose of paying the creditors of the firm the claims then matured and pressing. The amount of the loan was credited upon the open account of the firm with the bank and subsequently ten thousand dollars thereof, or thereabouts, were drawn out by the survivor upon his check and used in the payment of the liabilities of the firm. At the time this loan was made, it was not supposed by the officers of the bank or the surviving partner that the firm was insolvent, and no question is made but that both parties acted in good faith. The question is therefore presented whether a surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and by so applying the money borrowed create an equity for the satisfaction of which the assets of the firm may properly be devoted. As we have seen, the survivor became entitled to the assets which he had the right to sell, mortgage, and dispose of in order to pay the debts and close up the affairs of the copartnership. If he had the power to sell or mortgage, it would seem to

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follow that he had the power to borrow, and pledge the assets for the repayment of the loan; and, the amount borrowed having been faithfully applied in liquidation of the debts of the copartnership, equity will recognize the justness of the claim of the party making the loan.

"In the case under consideration it is true that the partnership is insolvent, and the question arises as between the bank and creditors of the partnership; but the creditors have not been harmed or prejudiced by the action of the bank in loaning the money to the survivor, for the assets were increased in value to the amount of the loan, and the money drawn out of the bank was applied in extinguishment of the claims of the creditors, thus reducing to that extent the liabilities of the firm. When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property, make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment. Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365 (4 Am. St. Rep. 460); Emerson v. Senter, 118 U. S. 3-8, 6 Sup. Ct. 981 (30 L. Ed. 49); Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369 (27 L. Ed. 211); Butchart v. Dresser, 4 De Gex, McNaughton & Gordon, 542; s. c. 10 Hare, 453; In re Clough, Bradford Commercial Banking Co. v. Cure, L. R. 31 Ch. Div. 326; Case v. Beauregard, 99 U. S. 119-124 (25 L. Ed. 370)."

NATIONAL UNION BANK OF MARYLAND v. HOLLINGSWORTH et al.

47 S. E. 618.

(Supreme Court of North Carolina. May 24, 1904.)

PARTNERSHIP — DISSOLUTION — DEATH OF PARTNER — NOTICE — SURVIVING PARTNER — NOTES — INDORSEMENT — INDIVIDUAL LIABILITY — CORPORATIONS — ORGANIZATIONS — TRANSFER OF ASSETS — DEBTS OF CORPORATORS — LIABILITY OF CORPORATION.

1. Where, in an action on a note against a firm which had been dissolved by the death of two of the partners, the personal representatives of such deceased partners were not made parties, their liability was not in issue.

2. Where a dissolution of a firm occurs by operation of law by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm.

3. A surviving partner has no power after dissolution to renew or indorse a firm note in the name of the firm.

4. A surviving partner who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the firm.

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5. Where a surviving partner of a firm, who was personally liable on an indorsement of a note in the firm name without authority, organized a corporation, and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt.

* * * * * * * *

"It is equally well settled that, where the dissolution is brought about by operation of law, by the death of one of the partners, it is not necessary to give notice, to prevent liability attaching to the estate of the deceased partner, or to either of the surviving partners, for any future contracts made in the name of the firm. In Marlett v. Jackman, 3 Allen, 287, Bigelow, C. J., says: 'Two text-writers, however, of great learning and authority, have laid down the rule that, when a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary, and the surviving partners are not bound by any new contract entered into by one of the firm in the partnership name after dissolution, although it is made with a person who had previously dealt with the firm, and had no notice or knowledge that it was terminated by the death of one of the members.' Citing Kent's Commentaries, Story on Partnership, and Colyer on Partnership. The learned chief justice further says: 'Starting, then, with the admitted proposition that death works a dissolution of a firm, and that thereby the estate of the deceased partner and his personal representatives, as well as his share of the assets of the firm, are absolutely relieved and absolved from any new contracts or subsequent transactions of the surviving partners which are not necessary to the settlement of the joint business, the inquiry at once arises as to the effect of such a dissolution, caused by the act of God, on the relative rights and duties of the surviving copartner. One of the essential elements of the contract of copartnership consists in the right which each member has to the continuance of all his associates as members of the firm. . . . When, therefore, by the death of a member of the firm, his personal liability ceases, and his estate is by operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow as a necessary consequence that the power of the surviving copartners to bind each other by new contracts and engagements must at once cease. The copartnership would then be terminated not only as to the deceased partner and his estate, but also as to the other members of the firm. The delectus personarum would not longer exist.'

"It seems to be equally well settled that a surviving partner has no power after dissolution to renew or indorse a note in the name of the firm. 'The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created. The implied power of the expartner does not extend to giving a note or to drawing a bill in the firm's name. Nor could he bind the firm by a check in its name. Renewals of outstanding bills or notes of the firm stand on the same footing, and, as the ex-partner could not draw a bill or note for a firm debt, neither could he renew a bill or note of the firm given for their debt.' Daniel, Neg. Inst., § 370. 'Where a note is issued by a partner

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after dissolution, it will not bind the other partners, even though given for a debt due by the firm.' Id., 371. 'Where the dissolution is by the death of one of the partners, the surviving partner may indorse a note payable to the firm in his own name.'

"Bristol v. Sprague, 8 Wend. 423; Whitman v. Leonard, 3 Pick. 177; Charles v. Remick, 156 Ill. 327, 49 N. E. 970; Woodson v. Wood, 84 Va. 478, 5 S. E. 277; Lusk v. Smith, 8 Barb. 570; Myatts v. Bell, 41 Ala. 222.

"In Abell v. Sutton, 3 East, 110, Lord Kenyon said in regard to the liability of a partner for an indorsement made after the dissolution of the firm: 'To contend that this liability to be bound by the acts of his partner extends to times subsequent to the dissolution is to my mind a most monstrous proposition. A man in that case could never know when he is to be at peace, and retired from all the concerns of a partnership.' 22 Am. & Eng. Ency. 214.

"'A note given by one partner after dissolution of the partnership does not bind the other partner, although given in the partnership name, and in consideration or settlement of a subsisting partnership liability.'

"Haddock v. Crocheron, 32 Tex. 277, 5 Am. Rep. 244; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Fellows v. Wyman, 33 N. H. 351.

"It is claimed, however, that the note in suit was given in renewal of notes executed by the same persons. The contention in regard to this phase of the case is: The defendant Hollingsworth executed a note payable to J. E. Dickerson & Co. for $4,900 in August, 1893, which was indorsed to and discounted by the Bank of Asheville, and indorsed to and rediscounted by the plaintiff bank. This note at maturity was returned to the Asheville bank, indorsed for collection, and charged to said bank by the plaintiff bank. Upon its receipt by the Asheville bank, it was credited to the plaintiff bank. The Asheville bank then procured a renewal note from the same parties, which was sent to the plaintiff bank for rediscount. It was in evidence that the plaintiff was under no obligation to rediscount the note thus taken in renewal. It would seem that each rediscount by the plaintiff bank was a separate and distinct transaction. It was in evidence that each note, as it was sent to the Asheville bank, and a new one taken, was marked 'paid,' and surrendered to the makers.

"Whether these transactions, resulting in the execution of the note in suit, operated as a payment of the original note, it is not necessary to decide. What constitutes a payment, otherwise than by money, is usually a mixed question of law and fact, dependent frequently upon the intention of the parties. It is undoubtedly true that the renewal of the note secured by mortgage or collateral will not operate to discharge the security. It is equally well settled that the giving of a note or draft for an existing indebtedness does not operate, unless so agreed by the parties, to extinguish the original indebtedness, and upon the dishonor of the note or draft the creditor may sue upon the original consideration. 'A note given by all the parties to pay for the goods delivered would not extinguish the original undertaking, like a bond or judgment taken

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$1900. Asheville, N. C. July 15 1897

Four months after date I promise to pay to the order of D. E. Dickerson & Co

Nineteen hundred —— Dollars

at First National Bank

Value received.

No. _____ Due _____

CRANE'S BOND

Partnership Note: Dissolution of Firm by Death of Partner: What Notice is Required to Creditors.

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J. E. Dickerson & Co

Prior to September 5, 1895. the firm of J. E. Dickerson & Co., whose name appears as indorser of this note, was composed of J. E. Dickerson, who resided in Asheville, and O. L. Cottrell, A. S. Watkins, W. S. Robertson, who resided elsewhere. For several years previous to 1895 Dickerson had floated considerable accommodation paper indorsed by him in the firm name, and included in such paper were notes signed by Hollingsworth, discounted by Dickerson & Co., and rediscounted by the National Union Bank of Maryland. This note was the descendant of some of such notes, — renewed, in effect, by the Asheville bank, but re-discounted as new paper by the National Union Bank. On the 5th day of September, 1895, Cottrell, one of the firm of J. E. Dickerson & Co., died. December 12th, 1895, Dickerson purchased from the surviving partners, and from the estate of Cottrell, their interest in the business, and in such purchase he assumed and agreed to pay the firm debts. None of the partners knew of this line of accommodation paper on which the firm name was indorsed, but as the firm had the benefit of it the liability of the firm was not questioned.

The National Union Bank did not know of the death of Cottrell, nor did it know that Dickerson had assumed the debts of the firm, and this note not being paid, it brought an action seeking to charge Robertson, the then only surviving member of the firm, except Dickerson, with the payment of the note. The Court held that Robertson was not liable. The bank took this note in good faith. It had previously and continuously taken paper with this firm's indorsement, and it had received no actual notice of the dissolution, and under the rule of the New York Court of Appeals (Bank of M. Valley v. Weston, 64 N. E. 946), the old members of the firm would have been liable even if notice of dissolution of the firm had been published in the papers, — the rule being that parties having dealings with a partnership are entitled to have actual notice of its dissolution; retiring members of a partnership cannot safely rely on relieving themselves by reason of future transactions of the firm *with its then customers* by knowing that there has been a published announcement of the dissolution, — they should know that such customers have actual notice or knowledge of the dissolution. But there is an exception to this general rule. Where one member of a firm dies this works an immediate dissolution of the firm, not only as to the deceased member, but also as between the surviving members themselves, and in a dissolution by operation of law, and this is such a dissolution, no notice is necessary to any one to relieve the members from future new contracts of any member of the dissolved firm. 47 S. E. 618. And while a surviving partner has the right to sell, mortgage, pledge, and dispose of the assets, he cannot bind his former partners by signing or indorsing the firm name to commercial paper, even in renewal, or for a debt owing by the firm. 100 N. W. 24.

McMaster's Com. Cases, Vol. 1905, 47 S. E. 618.

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for it. The plaintiffs might still maintain their action for goods sold and delivered, provided they produced and delivered up the note on trial, or proved it was destroyed.' Wilson v. Jennings, 15 N. C. 90, cited in Mauney v. Coit, 86 N. C. 471. 'The general doctrine is that the mere giving of a note for a debt is not a discharge or payment of the debt, and the note may be surrendered, and a recovery had on the debt.

"'But if there are any facts tending to show that the note, even when given by one of several joint debtors, was received in payment of the debt, then it becomes a question for the jury to determine whether it was so received, and, if they find that it was, then no action can be maintained on the debt.' Lee's Administrators v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505. In Spear v. Atkinson, 23 N. C. 262, the plaintiffs sold a bill of goods to the defendants, for which they gave their promissory note. Afterwards one of the defendants drew a bill of exchange in favor of the plaintiffs, and took up the promissory note. The bill was presented for payment and dishonored. There was no proof that the bill had been returned to the drawer, or that the plaintiffs ever offered to surrender it at the trial. In an action in assumpsit on the original bill of goods, the plaintiffs were nonsuited, and the judgment affirmed; Daniel, J., saying: 'If the plaintiffs, therefore, had surrendered the bill, even on the trial, they might have recovered upon the original consideration. For the taking of the note first, and then the bill, did not merge the original consideration, as a bond would have done.' The right of the creditor in such case is to sue upon the original consideration or contract. If, by any act of his, either of the original debtors is released, as by extending the time of payment upon valuable consideration or otherwise, such defense must be set up by such debtor. This action being upon the note executed July 15, 1897, more than two years after the death of Cottrell, and the dissolution of the partnership, and also after the purchase by Dickerson of the interest of the surviving partners in the assets of the old firm of J. E. Dickerson & Co., the action cannot be maintained as upon a bond indorsed by the firm of J. E. Dickerson & Co. J. E. Dickerson is, of course, individually liable, and the fact that he indorsed the note as J. E. Dickerson & Co. in no manner affects his individual liability. It would be a singular result, and work a great hardship upon partners, if they could be bound upon indorsements made by their late partners under the circumstances existing in this case."

Sales: Conditional Sale.

1. Where personal property is sold and delivered upon condition that the title shall remain in the vendor until the payment of the purchase price, and the latter elects to bring suit for the recovery of the debt, the adoption of this course is a waiver of the condition in the agreement of sale. Keystone Mfg. Co. v. Cassellius, 76 N W. 1028, 74 Minn. 115, followed.

2. A note to which was attached the condition that the ownership of the property for which it was given should remain in the vendor upon default of payment, was sent to an attorney in another State, who brought action to recover the debt and secured judgment thereon. Held:

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(1) That the sending of the note and conditional agreement to the attorney presumably authorized the latter to use all lawful means to collect the debt within his judgment and discretion.

(2) That in the absence of restrictions other than that the property be taken, the bringing of the suit was within the apparent authority of the attorney, and his client must be held responsible for his acts and the liabilities imposed thereby.

(3) That the bringing of the suit under the facts in this case relieved the property from the conditions in the agreement of sale.

(Syllabus by the Court.)

* * * * * * * *

"It was insisted for plaintiff at the trial and in this court that by this course there was a waiver of the conditions as to the retention of ownership by defendant, and that in bringing suit for the debt the plaintiff was relieved from the lien of defendant on the instrument under the title clause referred to. It must now be regarded as the settled law of this State, as well as of most others, that, where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be held a mortgage; and it is equally as well settled that, upon the vendee's failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the price, but the assertion of either right is an abandonment or waiver of the other. Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597; Aultman v. Olson, 43 Minn."

99 N. W. 784.
Sup. Court, Minn., May 13, 1904.

Sales: Excuse For Non-Delivery.

A contract of sale was as follows: "We have sold you * * * four to six cars daily Austen furnace coke, from now until April 1, 1900. It is understood that this covers the entire output of furnace coke from these Austen ovens. Price $3.20 per net ton delivered at your furnaces as named. Contracts subject to strikes, accidents or other causes." Held, that the words "or other causes" related to shortage of cars, and that such shortage was a legal excuse for non-delivery.

At the trial it appeared that the coke was sold and delivered under the following agreement in writing:

"Sale Memorandum.

"Order No. 1,791.

"Philadelphia, June 10, 1899.

"Thomas Iron Co., Easton, Penna.

"Dear Sirs. — We have sold you for your account of ourselves four to six cars daily 'Austen' furnace coke, from now until April 1, 1900. It is understood that this covers the entire output of furnace coke from these 'Austen' ovens.

"Price $3.20 per net ton, delivered at your furnaces as named.

"Terms, cash 15th of month, following shipment.

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"Shipments as required to commence at once.
"Consign to Hokendauqua, Pa. via Catasauqua & Fogelsville R. R.
"Very truly,
"HATFIELD & HILLIS.

"Contracts subject to strikes, accidents or other causes.
"Send all bills and bills of lading to this office.
"Accepted:
"Thomas Iron Co.,
"B. F. Fackenthal, Jr., Prest."

57 Atl. 950.
Sup. Court of Pa., March 21, 1904.

E. T. KENNEY CO. v. ANDERSON, et al.

81 S. W. 663.

(Court of Appeals of Kentucky. June 15, 1904.)

SALES — MACHINERY — WARRANTIES — CONSTRUCTION — AGENTS — AUTHORITY — ESTOPPEL — OFFER TO RETURN — CONDITIONS.

1. Where a written warranty, given on the sale of an engine, provided that in case of defects therein the buyer, within six days, should give written notice to the manufacturer by registered letter, the purpose of such requirement being to give the seller an opportunity to have an expert repair the defects, notice having been given and having been acted on, it was immaterial that it was not given in the exact manner and form required by the contract.

2. Where plaintiffs sold an engine to defendants, manufactured by the A. Co., under a warranty requiring defendants to notify the latter of any defects therein, notice of which was given to plaintiff, and the president of the A. Co. testified as plaintiff's witness that if notice had been given to that company as required by the contract it would have been sent to plaintiff, that the latter might send an expert to repair the engine, defendant's failure to send such notice to the A. Co. did not relieve plaintiff from liability on the warranty.

3. Where sellers of an engine, under a warranty, accepted and kept a payment of the price, with knowledge that their agent had agreed with the buyer that in case of the seller's failure to make the machine comply with the warranty, they would either furnish a new machine or surrender the buyer's notes and repay the cash paid, the buyer was estopped to deny that such agent was not authorized to make such agreement.

4. A provision in a contract for the sale of an engine, that local agents and salesmen were only authorized to make sales in accordance with instructions, and that mechanical experts were not agents and had no authority to bind the seller by any contract or statement whatever, was not notice to the buyers that a person who transacted the seller's business generally throughout the country, and who was their general collector, was not authorized to agree that if the sellers did not make the machine comply with the warranty they would furnish another or take it back and return notes and payments made.

5. A contract for the sale of machinery with a warranty provided that if it did not fill the warranty it should be returned. The buyers were unable to make the same work properly, and the seller at different times attempted to adjust the same, and thereafter the seller's agent collected the first note for the price, under an

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agreement that if the engine could not be made to fill the warranty the seller would take it back, furnish a new one, or refund the money. Held, that on the seller's failure to make the same work properly the buyer was entitled to require a return of the consideration before delivering possession to the seller.

"Appellant contends that it is not liable on the warranty, for the reason that appellees did not, within sixty days, give written notice to the Aultman Company by registered letter of the defects in the engine, nor did it give such notice to the local agent, Delong & Co., at Lexington. The purpose of this stipulation in this contract of warranty was to give the seller of the engine an opportunity to have an expert visit it and repair the defects, for its protection and benefit, as well as that of the buyer. The notice was the essential thing, and it appears that it did get the notice and acted upon it by sending its expert to the engine; and, even if appellant had the right to demand the giving of the notice in the exact way and manner as prescribed in the contract, it waived its right thereto by accepting and acting upon the notice it did receive. See the case of Frick Co. v. Morgan, 69 S. W. 1073, 24 Ky. Law Rep. 837, in which there was a written warranty similar to the one in the case at bar, and there was no allegation or proof that the Frick Company had any notice of any kind that the engine was defective in any manner. In that case the court said: 'It is clear from the testimony that appellants never waived the conditions of their contract as to the notice, and, as appellees failed to comply therewith, they cannot be permitted, after using the separator for more than two years, to defend an action for the purchase money on the ground that it failed to work satisfactorily.' The court in that case clearly indicated that warrantors in such cases may waive the conditions of their contract as to the manner and method of giving notice. In 28 Am. & Eng. Enc. of Law (1st ed.) 832, in speaking of warranties similar to the one at bar, it is said: 'The notice is not necessary where the seller's agent is present at the trial of the machine, and sees its failure to work as warranted, or where he otherwise impliedly waives notice, as by attempting to remedy a defect.' And again, on page 833, in note 2: 'And although a notice in writing may be required by the contract, yet, if the seller responds to an oral notice given to an agent, he thereby waives his right to a notice in writing.' Davis v. Butrick, 68 Iowa, 94 [26 N. W. 27]."

HALL v. GRAYSON COUNTY NAT. BANK.

(Court of Civil Appeals of Texas. June 8, 1904.)

BILLS AND NOTES — CONSIDERATION — FRAUD — FALSE REPRESENTATIONS — KNOWLEDGE — DUE DILIGENCE — CORPORATIONS — PROMOTION — SUBSCRIPTION — MATERIAL FRAUD — EVIDENCE — SUFFICIENCY — PROFIT OF PROMOTER.

1. Where representations made to the maker of a note were of a character to induce him to rely on them, and he believed them to be true and did rely on them in executing the note, the payee could not recover if the representations were false, though the maker might have ascertained their falsity by the exercise of ordinary diligence.

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2. Defendant executed a note to plaintiff for an interest in a syndicate organized to take over oil land which plaintiff purchased. There was evidence tending to show that plaintiff represented that the cost of the land was $30,000, when in fact it cost $17,000; that afterwards, on defendant's discovering the truth, plaintiff said that he had been deceived by the vendors, who also belonged to the syndicate, and that he had compelled the vendors to sell him the land at $17,000, whereon defendant allowed his subscription to stand, under the belief that he was purchasing a one-seventeenth interest instead of a one-thirtieth, and that plaintiff had been deceived by the vendors, when in fact there was evidence tending to show that he was in collusion with them. Held, in an action on the note, that there was evidence tending to show material fraud.

3. If plaintiff represented to defendant that defendant was to enter the syndicate on the same terms as plaintiff entered, but plaintiff had an agreement with the vendors that they were to protect him to the extent of $2,000 in case he sustained loss to the extent of $3,000, and concealed such agreement from defendant, the representations and concealment were material.

4. Where a promoter represents that property can be purchased for the corporation for a certain price, but the price includes commission or profit to the promoter, a subscriber can rescind a note executed for his subscription.

5. If a promoter entered into an agreement to release all subscribers who desired to be released, and concealed such agreement from one subscriber, who, had he been aware of it, would not have continued in the association, he was not liable on his note given for his subscription to the promoter.

6. Where a promoter represented to a subscriber that land purchased by the promoter cost a certain sum, and that the subscriber was getting the same terms and benefits as, and was on equality with, the promoter, but the promoter had an agreement with the vendors whereby they were to save him harmless to a certain extent in case of loss, and they did so, the subscriber was, in an action on a note given for his subscription, entitled to a credit for a proportional interest in the amount repaid to the promoter by the vendors.

* * * * * * * *

"The authorities hold that when the promoter represents that the property can be bought for a certain price, and the price stated really includes commission or profit to the promoter, any of the subscribers or associates in the proposed corporation may withdraw from the transaction on discovering the fraud, and, if a note or other contract has been executed, the same may be rescinded. Morawetz on Private Corporations, § 293; Short v. Stevenson, 63 Pa. 95; 23 Am. & Eng. Ency. Law, 235, 239; Dickerman v. Northern Trust Co., 176 U. S. 204, 20 Sup. Ct. 311, 44 L. Ed. 423; Yale Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159."

81 S. W. 762.

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R. J. SCHWAB & SONS CO. v. FRIEZE et al.

81 S. W. 1174.

(Kansas City Court of Appeals. Missouri. June 20, 1904.)

SALES — DELIVERY TO CARRIER — MECHANICS' LIENS — SUBCONTRACTORS — FILING — TIME.

1. Where plaintiff sold certain furnaces, to be erected in defendant's dwelling houses, the sale was complete from the day the furnaces were delivered to a carrier for shipment, followed by an acceptance by the purchaser.

* * * * * * * *

"The defendant Frieze entered into a contract with his codefendant, Eshelman, by which the former was to put a furnace in each of two certain houses owned by the latter. Frieze, on August 22, 1902, mailed an order to the plaintiff, a manufacturer at Milwaukee, Wis., to ship him two 'No. 44 Gilt Edge Furnaces,' with casings. The former had, previously to sending this order, written to and received from plaintiff its catalogues showing its price lists and discounts on the productions of its manufacturing establishment. The plaintiff, on September 11, 1902, shipped by railway the two furnaces ordered, which a few days thereafter were received by Frieze, with an invoice of the same. It appears that in the transportation of the furnaces a lower ash-pit door frame to one of them was broken; and on November 5th, next following, Frieze telegraphed to plaintiff to ship to him by express 'one ower ash-pit door frame,' which request was promptly complied with.

* * * * * * * *

"When the plaintiff delivered the two furnaces to the carrier at Milwaukee, f. o. b. the delivery, subject to the right of stoppage in transitu, was complete. Evans Garden C. Co. v. Ry. Co., 64 Mo. App. 305, and cases there cited. And as there was a subsequent acceptance of the furnaces, the sale thereby became complete in every respect. Lovelace v. Stewart, 23 Mo. 384; Gill v. Reed, 55 Mo. App. 246; Schermerhorn v. Herold, 81 Mo. App., loc. cit. 466. And the indebtedness then accrued.

"It does not clearly appear why the plaintiff furnished the broken part of the furnace without charge to Frieze. It may have been that it was paid for by the carrier."

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ROBINS MIN. CO. v. MURDOCK.

(Supreme Court of Kansas. July 7, 1904.)

CORPORATIONS — AUTHORITY OF PRESIDENT — EVIDENCE.

1. The president of a corporation has no authority, by virtue of his office, to bind the corporation by his admission of the indebtedness of such corporation, such admission not being shown to have been made by him while in the business of the corporation out of which the indebtedness grew, or as a part of the res gestæ. Such admission is merely hearsay, and its admission erroneous.

(Syllabus by the Court.)

* * * * * * * *

"The correct rule seems to be well stated in Clark & Marshall on Private Corporations, vol. 3, § 728: 'The president of a corporation has no authority to act for or bind it by contracts, or otherwise, by virtue of his office, and therefore his admissions or declarations, although made on behalf of the corporation, are not binding upon it or admissible in evidence against it, unless they are expressly authorized by the corporation, or are made in the course of transactions which are within the scope of the authority conferred upon him, and are a part of the res gestæ. If the president, however, is intrusted with the general management of the corporation, or the management of a particular transaction, any admission or declaration by him within the scope of his authority is the admission or declaration of the corporation.' Many authorities are cited in support of this proposition. The case of Central Electric Company v. Sprague Electric Company, 120 Fed. 925, 57 C. C. A. 197, was one in its facts much like the case at bar. It was there said: 'Statements of officers of a corporation that the company had agreed to pay the obligations of another corporation whose assets it had acquired were incompetent to show such agreement.' Other cases to the same effect are Hardwick Savings Bank & Trust Company v. Drenan, 72 Vt. 438, 48 Atl. 645; Rumbough v. Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528; Henry & Co. v. Bank, 63 Ala. 527; Johnston v. Loan Ass'n, 104 Pa. 394; Hawey v. Railway Co., 20 N. Y. 392; Thompson, Law of Corporations, vol. 4, § 4656. The same principle has been decided by this court in Dodge v. Childs, 38 Kan. 526, 16 Pac. 815; A., T. & S. F. R. R. Co v. Wilkinson, 55 Kan. 83, 39 Pac. 1043; Tennis v. Rapid Transit Co., 45 Kan. 503, 25 Pac. 876; Mo. Pac. Ry. Co. v. Johnson, 55 Kan. 344, 40 Pac. 641; A., T. & S. F. R. R. Co. v. Osborn, 58 Kan. 768, 51 Pac. 286; Walker et al. v. O'Connell, 59 Kan. 306, 52 Pac. 894. There was no evidence whatever that the president had had authority conferred upon him in regard to this matter. The burden in this respect rested upon the plaintiff. The management of the affairs of a corporation are in the hands of the directors; there is no presumption that the president has had delegated to him the power to bind his corporation for the payment of the debt of another; neither was the admission testified to connected with the transactions as a part of the res gestæ. The court was clearly in eror in admitting this evidence."

77 Pac. 596.

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ROBERTSON v. ROBERTSON.

71 N. E. 571.

(Supreme Judicial Court of Massachusetts. Suffolk. June 27, 1904.)

PLEDGES — CERTIFICATE OF STOCK — DELIVERY — EVIDENCE — SUFFICIENCY.

1. In an action against an executrix for the proceeds of the sale of two certificates of membership in produce exchanges, on the ground that these certificates were substituted by the testator for a certificate of stock held by plaintiff as collateral security for a loan, evidence held to justify a finding that the certificate of stock was never delivered to plaintiff.

2. A pledge of a certificate of stock is not valid if the certificate is not delivered.

Guaranty: Consideration.

The following quotation as to the notice of acceptance of a guaranty is from a decision by the Supreme Court of Michigan, 100 N. W. 468: "It is insisted that defendants are not bound by their guaranty, because they have never been notified of its acceptance. We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer, and does not become a binding contract until such notice. See Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686. It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. When, however, that undertaking recites a consideration, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the guaranty has been made with the assent of the obligee, communicated to the guarantors; and in such cases notice of acceptance is unnecessary. See Davis v. Wells, 104 U. S., at page 167, 26 L. Ed. 686; Davis Sewing Machine Co. v. Richards, 115 U. S., at page 527, 6 Sup. Ct. 173, 29 L. Ed. 480; Taylor v. John A. Tolman Co., 47 Ill. App. 264; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; De Cremer v. Anderson, 113 Mich., at page 580, 71 N. W. 1090."

Gaming Contract: Consideration.

"It is well settled that mere knowledge, without more, on the part of a lender of money, that the borrower intends to use the money for an illegal purpose, will not defeat a suit for its recovery. There must be a participation in the illegal act, or a furtherance of the unlawful design. This principle was expressly recognized in the case of Singleton v. Bank of Monticello, 113 Ga. 527, 38 S. E. 947, where the plea was that the money sued for was loaned for the purpose of speculating on margins. It was there held that the plea contained enough to take to the jury the question whether the bank, through its officers, had loaned the money for the purpose of aiding and abetting the illegal transaction; but in the opinion (page 531, 113 Ga., and page 948, 38 S. E.) Mr. Justice Lewis said: 'It is clear that if the Bank of Monticello loaned its money to Singleton absolutely, without concerning itself as to the disposition which he might make of it, the knowledge of its cashier, who was its authorized agent, that Singleton was

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borrowing the money for the sole purpose of engaging in a gaming transaction would not, without more, vitiate its claim against him. A plea which set forth no more than this would have been properly stricken on demurrer.' So, also, in the early case of Howell v. Fountain, 3 Ga. 176, 46 Am. Dec 415, where it was held that no action can be maintained upon a contract growing out of an immoral or illegal transaction when the transaction was not subsequent or collateral, but directly connected with the unlawful act, Nisbet, J., delivering the opinion, said: 'The distinction relied upon in this case by counsel for the complainant is this, to wit: Admitting the proposition * * * that no action can be maintained upon an illegal or immoral contract, yet where the contract was disconnected with the original unlawful act, and was founded on a new and distinct consideration, an action might be maintained upon it, although it could not be maintained upon a contract directly arising out of the illegal act. This distinction is well founded, and we recognize it.' In the present case the plea does not charge that the bank, or any one connected with it, had any concern whatever in the disposition of the money loaned to the defendant. It does not appear that the alleged illegal and immoral transaction was in any proper sense the consideration of the note and mortgage. On the other hand, it appears that the two were distinct transactions. It is not claimed that the bank had any connection with the suppression of the prosecution of the defendant's husband beyond the bare knowledge or reasonable ground of suspicion that the defendant intended to use the borrowed money for that purpose. Clearly, that is not enough to defeat a recovery of the money borrowed."

48 S. E. 120.

HOOPER v. VANSTRUM.

100 N. W. 229.

(Supreme Court of Minnesota. June 24, 1904.)

GIFT OF REALTY — WHAT CONSTITUTES — EVIDENCE.

1. A voluntary gift of land may be upheld, if no fraud is practiced by or for the grantee, where the relationship of the parties and the beneficial character of the gift are such as would naturally justify the belief that the grantor intended to make and complete the same.

2. But when the possession of the conveyance is retained by the record owner, without a present intention to part with the absolute dominion of the property, and the grantee has no notice thereof, the record of such conveyance is ineffective to transfer title.

3. Evidence considered, and held that the record of a conveyance was insufficient to show a purpose to part with the ownership of real property by the grantor, who executed the same, but retained it in his possession until his death by suicide, without giving any notice thereof to the grantee, and that the finding of the trial court that such record was made with such purpose is not sustained.

(Syllabus by the Court.)

* * * * * * * *

"A delivery of a deed in the lifetime of the grantor is essential to its validity, whether it be a conveyance for value, or a voluntary one,

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in consideration of love and affection. The question of the delivery of a deed or other written instrument is one of intention, and, to constitute a complete delivery thereof, the grantor must deal with it in a way evincing an intention to part presently and unconditionally with all control over it, and that it shall take effect according to its terms. Stevens v. Hatch, 6 Minn. 64 (19); Comer v. Baldwin, 16 Minn. 172 (Gil. 151); Thompson v. Easton, 31 Minn. 99, 16 N. W. 542; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Nazro v. Ware, 38 Minn. 443, 38 N. W. 359; Lee v. Fletcher, 46 Minn. 48, 48 N. W. 456, 12 L. R. A. 171; Barnard v. Thurston, 86 Minn. 343, 90 N. W. 574. It is said in the last case cited that authorities sustain the rule that where a deed which is beneficial to the grantee, and imposes no burdens upon him, is delivered unconditionally by the grantee to a third party, who has knowledge of it, his acceptance will be presumed, and the delivery completed. Further than this we have not gone in sustaining the neessary delivery in any case, and while there are some authorities which hold that a presumption arises that there is a delivery from the fact that the deed is recorded, as in Fenton v. Miller, 94 Mich. 204, 53 N. W. 957, where the grantor was the recorder, this presumption was held to be only of intention, which might be rebutted. See, also, Glaze v. Ins. Co., 87 Mich. 349, 49 N. W. 595; Patrick v. Howard, 47 Minn. 40, 10 N. W. 71."

GILLESPIE v. BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York. April 26, 1904.)

CARRIERS — MISCONDUCT OF EMPLOYEES — LIABILITY — DAMAGES.

1. A street railway company is liable to a passenger for an injury to his feelings because of insulting language used by a conductor.

2. In an action against a railroad to recover for injuries to feelings, caused by insulting language of conductor, the jury may consider the humiliation and injury to the feelings, but not any injury to the character resulting therefrom.

3. Where a passenger on a street car tendered the conductor an amount more than the fare, and asked for a transfer, and, after the conductor had attended to another passenger, demanded her change, whereupon the conductor in an abusive manner refused to return any change, but called the passenger a deadbeat and swindler, a directed verdict for plaintiff for the amount of the change as the extent of the carrier's liability is reversible error.

Parker, C. J., and Gray and O'Brien, JJ., dissenting.

* * * * * * * *

"Having thus considered a portion of the elementary authorities relating to this question, we will now consider a few of the many decided cases relating to the same subject. In Chamberlain v. Chandler, 3 Mason, 242, 245, Fed. Cas. No. 2,575, Judge Story, who delivered the opinion of the court, in discussing the duties, relations, and responsibilities which arise between the carrier and passenger, said: 'In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere shiproom and personal existence on board, but for reasonable food, comforts, necessaries, and kindness. It is a stipulation,

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not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet farther; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feeings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds. * * * It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated; and the wrong is to be redressed as a cause of damage.' In Knoxville Traction Company v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549, it was held that an electric street railway company was liable in damages to a passenger for the injury to his feeings by the indecent and insulting language of its employee, upon the ground, not of tort or negligence, but of breach of its contract that obligates the carrier not only to transport the passenger but to guarantee him respectful and courteous treament, and to protect him from violence and insult from strangers and from its own employees; that as to the latter, the obligation of its contract is absolute; and that it selects its agents to perform its contract, and the carrier, and not the passenger, must assume the reponsibility for the acts and conduct of such agents. In Cole v. Atlanta & West Point R. R. Co., 102 Ga. 474, 477, 31 S. E. 107, it was held that it was the unquestionable duty of a railroad company to protect a passenger against insult or injury from its conductor, and that the unprovoked use by a conductor to a passenger of opprobrious words and abusive language tending to humiliate the passenger or subject him to mortification gives to the latter a right of action against the company. In that case it was said: 'The carrier's liability is not confined to assaults committed by its servants, but it extends also to insults, threats, and other disrespectful conduct.' In Goddard v. Grand Trunk R. R. Co., 57 Me. 202, 213, 2 Am. Rep. 39, it was held that a common carrier of passengers is responsibe for the misconduct of his servant towards a passenger. In that case Walton, J., delivering the opinion of the court, said: 'The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. * * * He must not only protect his passenger against the violence

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and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence and wilful misconduct of the carrier's servant, the carrier is necessarily responsible' — citing Howe v. Newmarch, 12 Allen, 55; Moore v. Railroad, 4 Gray, 465, 64 Am. Dec. 83; Seymour v. Greenwood, 7 Hurl. & Nor. 354; Railroad v. Finney, 10 Wis. 388; Railroad v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520; Railroad v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; Railway v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Flint v. Transportation Co., 34 Conn. 554, Fed. Cas. No. 4,873; Landreaux v. Bell, 5 La. [O. S.] 275; Railroad v. Blocher, 27 Md. 277. The decision in Southern Kansas R. R. Co. v. Hinsdale, 38 Kan. 507, 16 Pac. 937, was to the effect that where a conductor, in ejecting a person from a train, uses insulting or abusive language, such person may recover damages therefor on account of the injury to his feelings, but cannot, in an action for damages for his expulsion, also receive damages because the words used tended to bring him into ignominy and disgrace. So, in Craker v. Chicago & N. W. R. R. Co., 36 Wis. 657, 17 Am. Rep. 504, it was held that a railroad company is bound to protect female passengers on its trains from all indecent approach or assault; and where a conductor on the company's train makes an assault the company is liable for compensatory damages. In Bryan v. Chicago, R. I. & P. R. R. Co., 63 Iowa, 464, 19 N. W. 295, it was also held that an action by a passenger on the defendant's road would lie for injuries sustained from insolent, abusive, and offensive words spoken to her by the conductor. In McGinness v. Mo. Pac. Ry. Co., 21 Mo. App. 399, the decision of the United States court in Chamberlain v. Chandler was followed, and the discussion of the court in that case closely followed the discussion by Judge Story. In Spohn v. Missouri Pacific Railway Co., 87 Mo. 74, the court held that the company was liable to its passengers for any violence or insults from others while the relation of carrier and passenger existed. See, also, Malecek v. Tower Grove & Lafayette R. R. Co., 57 Mo. 17; Lou. & Nash. R. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600; Winnegar's Administrator v. Cent. Pass. Ry. Co., 85 Ky. 547, 4 S. W. 237; Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451; Eads v. Metropolitan St. Ry. Co., 43 Mo. App. 536; Block v. Bannerman, 10 La. Ann. 1; and Coppin v. Braithwaite, 8 Jurist, pt. 1, 87. The duties arising between a carrier and passenger have been several times discussed in this State, as in Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588, 590, 43 Am. Rep. 185, where it was said: 'By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. * * * "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and, if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust."' The court then quoted with approval the decision in Nieto v. Clark, 1 Cliff. 145, 149, Fed. Cas. No.

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10,262, where it was said: 'In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. * * * A common carrier undertakes absolutely to protect his passengers against the misconduct of their own servants engaged in exeuting the contract. Subsequently, in Dwinelle v. N. Y. C. & H. R. R. R. Co., 120 N. Y. 117, 125, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the same doctrine was held, and the foregoing portion of the opinion in the Stewart case was quoted and reaffirmed by this court. It was there added: 'These and numerous other cases hold that, no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act toward the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences.' Again, in Palmeri v. Manhattan R. Co., 133 N. Y. 261, 266, 30 N. E. 1001, 16 L. R. A. 136, 18 Am. St. Rep. 632, it was held that the corporation is liable for the acts of injury and insult by an employee, although in departure from the authority conferred or implied, if they occur in the course of the employment. In that case the employee alleged that the plaintiff was a counterfeiter and a common prostitute, placed his hand upon her, and detained her for a while, but let her go without having her arrested. The action was to recover damages for unlawful imprisonment, accompanied by the words alleged to have been spoken. This court held she was entitled to recover. The judge then said: 'Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed.'

"The foregoing authorities render it manifest that the defendant was not only liable to the plaintiff for the money wrongfully retained by its conductor, but also for any injury she suffered from the insulting and abusive language and treatment received at his hands.

"This brings us to the consideration of the elements of damages in such a case, and what may be considered in determining their amount. Among the elements of compensatory damages for such an injury are the humiliation and injury to her feelings which the plaintiff suffered by reason of the insulting and abusive language and treatment she received, not, however, including any injury to her character resulting therefrom. She was entitled to recover only such compensatory damages as she sustained by reason of the humiliation and injury to her feelings, not including punitive or exemplary damages. 'Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary, damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not, and generally does not, depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice. But, whatever view is taken of this question, it is clear that, where the expulsion is made in consequence of a mistake of another agent of the carrier — as in a case where a previous conductor erroneously punched the transfer check which he gave to the passenger so as to read 2:40 p. m. instead of 3:40 p. m., and, in addition to this, the expulsion was accom-

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panied by insulting remarks made to the passenger in the presence of others, damages may be given, founded on the humiliation and injury to the feelings of the passenger.' Thompson on Negligence, § 3288. The same doctrine is laid down in Joyce on Damages, § 354. In Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25, where a passenger was ejected by the conductor, who honestly supposed the fare had not been paid, and no unnecessary force was used, it was held that the act of the defendant's servant, being unlawful, rendered the defendant liable for compensatory damages, including compensation for loss of time, the fare upon another car, and a suitable recompense for the injury done to the plaintiff's feelings. In Eddy v. Syracuse Rapid Transit R. Co., 50 App. Div. 109, 63 N. Y. Supp. 645, it was held that, where the plaintiff entered a car believing that his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and entitled to recover compensatory damages, including the indignity, humiliation, and injury to his feelings by the remarks of the conductor and his wrongful ejection from the car. In Miller v. King, 84 Hun, 308, 310, 32 N. Y. Supp. 332, it was held that the conductor had no right to eject the plaintiff; that his action in doing so was unlawful, and that the plaintiff was entitled to damages for the indignity and humiliation suffered thereby. See, also, Sedgwick on Damages, § 865. In Jacobs v. Third Ave. R. R. Co., 71 App. Div. 199, 202, 75 N. Y. Supp. 679, it was held that the plaintiff was entitled to recover compensatory damages, which embraced loss of time, the amount which the plaintiff was obliged to pay for passage upon another car, and injury done to his feelings by reason of the indignity which he wrongfully suffered. The same doctrine was held in Ray v. Cortland & Homer Traction Co., 19 App. Div. 530, 534, 46 N. Y. Supp. 521. See, also, Pullman's Palace Car Co. v. King, 99 Fed. 381, 382, 39 C. C. A. 573. In Shepard v. Chicago, R. I. & P. R. R. Co., 77 Iowa, 54, 41 N. W. 564, the court charged the jury: 'When a passenger is wrongfully compelled to leave a train and suffer insult and abuse, the law does not exactly measure his damages, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury may say is right;" and it was held that his instruction was not subject to the objection that it authorized an allowance of exemplary damages, because damages may properly be allowed for mental suffering caused by indignity and outrage, and such damages are compensatory, and not exemplary. In Craker v. Chicago & N. W. R. R. Co., 36 Wis. 657, 17 Am. Rep. 504, it was held that in actions for personal torts the compensatory damages which may be recovered of the principal for the agent's act include not merely the plaintiff's pecuniary loss, but also compensation for mental suffering, and that in awarding compensatory damages in such cases no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong or insult arising from an act really or apparently dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. In Cole v. Atlanta & West Point R. R. Co., 102 Ga. 474, 479, 31 S. E. 107, it was held that, even where there was no actual assault, but the company has failed in its duty to protect its passenger from insult, abuse, and ill treatment, the plaintiff is entitled to recover damages for the pain and mortification of being publicly denounced as a deadbeat, and in

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that case it was said: 'While this was a wanton act of commission by a servant of the company, it was also a negligent omission on the part of its servants to perform towards the plaintiff a duty imposed by law upon their master.' Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake. Louisville & Nashville R. R. Co. v. Hine, 121 Ala. 234, 25 South. 857. Where unnecessary violence was used in ejecting a passenger from a train, he is entitled to damages for the direct consequences of the wrong, including as well physical pain as mental suffering resulting from accompanying insults, if any. Texas Pacific R. R. Co. v. James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347. A conductor of a railroad company represents the company in the discharge of his functions, and being in the line of his duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of his authority, whether of omission or commission. In that case the court charged that 'in estimating damages they might take into consideration the indignity, insult, and injury to plaintiff's feelings by being publicly expelled,' and it was held proper. S. K. R. R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766. Damages may be properly allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not; and such damages are compensatory, and not exemplary. Shepard v. Chicago, R. I. & P. R. R. Co., 77 Iowa, 54, 41 N. W. 564. Where the plaintiff, holding a ticket, was wrongfully threatened with expulsion from the cars, charged with attempting to ride without paying therefor, and paid his fare rather than to be ejected, it was held that he was entitled to recover damages for the humiliation suffered and indignity done him by such action on the part of the conductor. Penn. Co. v. Bray, 125 Ind. 229, 25 N. E. 439. Where a passenger is expelled from a train, and without fault on his part, he may recover more than nominal damages, although he has suffered no pecuniary loss or received actual injury to the person by reason of such expulsion; and the jury, in estimating the damages, may consider not only the annoyance, vexation, delay, and risk to which the person was subjected, but also the indignity done him by the mere fact of his expulsion. Chicago & Alton R. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133. A person wrongfully ejected from a train is entitled to recover such damages as he may have sustained by the delay occasioned by the expulsion, and all the additional expenses necessarily incurred thereby, as well as reasonable damages for the indignity to which he was subjected in being expelled from the train. Penn. R. R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89. Where there was a wrongful expulsion of a passenger from the car, although unaccompanied by any physical force or violence, it is actionable, and in such a case the sense of wrong suffered and the feeling of humiliation and disgrace engendered is an actual damage for which the injured party may recover compensation, such damages being compensatory and not exemplary. Willson v. Northern Pacific R. R. Co., 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. See, also, G. C. & S. F. R. R. Co. v. Copeland, 17 Tex. Civ. App. 55, 42 S. W. 239; Railroad Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; Cooper v. Mullins, 30 Ga. 146, 76 Am. Dec. 638; Railroad Co. v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913; Railroad Company v. Dickerson, 4 Kan. App. 345, 45 Pac. 975.

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"After this somewhat extended review of the authorities bearing upon the subject, we are led irresistibly to the conclusion that the defendant is liable for the insulting and abusive treatment the plaintiff received at the hands of its servant, that she is entitled to recover compensatory damages for the humiliation and injury to her feelings occasioned thereby, and that the trial court erred in directing a verdict for the plaintiff for twenty cents only, and in refusing to submit the case to the jury.

"The judgment of the Appellate Division and trial court should be reversed, and a new trial granted, with costs to abide the event.

"GRAY, J. (dissenting). I dissent, because I think it is extending unduly the doctrine of a common carrier's liability in making it answerable in damages for the slanderous words spoken by one of its agents.

"BARTLETT, HAIGHT, and CULLEN, JJ., concur with MARTIN, J. PARKER, C. J., and O'BRIEN, J., concur with GRAY, J.

"Judgments reversed, etc."

LUND v. THACKERY et al.

(Supreme Court of South Dakota. June 1, 1904.)

DEEDS — EXECUTION — FILLING IN BLANKS — AUTHORITY OF AGENTS — NECESSITY OF WRITING — DELIVERY BY AGENTS — VIOLATION OF INSTRUCTIONS — KNOWLEDGE OF PURCHASER — ASSUMPTION OF RISK.

1. A deed executed and acknowledged by the grantor, with the name of the grantee left blank, to be inserted by an agent, is invalid for any purpose until the name of the grantee is inserted therein.

2. Under Civil Code, § 938, providing that estates in real property, other than at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing, an agent not authorized by writing cannot insert the name of the grantee in a deed executed and acknowledged by the grantor, with such name left blank, so as to vest title in a grantee who knows that the instrument was executed in blank.

3. Where a deed, having the name of the grantee and consideration left blank, was placed in the hands of an agent to be delivered when title should be accepted, and the purchase money deposited in the bank in the name of the grantee, the principal was not bound by the filling of the blanks and delivery of the deed before the title was accepted, and the consideration placed absolutely under his control, to a purchaser who knew that the deed was executed in blank.

4. One who has no right to property cannot question the validity of a deed from a former owner thereof to another.

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HALLWOOD CASH REGISTER CO. v. BERRY et al.

80 S. W. 857.

(Court of Civil Appeals of Texas. April 20, 1904.)

FOREIGN CORPORATIONS — PERMIT — SALES — FRAUD — RESCISSION — RETURN OF PROPERTY.

1. A foreign corporation, selling goods in the State through an agency, is not required to obtain a permit to do business in the State.
2. One who has been fraudulently induced to purchase an article, but who retains and uses it after discovery of the fraud, waives his right to rescind.
3. While retention and use of an article after discovery of the fraud by which the sale was induced precludes a rescission of the contract, it does not prevent a recovery of the damages resulting therefrom.
4. Parol evidence is admissible to show that a written contract of sale was induced by fraud.
5. Where a cash register sold defendant was utterly worthless, there was a failure of consideration, and it was not incumbent on him to return it within a reasonable time in order to defend against an action for the price.
6. Where a machine was sold by fraud, the purchaser, in an action for the price, was entitled to a return of payments and a cancellation of the notes for the purchase price.

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* Rehearing denied May 18, 1904.

"The rule is that a defrauded party must disaffirm the contract at the earliest practical time after the fraud is discovered, and that he must return or offer to return whatever he has received from the other party; and if he retains the article purchased, and continues to use it after discovery of the fraud that induced the purchase, he will be held to have waived the right to rescind the contract and to have acquiesced in it."

In a Michigan case, cited by appellant, the above-stated principle was discussed and applied as follows: "The testimony shows that, just prior to the commencement of this suit, the defendant notified the plaintiff that he would not keep the property, and plaintiff must take it away. This was not done, and defendant by his own testimony continued to use it. It was the duty of defendant, as soon as he learned of the misstatements, to have rescinded the contract; and notice of such rescission must have been promptly given, and adhered to, in order to bind the parties thereto. The continued use of the property for some thirty days after he had learned the facts would be a waiver of the right of rescission, even though notice of such rescission had been given."

A number of Michigan decisions were cited in support of the rule announced, and the court proceeded: "While the court left the question of rescission to the jury, we think, under defendant's own testimony, the court should have instructed a verdict for plaintiff. We think defendant's continued use of the property for thirty days after he learned of the alleged fraud amounted to a waiver of any intent to rescind the contract." Foster v. Rowley, 67 N. W. 1077. In the case of Palmer

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v. Banfield, 56 N. W. 1090, it appeared from the testimony that a reaper and harvester was delivered to the defendant on Thursday, and on Friday he discovered the defects in the machine, and he decided to return it. However, he used the machine nearly all of Saturday, and until he had finished cutting his grain, when he returned it; but the plaintiff refused to accept it. The Supreme Court of Wisconsin held that such use was an acceptance of the machine as a compliance with the contract, and was fatal to the rights to rescind. In the case of Bassett v. Brown, 105 Mass. 551, it was held that a party, led into a contract by fraud, "was entitled, upon discovering the facts, to elect whether to affirm the conveyance and retain the consideration, or to avoid it. . . . If, after such knowledge, he continues to deal with the property received as his own, he thereby affirms the contract by which he received it."

"The testimony of J. M. Berry, one of the appellees, brings this case clearly within the scope and application of the rule laid down in the decisions cited. He knew that the machine was worthless, and yet he used it after gaining such knowledge. He did not retain the machine after he went to Dallas for the purpose of further testing its usefulness and availability. He knew as much the first day he used it as afterwards, according to his own statements. He used it for the purposes for which he had bought it, and thereby waived all right to rescind his contract of purchase."

"While the evidence of retention and use of the register after knowledge of the fraud precluded a rescission of the contract, it did not prevent a recovery of the damages resulting therefrom; and there are allegations of a breach of the warranty of the machine, the misrepresentations by which the contract was obtained, and the total worthlessness of the machine. 'If the fraud result in a contract, performance, of the same, after discovering that it was fraudulently obtained by the opposite party, does not preclude a person suing for damages on account of the fraud. The injured party may retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it; or he may recoup any damages which he has sustained, if the opposite party sue him for money due on the contract or for failure to perform.' The language quoted is from Bigelow on Fraud, and is approved in Grabenheimer v. Blum, 63 Tex. 369."

AMERICAN NAT. BANK v. MOREY.

80 S. W. 157.

(Court of Appeals of Kentucky. April 20, 1904.)

BANKS — WRONGFUL DISHONOR OF CHECK — EXCESSIVE DAMAGES.

1. In an action against a bank for damages because of its wrongful refusal to honor the check of a depositor, who was pursuing a course of study in a strange city, it appeared that she lost the confidence of her instructor, was delayed for two months in opening a shop for her art, and expended $2.86 in telegraphing to defendant in trying to induce it to honor her check, and to her relatives to obtain money to meet the dishonored check. Held, that a verdict for $500 was not excessive.

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Appeal from Circuit Court, Jefferson county, Common Pleas Division.

"Not to be officially reported."

Action by Virgania R. Morey against the American National Bank. From a judgment for plaintiff defendant appeals. Affirmed.

Humphrey, Burnett & Humphrey, for appellant. R. C. & J. J. Davis, for appellee.

NUNN, J. This is the second appeal in this case. The first opinion is reported in American Nat. Bank v. Morey, 69 S. W. 759, 24 Ky. Law Rep. 658, and is referred to for a history of the facts relative thereto. In that opinion the court said that the instruction on punitive damages should not have been given; that she was only entitled to recover for the loss of credit, of business, or of instruction in her art that she sustained by reason of the dishonor of her check. On the return of the case to the lower court, the appellee filed an amended petition setting forth these matters of damage, as permitted by the former opinion. Another trial was had before a jury, and the court gave to the jury the following instruction: "It will be your duty in this case to find for the plaintiff in such sum as you may believe from the evidence will fairly and reasonably compensate her for any loss of credit she may have suffered, or for any loss of time or instruction which she otherwise would have enjoyed, and for any expense she may have incurred in telegraphing, by reason of the non-payment of the check mentioned in the petition." The evidence produced on the last trial, in substance, showed that by reason of the dishonor of the check she lost the confidence of her instructor, and was compelled to desist from further instruction for four weeks, which she had intended to take. It was her intention, after finishing her course of instruction, to open a shop for her business and art in the following December, but, by reason of the dishonor of this check, she was compelled to delay her opening until the following March. Also she expended $2.86 in telegraphing to appellant in trying to induce it to honor her check, and to her relatives in Louisville to obtain money to meet this dishonored check. The jury returned a verdict on this last trial for $500 in favor of appellee, which the court refused to set aside, and rendered judgment thereon, and the appellant has appealed.

The last trial conformed in all respects to the former opinion of this court in this case. The only question to be determined is whether or not the amount of the verdict is excessive. She certainly was entitled to recover some damages. In the former opinion it is shown that a judgment for $300 for dishonoring was affirmed. Patterson v. Marine National Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778. The court in that case charged the jury that the plaintiff was entitled to recover substantial damages, and in a certain state of case they might find puntive damages. In the same opinion the case of Schaffner v. Erdman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192, was referred to, where a judgment for $450 was affirmed, where the dishonor of the check was due to a mistake of the bookkeeper in charging the checks of another customer to the account of the plaintiff. In the former opinion in this case the court quoted from the above Pennsylvania case the following language: "Individual and corporate business could hardly exist for a day without banking facilities. At the same

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time the business of the community would be at the mercy of banks if they could, at their pleasure, refuse to honor their depositors' checks, and then claim that such action was a mere breach of an ordinary contract, for which only nominal damages could be recovered, unless special damages were proven. There is something more than a breach of contract in such cases; there is a question of public policy involved; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages."

While this verdict in a sense appears large, yet we are unwilling to invade the province of the jury, especially after a second trial, and determine the damages recovered are anything more than substantial. Wherefore the judgment of the lower court is affirmed, with damages.

SCHELE v. WAGNER. (No. 20,335.)

71 N. W. 128.

(Supreme Court of Indiana. May 24, 1904.)

NONTRADING PARTNERSHIP — COMMERCIAL PAPER — INDORSEMENT — POWERS OF PARTNERS — DEATH OF PARTNER — CLAIMS AGAINST ESTATE — BURDEN OF PROOF.

1. A partnership engaged in the insurance and loan business is a nontrading or noncommercial partnership, and hence there is no presumption that one member of such firm has authority to bind the other by indorsing commercial paper in the firm name; the burden being on the holder of a note so indorsed to prove that such indorsement was expressly authorized or was the result of necessity or usage.

* * * * * * * * * * * * * *

HADLEY, J. This action is based on a promissory note filed by appellant as a claim against the estate of Claude Eme, deceased, of which appellee is the administrator. The note purports to have been executed by Elizabeth Kanning to Eme & Son, a partnership composed of the decedent and his son Julius Eme, doing business as insurance, real estate, and loan brokers, and by said firm indorsed to appellant. Among other things, it is alleged in the complaint that a part of the business of the firm of Eme & Son was to secure loans for clients; that one of their methods in negotiating and securing loans was to cause the applicant for the loan to execute his promissory note payable to the order of said firm of Eme & Son, and the said firm would then indorse said note to the person making the loan; that said firm, through its junior member, Julius, presented to the plaintiff the promissory note sued on and filed, purporting to have been executed by Elizabeth Kanning to the said firm, and requested the plaintiff to make a loan to Mrs. Kanning upon said note; that, believing said note to be genuine, and that the same had been executed by Mrs. Kanning for the purpose of securing a loan, as represented by said firm, he agreed to, and did, make said loan, and delivered to said firm, in money, the full amount called for by said note, whereupon said Julius, acting for said firm, and in pursuance of agreement, and within the authority and scope of the business of said firm, indorsed said note to the plaintiff by writing the firm name on the back thereof as follows: "Eme & Son." Appellee

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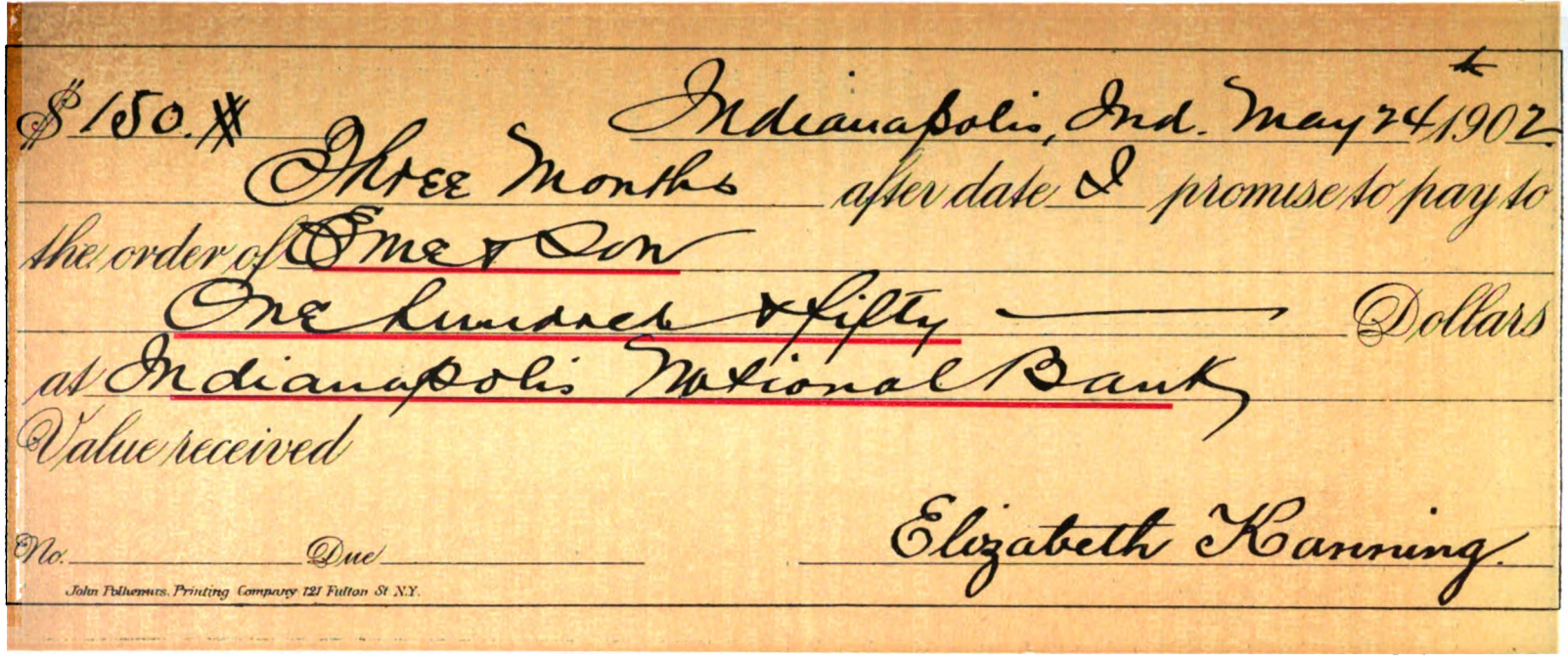

$150.00 Indianapolis, Ind. May 24 1902

Three Months after date I promise to pay to

the order of Myself

One hundred & fifty ——— Dollars

at Indianapolis National Bank

Value received

No. ____ Due ____ Elizabeth Kanning.

John Polhemus Printing Company 121 Fulton St N.Y.

Partnership: Right of Partner in Non-Trading Partnership to Make or Indorse Notes in the Firm Name.

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Eme and Son

The firm of Eme & Son, doing business as insurance, real estate, and loan agents, was composed of Claude Eme and his son Julius.

Julius, without the consent of his partner, indorsed the firm name on this note and had it discounted for his own use and benefit. The note was not paid, and an action was brought against the indorsers.

The administrator of the estate of Claude Eme defended the action on the ground that the partnership was a non-trading one, and that Julius Eme could not, therefore, bind his partner by indorsing the firm name on commercial paper.

This defense was sustained. The Court said in part: "There can be no doubt of the general rule that where two or more persons engage as partners in a particular business, a transaction by one member of the firm within the scope of the business in which they are engaged will be presumed to be on the partnership account. . . . The law has divided partnerships into two classes — trading, or commercial, and non-trading. The business of the former being to buy and sell, each partner is presumed to be invested with authority from his co-partners to execute notes, bills of exchange, and such other evidences of credit, on the firm account as are usual and appropriate to such business.

"But no such presumption operates in a partnership of the non-trading class. . . . A partnership engaged in the insurance, real estate, and collecting business is of the non-commercial or non-trading class. 78 Mo. 128. So, also, printers, publishers, contractors, livery stable keepers, tavern keepers, farming, running a threshing machine, etc.

"In all such cases one partner has no implied power to bind his co-partners by executing or indorsing notes in the firm name, even in payment of firm debts. The ordinary business of the loan broker is to solicit borrowers and lenders, and to bring these together for a commission, and the broker's indorsement of the borrower's paper is extraordinary and inconsistent with sound business principles. . . . One partner in a non-trading partnership cannot bind his co-partner by a bill or note drawn, accepted, or indorsed by him in the name of the firm — not even for a debt which the firm owes — unless he have express authority therefor from his co-partner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is on the holder of the note who sues on it to prove such authority, necessity, or usage."

McMaster's Com. Cases, Vol. 1905, 71 N. W. 128.

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availed himself of the benefits of section 2479, Burns' Ann. St. 1901, and filed no answer. Trial by the court. Finding and judgment against appellant for costs. The only assignment in this court is the overruling of the motion for a new trial. The insufficiency of the evidence is the only ground upon which a reversal is asked.

It is admitted that the name of Elizabeth Kanning, as maker of the note, was forged by Julius Eme, and that the counterfeit note was by him indorsed in the firm name to appellant, and that he received thereon in money the full face value.

The controversy involves two questions: (1) Was the indorsing of the note in suit by Julius Eme in the firm name within the apparent scope of the partnership business? And (2) if not within the scope of the business, is it sufficiently shown by the evidence that the practice by Julius was so frequent, general, and open as to charge the deceased partner with the knowledge that it was being done?

There can be no doubt of the general rule that, where two or more persons engage as partners in a particular business, a transaction by one member of the firm within the scope of the business in which they are engaged will be presumed to be on the partnership account. Porter v. Wilson, 113 Ind. 350, 15 N. E. 676. In determining the power of one partner to bind his firm, regard must always be had to the character of the business in which they are engaged. To facilitate the inquiry, the law has divided partnerships into two classes — trading, or commercial, and nontrading. 22 Am. & Eng. Ency. (2d ed.), pp. 61, 62, and authorities there collated. The business of the former being to buy and sell, each partner is presumed to be invested with authority from his copartners to execute notes, bills of exchange, and such other evidences of credit, on the firm account, as are usual and appropriate to such business. Schellenbeck v. Studebaker, 13 Ind. App. 438, 41 N. E. 845, 55 Am. St. Rep. 240, and cases cited. But no such presumption operates in a partnership of the nontrading class, which holds itself out as engaged in an employment or occupation which does not necessarily or fittingly embrace buying and selling, or a pledging of the firm's credit, unless it is shown to be the common usage, or the business is of a character to make the power essential to a proper transaction thereof. Dowling v. National Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795; Schellenbeck v. Studebaker, supra, and authorities cited on page 440, 13 Ind. App., page 846, 41 N. E., 55 Am. St. Rep. 240. A partnership engaged in the insurance, real estate, and collecting business is of the noncommercial or nontrading class. Deardorf's Adm'r v. Thacher, 78 Mo. 128, 47 Am. Rep. 95. So, also, printers and publishers, contractors, livery stable keepers, tavern keepers, farming, running a threshing machine, etc. See illustrations and authorities collected in 22 Am. & Eng. Encyc. L., p. 63; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Schellenbeck v. Studebaker, supra. In all such cases one partner has no implied power to bind his copartners by executing or indorsing notes

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in the firm name, even in payment of firm debts. Such power can only arise from consent, ratification, custom, or necessity. The partnership business of Eme & Son was that of insurance and loan brokers. There is nothing in the character of this business, when conducted according to the usual mode, that imports the necessity of pledging the partnership's credit by the execution and issuance of the firm's notes or indorsements. The ordinary business of the loan broker is to solicit borrowers and lenders, and to bring these together, for a commission, and the broker's indorsement of the borrower's paper is extraordinary and inconsistent with sound business principles. It must therefore be adjudged a nontrading or noncommercial partnership.

The business being noncommercial, and the execution and indorsement of promissory notes being unnecessary in carrying on the business, and unusual in like concerns, appellant had no right to presume that Julius Eme had authority to bind his father by indorsing the note in the firm name, and the burden rests upon him to prove the validity of the note against the decedent's estate. The generally recognized rule in such cases is clearly expressed in the well-considered case of Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757, in these words: "One partner in a nontrading partnership cannot bind his copartner by a bill or note drawn, accepted, or indorsed by him in the name of the firm — not even for a debt which the firm owes — unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnership; and the burden is upon the holder of the note who sues on it to prove such authority, necessity, or usage."

* * * * * * * *

PEARSELL MFG. CO. v. JEFFREYS et al.

81 S. W. 901.

(Supreme Court of Missouri, Division No. 1. June 20, 1904.)

GUARANTIES — ACCEPTANCE — NOTICE — DELIVERY — AGENCY — APPEAL — FINDING OF FACTS — CONCLUSIVENESS.

1. Notice of the acceptance of a guaranty to the guarantors, either actual or implied, is essential to render the guarantors liable thereon.

2. Where guarantors of payment for goods to be purchased signed the guaranty and gave it to their principal or her son-in-law for her, and all communications that the guarantors had with the seller were had through the principal, notice of acceptance of the guaranty to such guarantors might properly have been made through the principal, the guarantors being chargeable with notice of the transactions had under the guaranty between the principal and the seller.

3. Defendants, at the request of J.'s son-in-law, guarantied the payment of goods to be purchased of plaintiff by J., and delivered the guaranty to the son-in-law, after being executed, to be delivered to plaintiff. The guarantors had no direct

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communication with plaintiff, who, on the faith of the guaranty, sold goods to J. on credit. Held, that it would be inferred from such facts that notice of acceptance of the guaranty was given by plaintiff to defendants through the person delivering the guaranty to plaintiff.

4. A finding of fact by the trial court which is sustained by the evidence is conclusive on appeal.

* * * * * * * *

VALLIANT, J. This suit was begun in a justice's court, taken by appeal to the Circuit Court, where there was a judgment for $16.37 for the plaintiff from which the defendants appealed to the Kansas City Court of Appeals, where it was concluded that the judgment ought to be reversed and the cause remanded, but the judges of that court were of the opinion that their decision was in conflict with a decision of the St. Louis Court of Appeals, viz., Globe Co. v. Bickley, 73 M. A. 499, and for that reason transferred the cause to this court for determination.

The suit is founded on an alleged contract in writing as follows:

"April 1, 1900, I the undersigned agent for the Pearsell Manufacturing Company of Des Moines, Iowa, do hereby agree to remit amount due company of each order I buy of said company within 30 days after receiving said goods.

"[Signed] MARY JEFFREYS, Agent.

"We the undersigned, have faith in the honesty and reliability of Mrs. Mary Jeffreys and will guarantee the payment of each bill of goods said Mrs. Jeffreys may buy of said Pearsell Manufacturing Company within 30 days after receiving goods.

"[Signed]

"Name,	Occupation.
"Mr. Geo. H. Parker,	Cond'r C. M. & St. P.
"Lewis S. Prentiss,	Real Estate Agent.
"F. W. Ashby,	Real Estate Agent."

* * * * * * * *

The evidence for defendants tended to prove that the body of the instrument sued on was a printed form sent out by the plaintiff; that it was presented to them by Mr. Parker, a son-in-law of Mrs. Jeffreys, with the request that they sign it. The paper, in the form as presented to them, called for payment for the goods within ten days from delivery, but they objected to that as being too short a period, and interlined the paper to read thirty days, and then signed it and returned it to Mr. Parker, and never saw or heard of it again until demand was made on them for payment of the bill sued on. They were never notified that the plaintiff had accepted their proposal to guaranty the payment of Mrs. Jeffreys' bill, or that any goods had been sold to her, until the bill was presented to them for payment, a few days before the suit was brought. They denied that they acknowledged the debt, or that they only asked time for payment.

The case was submitted to the court on the evidence; jury waived; there were no instructions asked or given. The result of the trial was as above stated.

The judgment in the case will depend on the answer to the question whether or not the written document and the attending circumstances constitute a complete contract of guaranty, or only a proposal which never became a contract. The Circuit Court took the view that it was

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a complete contract; the Kansas City Court of Appeals were of the opinion that the transaction never got beyond a mere proposal. There was no evidence to show that, between the time of the signing of the paper by the defendants and the day on which the bill was presented to them for payment, there had been any notice expressly given them that the plaintiff had accepted their guaranty. It is as essential to a contract of guaranty as it is to any other contract that both parties agree to it; a proposal never becomes binding on the proposer until it is accepted. The cases referred to in the opinion of Judge Ellison for the Kansas City Court of Appeals in this case sustain this doctrine. In Rankin v. Childs, 9 Mo. 674, it appeared that one McCourtney applied to the plaintiff for a bill of lumber, and was told that security would be required. In a few days thereafter he presented a bill of the lumber desired, signed by himself, and below his signature this: "I hereby guarantee the payment of the above bill. Wm. Childs." The lumber required was furnished to McCourtney on the bill, and Childs knew that it was furnished. He had no notice that his proposal to guaranty the payment of the bill had been accepted, except such as might have been implied from the fact that the lumber was furnished and he knew it. There was no evidence that demand of payment had been made of McCourtney, or that he was insolvent. The Circuit Court sustained a demurrer to the evidence, and the judgment was affirmed. This court held that acceptance of the proposal to guaranty the bill, and notice thereof, were necessary to make it a binding obligation on Childs, and in that connection, referring to the fact that Childs knew that the lumber was being furnished, the court said: "Whether that would constitute a sufficient notice of the acceptance of his guaranty, and that upon the faith thereof the plaintiffs were delivering the materials for the boat, ought to have been left to the jury." But the judgment was affirmed on the ground that there was no evidence that a demand of payment had been made on McCourtney, or that he was insolvent. The point in that decision directly bearing on the case at bar is that acceptance of the proposal, and notice thereof to the proposer, are essential to complete the contract, but such acceptance and notice may be inferred if the circumstances justify the inference. In Bank v. Shine, 48 Mo. 456, 8 Am. Rep. 112, the defendant wrote a letter to the president of the bank, asking him to submit to his board a proposition to loan O'Neil & Co. $15,000, and that if the bank would make the loan he would hold himself responsible for the payment, and concluded with this: "If the Central cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere." The court interpreted that to be a mere proposal, and not binding until acceptance and notice. Indeed, the concluding clause in the letter is in effect an invitation for an answer. In Taylor v. Shouse, 73 Mo. 361, a paper of character similar to that in question was signed by the defendant's intestate on March 29th, on the 30th he was taken ill, on the 31st he was totally incapacitated for business, and on April 1st he died. The paper was mailed March 31st to plaintiff, who lived in Kansas. The court held that there was no evidence that the intestate had any notice that his proposal had been accepted, and he was not bound. There was no room for an inference of notice in that case. In Harvester Co. v. Sulser, 78 Mo. App. 670, the instrument sued on called for an acceptance, and expressed that it was not binding until accepted. In Bank v. Goldstein, 86 Mo. App.

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516, the proposal was to guaranty loans to the amount of $2,000 that the bank might make within certain dates. Several months after the proposal was signed, but within the dates named, the bank advanced the party between seven and eight thousand dollars. No notice of acceptance of the proposal had been given the defendant, and he had no knowledge that the bank had made the loans. The trial court gave a peremptory instruction for the defendant, and the judgment was affirmed. Whilst those cases hold that acceptance and notice thereof are necessary to convert the proposal into a contract, they do not place contracts of this kind outside of the rule, which applies to all contracts not wholly in writing, that the contract itself, or an essential feature thereof, may be inferred if the circumstances justify the inference. In Parsons on Contracts it is said: "The contract of guaranty, like every other contract, implies two parties, and requires the agreement of both parties to make it valid. In other words, a promise to pay the debt of another is not valid unless it is accepted by the promisee. Language is sometimes used by courts and legists which might seem to mean that there were cases of guaranty which need not be accepted, but that is not accurate; there are cases in which this acceptance is implied and presumed, but there must be acceptance or assent, expressed or implied, or there can be no contract. . . . The principle which underlies the whole law of guaranty is that this contract, like every other, must be known to the parties to it. Still this knowledge need be only a reasonable knowledge, and we understand the courts which hold that notice of acceptance is not always necessary to mean only that, where an offer to guaranty is absolute, and contains in itself no intimation of desire for specific notice of acceptance, it may be supposed that the officer has a reasonable knowledge that his guaranty is accepted and acted upon, unless he is informed to the contrary." 2 Parsons on Contracts (9th ed.), 12. In a note to the text is a very learned discussion of the subject and review of the decisions by the editor, in which he says: "Every contract does not need notice of acceptance. Upon performance of the act requested in the offer of a unilateral contract, the obligation of the offerer becomes complete, the performance itself indicating acceptance. . . . And such an offer may be addressed to the public generally, as an offer of reward usually, and a letter of credit frequently, is." Holding now, as this court had always held, that acceptance and notice in such case are necessary, yet we also hold that acceptance and notice may be inferred if the circumstances justify the inference, or they may be waived if a purpose to do so appears in the terms of the offer itself or in the conduct of the parties.

Let us now turn to the facts of the case in hand. Here was a printed form of a contract sent out by the plaintiff to a prospective customer. It is clumsily drawn, confusing the character of agent with that of purchaser, yet it carries the idea that Mrs. Jeffreys is to buy goods on a credit of thirty days, and the payment is to be guaranteed by her friends, she to sign it in one part and they in another part. The natural inference is that when signed it is to be returned to the plaintiff, and if satisfactory the goods will be furnished. There is nothing on the face of the paper inviting an answer, and nothing in the nature of the business to suggest that an answer is expected. These defendants furnished Mrs. Jeffreys with this document for the purpose of having her present it to the plaintiff and obtain goods on the faith of it; they heard nothing

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of it afterwards, and made no inquiry about it; they doubtless inferred that it had been accepted and acted upon, and the circumstances of the case justified that inference.

But there is another fact in this case that bears on the question of the knowledge of these defendants as to the transactions between the plaintiff and Mrs. Jeffreys, based on the faith of this document. There were no negotiations between these defendants personally and the plaintiff, as was the case in Bank v. Shine, above quoted; their transaction with the plaintiff was through Mrs. Jeffreys. They signed the paper and gave it to her, or to her son-in-law for her. All the communication they ever had with the plaintiff was through her, and therefore, when she came to the plaintiff accredited by these defendants to present a proposition of guaranty, the plaintiff had a right to return its answer to them through the same agency, and the defendants are chargeable with notice of what occurred thereupon between the plaintiff and Mrs. Jeffreys. The paper was designed to induce the plaintiff to sell goods to Mrs. Jeffreys on a credit of thirty days; the natural inference is that it was given to her to be by her presented to the plaintiff and obtain goods on the faith of it. She made the use of it that these defendants must have expected that she would make, and the plaintiff acted upon it as the defendants must have expected it would act. The defendants' proposition came to the plaintiff through the person whom they authorized to carry it, the answer was given by the plaintiff to that person, and the natural inference is that the answer reached the defendants through the agency of their own choice. Whether the circumstances justify the inference is a question for the trier of the facts, as was said in Rankin v. Childs. In this case the finding of the trial court is sustained by the evidence, and is conclusive on that point.

The judgment of the Circuit Court is affirmed. All concur.

BRANNUM LUMBER CO. v. PICKARD. (No. 4,866.)

71 N. E. 676.

(Appellate Court of Indiana, Division No. 1. July 1, 1904.)

PRINCIPAL AND SURETY — NOTES — MATERIAL ALTERATION — CHANGE OF DATE — EXTENSIONS.

1. Where the date of a note was altered after it had been signed by a surety, and without his knowledge, so as to postpone the date of payment, the alteration was material, and the surety discharged.

2. A provision in a note that the makers and indorsers expressly agree that the payee may extend the time of payment and receive interest in advance from either the makers or indorsers for any extension so made, and waive any defense thereto on account of the same, does not prevent the release of a surety by a change in the date of the note after signature by the surety, such change making the note mature later.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

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Action by the Brannum Lumber Company against Edward M. Pickard. From a judgment for defendant, plaintiff appeals. Affirmed.

Kittinger & Diven, for appellant. Byron McMahan and Edward F. Dailey, for appellant.

BLACK, C. J. The appellant brought suit against the apellee and one James S. Snethen upon two promissory notes. There having been no service of process on the defendant Snethen, the cause was dismissed as to him by the appellant. The appellee answered by general denial and by a paragraph denying the execution of the notes, both answers being verified. The court rendered a special finding, wherein it was stated, in substance, that on and prior to April 15, 1901, Snethen was indebted to the appellant for lumber and materials sold and delivered to him in the sum of $175, and on that day the appellant agreed with Snethen to accept his notes to settle this indebtedness, conditioned that he would give the appellee as surety on the notes, one to be for $100, due in ninety days from date, and the other for $75, due in 120 days from date, each of the notes to bear eight per cent. interest from the date above stated, and providing for attorney's fees; that on the day above mentioned Snethen and the appellee signed the notes sued on "in their present forms, except the erasures of the phrase 'Apr. 15' and the inserted phrase 'May 2;'" that the notes so signed were kept in the possession of Snethen from April 15 until May 2, 1904, when they were taken to one Joseph G, Brannum, a member of the appellant, and its general manager, and then the date April 15th was erased, and the date May 2d was inserted, and the notes were then delivered to Brannum for the appellant; that these erasures and insertions were made at that time by Snethen, in the presence of Brannum, and with his knowledge and consent; and Snethen, who had been intrusted with the notes by the appellant as surety thereon, then delivered them to Brannum, the manager and business agent of the appellant, who received them for the appellant, in accordance with the above-mentioned agreement, in settlement of said account due to appellant; that at the time of the delivery of the notes to Brannum and immediately thereafter by Snethen, Brannum, acting for the appellant, suggested to Snethen that he was entitled to a credit on the notes of the amount of the interest thereon from April 15, 1901, to May 2, 1901, and thereupon Snethen erased the date of April 15th and inserted the date of May 2d in the notes, which change was intended by the parties for the purpose of giving Snethen the benefit of a credit for the amount of interest that had then accrued on the notes; that the appellee did not see either of the notes from the time he signed them on the 15th day of April, 1901, until after the commencement of this action, and did not have any knowledge whatever that the dates of the notes had been changed, and did not give any consent or authority to Snethen or Brannum or the appellant to make such changes in the notes, and was not present at the time of the delivery, and did not know when the notes were delivered to the appellant; that the appellee did not receive any part of the consideration for the notes, or either of them; and he signed the notes and each of them as surety of his codefendant, Snethen, and in no other capacity. The forms of the notes were set out in the findings. They

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bore date of May 2, 1901, but in each there was an erasure of "April 15," above which was written "May 2." The notes severally were payable to the order of the appellant at a bank in this State, and bore interest at the rate of eight per cent., and contained the following: "The makers and indorsers of this note further expressly agree that the payee or its assigns may extend the time of payment thereof from time to time, and receive interest in advance or otherwise from either of the makers or indorsers for any extension so made, and waive any defense thereto on account of same." It was found that the notes were due and wholly unpaid, that there was due thereon in principal and interest a specified sum, and the amount of a reasonable attorney's fee was stated. The court stated as conclusions of law that the change of dates on the notes was a material alteration, and they were not the notes signed by the appellee, but a new contract, in which he was in no way a party, and not binding upon him; that the change of dates without the authority, knowledge, and consent of the appellee released him from liability thereon; and that the appellant should recover nothing from the appellee in this suit.

The question as to the correctness of the court's conclusions of law is alone presented here. The changing of the dates of the notes constituted material alterations. The legal effect of the contracts was changed thereby without the consent or knowledge of the surety. The action of the principal maker in the presence of the agent of the payee, and with his assent, rendered the payee privy to the alteration, which was, in effect, the action of the payee. The contracts, as altered, were not the same in legal effect as those signed by the surety. The dates of the maturity of the notes were by that act postponed. The notes were thereby rendered invalid as against the surety. That this would be the effect of the alterations in the absence of the provision in each of the notes relating to the extending of the time of payment from time to time, and to receiving interest for such extensions, quoted above, does not seem to be much contested by the appellant; but it seems to be supposed by counsel that by reason of such provision the alteration did not change the legal effect of the notes. This provision authorizing the payee or its assigns to extend the time of payment from time to time, and to receive interest in advance, or otherwise, from the makers or indorsers for any extension so made, had relation to the date of the notes as signed by the appellee, and contemplated extensions of periods, the first of which as to each note would begin and run from the time when that note would mature if there was no such extension. The first extension that could be made pursuant to that provision would commence, as to one of the notes, at the expiration of ninety days from April 15, 1901, and as to the other note at the expiration of 120 days after that date. The provision in question contemplated the making of an agreement or agreements additional to those evidenced by the notes, and not alterations of the notes themselves. Without relation to the question as to how the interest of the surety might be affected by the change of the date of the execution of the notes, it is plain that the contracts were not the same in legal effect as they would have been if not so changed, and therefore the alterations were material, and the appellee was thereby discharged from liability thereon. In Bell v. The State Bank, 7 Blackf. 456, it was said: "It must be evident that, the nearer the

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blank instrument approaches to perfection, the more restricted must be the authority. If the sum, date, or time of payment be inserted, they cannot be changed." In Hamilton v. Wood, 70 Ind. 306, the date of a note, inserted therein, being a date subsequent to the real time of its execution, was erased by a holder without the knowledge or consent of the maker, whereby the note had the appearance of being dated at the real time of the execution thereof. This was held to be in legal effect the destruction of the note. See, also, Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Kountz v. Hart, 17 Ind. 329; Hart v. Clouser, 30 Ind. 210; Schnewind v. Hacket, 54 Ind. 248; Cochran v. Nebeker, 48 Ind. 459; Franklin L. Ins. Co. v. Courtney, 60 Ind. 134; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Dietz v. Harder, 72 Ind. 208; Johnston v. May, 76 Ind. 293; Eckert v. Louis, 84 Ind. 99; Hert v. Oehler, 80 Ind. 83; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Moore v. Hinshaw, 23 Ind. App. 267, 55 N. E. 236, 77 Am. St. Rep. 434.

Judgment affirmed.

UNION SELLING CO. v. JONES.

128 Fed. 672.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1904.)

No. 1,840.

1. WRITTEN CONTRACTS — PAROL EVIDENCE.

Where a contract has been reduced to writing, and imports on its face to be a complete expression of the whole agreement, it will be presumed that the parties have introduced into it every material item and term; and hence parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular point to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks; and the legal import can no more be varied by parol than can what is written.

2. SAME — SURROUNDING CIRCUMSTANCES.

Though proof of the surrounding circumstances may be introduced to aid a proper construction of uncertain or ambiguous terms in a written contract, such surrounding circumstances do not include prior representations, proposals, and negotiations of a promissory character, leading up to and superseded by the written agreement.

3. SAME — SALES — WARRANTIES — CONSTRUCTION.

Where a contract for the sale of binder twine contained the words "Quality guaranteed," such words were not uncertain or ambiguous, but should be construed to import a warranty that the twine was reasonably fit for the use for which twine is designed, and should be salable or marketable under that description, and hence parol evidence was inadmissible to show that such warranty, by reason of prior negotiations between the parties, was intended to include certain representations as to quality.

4. SAME — DAMAGES.

In an action to recover for failure to deliver twine of the quality called for by the contract, the proper measure of damages is the difference between the actual value of the property at the time of the sale and what its value would

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have been if it had conformed to the warranty. Neither the vendee's right of recovery, nor the measure of his damages, is dependent on a resale by him, or upon the price obtained at a resale.

In error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Jones against the Union Selling Company to recover damages for the breach of an express warranty of the quality of twine sold to him by the company under a written contract entered into at Hastings, Neb., June 6, 1900, which described the twine and stated the warranty in this manner: "30,000 pounds of Binder Twine, Crown Brand, as follows: 27,000 pounds Standard, eleven cents per pound; 3,000 pounds Sisal, eleven cents per pound. Gross weight, delivered F. O. B. cars at Hastings. . . . Quality guaranteed." The twine was then in cars at Council Bluffs, Iowa, was to be shipped in a few days, and was to be paid for in cash upon the presentation of the bill of lading. Delivery of the twine and payment of the purchase price were promptly made. The Selling Company was a distributor or wholesale dealer at Omaha, Neb., in the products of the Standard Rope & Twine Company's Mills, which included the Crown brand of binder twine. Jones was a retail dealer in farm implements and binding twine at Hastings, and purchased this twine for sale to farmers in that vicinity, to be used by them in binding their grain. He was not familiar with, and had not dealt in, twine of the Crown brand. All this was known to the company when the contract was made. In addition to the above matters, about which there was no dispute at the trial, plaintiff's petition alleged that, when the contract was made, the words "Quality guaranteed" were agreed by the parties to refer to a proposed guaranty mentioned in a letter from the Selling Company to Jones, dated March 7, 1900, and that this letter was made a part of the warranty. The letter was set forth in the petition, and the portion containing the proposed guaranty reads: "We are the manufacturers of the Sewell & Day and Crown brands of rope and binder twine, and do not hesitate to guarantee the quality of these grades of twine, to be superior to that of our competitors. We quote you: Sisal & Standard binder twine 11¾c. per lb., Manilla binder twine 14¾c. per lb., pure Manilla binder twine 16¼c. per lb., in small lots F. O. B. Omaha. If you could use 10,000 lbs. or more we could name you a lower price. The twine which we will furnish is all new, of this year's make and put up in the new style 50 lb. flat bales. We have no doubt but that the quality of the twine which we can furnish will be entirely satisfactory to you and your customers." It was then alleged that the warranty respecting the "quality, character, and condition" of the twine was broken by the Selling Company. "That said twine was not of good quality, and was not suitable for the purposes for which it was purchased by plaintiff. The quality of said twine was not superior to that of the defendant's competitors, but, on the contrary, was grossly inferior to the ordinary and average binding twine then upon the market. That the quality of said twine was not satisfactory to plaintiff or to his customers, and was not of a character with which either plaintiff or his customers ought to have been satisfied. And said twine was not all new, of the make of 1900, but, on the contrary, said twine was old and unsound, knotty, uneven, and much of it rotten and otherwise defective, and practically of very little value." Damages in the sum of $2,600 were alleged, and judgment was prayed for that amount. These matters were denied by the answer. A trial resulted in a verdict and judgment for plaintiff for $675, which defendant seeks to have reversed upon this writ of error.

James H. McIntosh, for plaintiff in error.

T. J. Mahoney and J. B. Cessna, for defendant in error.

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Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal controversy in this case is over the quality of twine required to satisfy the terms of the express warranty in the written instrument in which the parties stated their agreement. At the trial the court took the view that it was permissible to determine this by reference to the negotiations which preceded and resulted in the making of the written contract. These negotiations covered a period of three months, and consisted of letter correspondence and separate conversations between the plaintiff and each of two agents of the defendant. All were admitted in evidence over the objection of the defendant. This ruling proceeded upon the theory that the terms of the written contract were uncertain and ambiguous, and could be explained and made certain by extrinsic evidence. If the letter of March 7, 1900, be accepted as giving certainty to the terms of the warranty, it would be satisfied only by the delivery of new binding twine, of the make of 1900, and of a quality superior to that of any binding twine sold by any of the defendants's competitors, and entirely satisfactory to the plaintiff and his customers. If one or both of the conversations be accepted as giving certainty to the warranty, then it would be satisfied only by the delivery of twine of equal quality with certain samples shown to the plaintiff at Omaha by an agent of the defendant during one of these conversations. In the plaintiff's petition the position was taken that the warranty should be interpreted by reading into it the letter of March 7th, and no reference was made to any samples of twine as having such relation to the transaction that they would give precision to the terms of the warranty; but at the trial the plaintiff gave in evidence both the letter and the conversations, although in thus offering an alternative of inconsistent interpretations he was obscuring, rather than clarifying, the meaning of the warranty, and was illustrating the mistake in resorting to this class of evidence to ascertain what is intended by an agreement expressed in writing. The contract makes no reference to the letter of March 7th, or to samples exhibited during the oral negotiations, and does not suggest that either of these was in the minds of the parties when they reduced their agreement to writing, or that the whole agreement is not completely expressed therein. The law applicable to such a contract is nowhere better expressed than in Thompson v. Libby, 34 Minn. 374, 377, 26 N. W. 1. It was there said by Judge Mitchell:

"The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement — that is, contains such language as imports a complete legal obligation — it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks. 2 Phil. Evidence (Cow. & H. Notes) 669; Naumberg v. Young, 44 N. J. Law, 331 [43 Am. Rep. 380]; Hei v. Heller, 53 Wis. 415 [10 N. W. 620]. And the

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law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol, any more than what is written. 2 Phil. Ev. (Cow. & H. Notes) 668; La Farge v. Rickert, 5 Wend. 187 [21 Am. Dec. 209]; Creery v. Holly, 14 Wend. 26; Stone v. Harmon, 31 Minn. 512 [19 N. W. 88]."

The rules embodied in this statement of the law are firmly established, and have been frequently declared in the decisions of this court and of the Supreme Court. Bast v. Bank, 101 U. S. 93, 96, 25 L. Ed. 794; De Witt v. Berry, 134 U. S. 306, 315, 10 Sup. Ct. 536, 33 L. Ed. 896; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; Harrison v. Fortlage, 161 U. S. 57, 63, 16 Sup. Ct. 488, 40 L. Ed. 616; Wilson v. New U. S. Cattle Ranch Co., 20 C. C. A. 245, 249, 73 Fed. 994; Grand Avenue Hotel Co. v. Wharton, 24 C. C. A. 441, 443, 79 Fed. 43; Godkin v. Monahan, 27 C. C. A. 10, 83 Fed. 116; Insurance Co. v. McMaster, 30 C. C. A. 532, 540, 87 Fed. 63; Green v. Chicago, etc., Ry. Co., 35 C. C. A. 68, 71, 92 Fed. 873; Franklin v. Browning, 54 C. C. A. 258, 117 Fed. 226; Wilson v. Deen, 74 N. Y. 531, 534; Mast v. Pearce, 58 Iowa, 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125; Phillips v. Iola Portland Cement Co., (C. C. A.) 125 Fed. 593, 596; McQuaid v. Ross, 77 Wis. 470, 46 N. W. 892; J. I. Case Pow Works v. Niles & Scott Co., 90 Wis. 605, 63 N. W. 1013; Sylvester v. Carpenter Paper Co., 55 Neb. 621, 625, 75 N. W. 1092.

Where, without fraud, accident, or mistake, the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties. Bast v. Bank, 101 U. S. 93, 96, 25 L. Ed. 794. If there is uncertainty or ambiguity in the terms employed, the actual condition of things, and the position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. Reed v. Insurance Co., 95 U. S. 23, 30, 24 L. Ed. 348; Phelps v. Clasen, 1 Woolw. 206, 212, 19 Fed. Cas. 445, No. 11,074. That which may be so shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus ingrafted upon it. Union Stock, etc., Co. v. Western, etc., Co., 7 C. C. A. 660, 668, 59 Fed. 49; Bast v. Bank, 101 U. S. 93, 97, 25 L. Ed. 794; Oelrichs v. Ford, 23 How. 49, 63, 64, 16 L. Ed. 534; Ferguson Contracting Co. v. Manhattan Trust Co., 55 C. C. A. 529, 533, 118 Fed. 791. Bradley v. Steam Packet Co., 13 Pet. 89, 92, 103, 10 L. Ed. 72, involved the use of extrinsic evidence to ascertain the meaning of a written contract "for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac Creek." A controversy arose as to whether this covered the time when navigation was so completely stopped by ice that no boat could be used. It was held permissible to prove the circumstances which accompanied the transaction, viz., that the defendant for several years had been, and then was, contractor for the transportation of the mail from Washington, D. C., to Fredericksburg, Md.; that the customary route of the mail was by steam-

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boat from Washington to Potomac Creek, and thence by land to Fredericksburg; that the defendant kept an establishment of horses and stages for the transportation of the mail all the way by land at seasons when the navigation of steamboats was stopped by ice; that, when the contract was made, defendant's own steamboat had become disabled, and he was then about completing a new boat, called the "Sydney;" that it was a matter of notoriety, and was known to and understood by plaintiff, when the contract was made, that as soon as navigation should be closed by ice the mail from Washington to Fredericksburg would have to be transported all the way by land, instead of being transported by steamboat to Potomac Creek, and thence by land to Fredericksburg; and that the steamboat Franklin would not be required by defendant, and could not be used by him, when the navigation should be closed. It was further held, in that connection, that it was not permissible to prove that, in the negotiations antecedent to the making of the written contract, it was communicated to the plaintiff by defendant or his agent that the defendant intended to keep the steamboat Franklin in use so long as the navigation remained open, and no longer. Gilbert v. Moline Plow Co., 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476, was an action upon a letter of guaranty in which it was attempted to be shown by parol that a prior letter of the person who obtained credit by reason of the letter sued upon was to be taken as an explanation or part of the latter, but this was held not permissible, as the letter of guaranty contained no reference to the prior letter, and appeared to be complete in itself. Wiener v. Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775, was an action upon a written contract for the purchase of "300 bushels of barley," the quality of which was not expressly specified. It was sought to be shown by parol that the purchase was made by sample, and that the barley tendered under the contract was not of as good quality as the sample. In holding the evidence inadmissible, the court said:

". . . For the purposes of this case, it is unnecessary to determine whether the merchantable quality of the barley to be delivered is a legal implication from the terms of the contract or not. It is enough for the determination of this case to know that there is neither an express statement in the writing, nor a legal implication from what is stated, that the barley was sold by sample, or that it should be of the quality of a sample furnished to the buyer at the time of the contract. This court has repeatedly held that where there is a written instrument binding upon both of the parties thereto, which in itself is a complete contract, capable of being understood and enforced, parol evidence cannot be resorted to to change its express provisions or their legal effect."

Gardiner v. Gray, 4 Camp. 144, was an action upon a written contract for the sale of what was described as "12 bags of waste silk," In rejecting parol proof of a sale by sample offered for the purpose of establishing the quality of the commodity intended to be sold, Lord Ellenborough said:

"I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony."

The same ruling was made in Meyer v. Everth, 4 Camp. 22.

The law controlling the operation of a contract is deemed to be,

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and usually is actually, within the contemplation and intention of the parties, as much as the words in which it is expressed, and becomes equally an essential part of it. Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357; Bulkley v. United States, 19 Wall. 37, 40, 22 L. Ed. 62; Hearne v. Ins. Co., 20 Wall. 488, 493, 22 L. Ed. 395; Rogers v. Kneeland, 10 Wend. 219, 252; Johnston v. King, 83 Wis. 12, 53 N. W. 29; Manistee, etc., Co. v. Shores Lumber Co., 92 Wis. 28, 65 N. W. 865. For this reason the rule that a written contract cannot be varied by parol extends to the legal import or intendment of the contract, as well as to the terms or words in which it is written. The Delaware, 14 Wall. 579, 20 L. Ed. 779; Renner v. Bank of Columbia, 9 Wheat. 581, 587, 6 L. Ed. 166; Bank of United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316; Brown v. Wiley, 20 How. 442, 447, 15 L. Ed. 965; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Meehan v. Valentine, 145 U. S. 611, 625, 12 Sup. Ct. 972, 36 L. Ed. 835; Godkin v. Monahan, 27 C. C. A. 410, 83 Fed. 116; Mills v. Miller, 4 Neb. 441, 443; Wilson v. Deen, 74 N. Y. 531, 534; Thompson v. Libby, supra. A contrary view was declared by Mr. Justice Washington in Susquehanna, etc., Co. v. Evans, 23 Fed. Cas. 450, No. 13,365, but it was rejected by the Supreme Court in Bank of United States v. Dunn and Martin v. Cole, supra.

Turning now to the facts of the case under consideration, it was shown at the trial, as before stated, that the actual condition of things and the situation of the parties at the time of the making of this contract, and then understood and known by both of them, were these: The plaintiff was a retail dealer in binding twine, and was about to buy a supply of that commodity for sale to the farmers of his vicinity for use in binding grain; the defendant was a wholesale dealer in, or distributor of, binding twine of a brand or manufacture with which the plaintiff was not familiar; and the twine which became the subject of the sale was at a point remote from that where the contract was made, and therefore not open to the inspection of the plaintiff. Under these circumstances, the parties entered into a written contract for the sale by the defendant to the plaintiff of "30,000 pounds of binder twine * * * 27,000 pounds standard * * * 3,000 pounds sisal, * * * quality guaranteed." It is not certain that there is any difficulty in understanding its language or effect when the face of the contract alone is considered, but, read in the light of these surrounding circumstances, which were competently proven, the meaning of the words employed and the intention of the parties are clear, and there is no doubt that the agreement is completely expressed. The legal import or intendment of such a contract is that the seller warrants that the article delivered shall, conformably to its description, be binder twine — that is, reasonably fit for the use for which binder twine is designed — and shall be saleable or marketable under that description. This is the rational meaning, and in law the effect, of a warranty of quality, where no special quality is named and no words of limitation are used. Gardner v. Gray, 4 Camp. 144; Jones v. Just, L. R. 3 Q. B. 197; Dushane v. Benedict, 120 U. S. 630, 636, 7 Sup. Ct. 696, 30 L. Ed. 810; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 28 L. Ed. 86; Van Winkle v. Crowell, 146 U. S. 42, 49, 13 Sup. Ct. 18, 36 L. Ed. 880; Cleveland Linseed Oil Co. v. Buchannan, 57 C. C. A. 498, 120 Fed. 906; Omaha, etc., Co. v. Fay, 37 Neb. 68, 75, 55 N.

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W. 211; Hastings v. Lovering, 2 Pick. 214, 13 Am. Dec. 420; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; Howard v. Hoey, 23 Wend. 350, 35 Am. Dec. 572; Hoe v. Sanborn, 21 N. Y. 552, 562, 78 Am. Dec. 163; Id., 36 N. Y. 93, 98; Merriam v. Field, 29 Wis. 640; Best v. Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; Benjamin on Sales, §§ 656, 657; 2 Story on Contracts, § 1071; 1 Chitty on Contracts, 634; 2 Addison on Contracts, p. *975; Tiffany on Sales, 173.

The effect of permitting the plaintiff to prove the antecedent negotiations was to establish a standard for determining whether the warranty had been satisfied, and the extent of any departure therefrom, which was different from the standard which the parties had established for themselves by their final agreement expressed in writing. This was error.

Error is also assigned upon an instruction given to the jury to the effect that the price obtained by the plaintiff upon resales by him of the twine could not be considered in assessing his damages for the breach of warranty in the sale by the defendant. The plaintiff testified that the value of twine conforming to the warranty would have been thirteen cents per pound, while five cents per pound was the full value of the inferior twine actually delivered. It was shown that most of the twine had been resold by the plaintiff at prices ranging from about nine cents to eleven cents per pound, and that these sales were all with a warranty of quality. The proper measure of damages applicable to a case like this is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. Schreiber v. Andrews, 41 C. C. A. 663, 666, 101 Fed. 763. And neither the vendee's right of recovery, nor the measure of his damages, is dependent upon a resale by him or upon the price obtained at a resale. At most, the price thus obtained may be some, but not conclusive, evidence of the actual value. Muller v. Eno, 14 N. Y. 597, 607, 609; Bach v. Levy, 101 N. Y. 511, 515, 5 N. E. 345; Brock v. Clark, 60 Vt. 551, 15 Atl. 175; Atkins v. Cobb, 56 Ga. 86, 90; Reggio v. Braggiotti, 7 Cush. 166, 169; Clare v. Maynard, 7 C. & P. 741, 32 E. C. L. 849. But where the resale is with a warranty of quality, or in ignorance of the actual quality, it is not any evidence of the value of the article in its inferior condition. Muller v. Eno, supra; Brown v. Bigelow, 10 Allen, 242; Miamisburg, etc., Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. 175. There was no error in this instruction.

The judgment is reversed, with a direction to grant a new trial.

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FIRST NAT. BANK OF NASHVILLE v. NATIONAL SURETY CO.

130 Fed. 401.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1904.)

No. 1,250.

1. APPLICATION OF PAYMENTS — RIGHTS OF SURETY — INDEMNITY INSURANCE FOR SPECIFIC TERM.

Defendant, a surety company, executed a bond to plaintiff bank by which it undertook, for the term of one year, to indemnify plaintiff against loss sustained by the dishonesty of employees. Action was brought thereon to recover for loss alleged to have occurred during the term through the action of a bookkeeper in falsifying the account of a depositor so as to increase his apparent credit balance, by which he was enabled to and did overdraw his account to a large amount. Such false entries and overdrafts continued through four years, but defendant's bond covered only about three months of the last part of the bookkeeper's employment, there having been bonds with different sureties covering a portion at least of the previous time. The depositor's account was the ordinary running account, subject to check, and continuous during all the time, and no application of deposits to any particular item of debit was made by either party, nor by implication, there having at no time been an overdraft as shown by the books. The false entries and overdrafts continued for a part of the time after defendant's bond went into effect, but subsequent deposits made prior to the time the bookkeeper's employment terminated exceeded the checks paid during the same time in an amount greater than such overdrafts. Held, that the ordinary rule in such cases between debtor and creditor, that payments should be appropriated to the oldest item of indebtedness, could not be applied as against a surety whose obligation covered a distinct portion of the time during which the account was running, but that as between plaintiff and defendant all deposits made during the currency of the bond would be applied by the court to the debit items made during the same time, and, it appearing that they exceeded the sums drawn out, there was no loss to the bank during the term for which defendant was liable.

2 SAME — DISTINCT BONDS FOR DIFFERENT TERMS.

When there are different bonds given by a bank official, covering different periods of time, with different sureties, an unappropriated payment made by the common principal is not to be always applied by the court to the oldest obligation. Regard must be had to the responsibility of the different sureties, as limited by the period for which they respectively contract, as well as to the injustice that would ensue if collections received under one obligation are applied to the discharge of a liability under a preceding or succeeding term, with distinct sureties.

In error to the Circuit Court of the United States for the Middle District of Tennessee.

Walter Stokes and James C. Bradford, for plaintiff in error.

Granbery & Trabue, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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LURTON, Circuit Judge, delivered the opinion of the court.

This was an action by the First National Bank of Nashville, Tenn., against the National Surety Company, on a bond of indemnity made by the latter company, to recover a loss sustained through the dishonest conduct of one W. W. Lea, an individual bookkeeper in the service of the bank. Upon the pleadings and evidence Judge Clark directed a verdict for the surety company.

By the bond the surety company agreed to pay to the bank "the amount of any loss or damage that shall happen to the employer, in respect of any funds, property or estate belonging to or in the custody of the employer, through the dishonesty of any of the employees, or through any act of omission or commission of any of the employees, done or omitted in bad faith, and not through mere negligence, incompetency, or any error of judgment," etc. The bond covered a number of the bank's employees, of whom W. W. Lea was one. Lea was the bookkeeper, and kept the individual ledger containing accounts of those depositors the initial letters of whose names were one of the letters of the alphabet from A to K, inclusive. Among those depositors whose accounts were kept by him was the mercantile firm of Connor & Brady. This firm did business with the plaintiff for a number of years. Their account was what is called an "active" one, and almost daily deposits were made and checks drawn thereon. Lea neither received nor paid out any money. Deposits were paid to the receiving teller, who, during same day, turned over to the assistant teller memoranda of the deposits called "deposit slips." A list of these was made out by the assistant teller, which was handed to the individual bookkeepers, who entered therefrom, on a book called the "scratcher," the amount of each deposit and the name of the depositor. Checks were paid by the paying teller, who, after payment, turned same over to the assistant teller, who, after making a list of them, handed them to the individual bookkeepers. The latter then entered them on the scratcher. At the close of each day the individual bookkeepers transferred from the scratcher to the individual ledgers the deposits and checks thus recorded thereon. This ledger should therefore show deposits and checks corresponding with the entries made on the scratcher. The account of each customer was balanced at the end of each day, and, if properly kept, showed the precise condition of the depositor's account after crediting each deposit and charging each paid check. The account of Connor & Brady was in this way kept by Lea. This was evidence tending to show that in the interest of Connor & Brady, and for the purpose of defrauding the bank, the account of that firm was falsified in three distinct ways, the object being to give Connor & Brady fictitious credit balances against which they could draw. One of the methods was to post from the scratcher a larger deposit than shown. To illustrate: On July 2, 1900, the firm deposited $503.70, which was honestly entered by Lea on the scratcher from the deposit slips handed him by the assistant teller. In posting this to their account on the individual ledger, this deposit was entered as $1,503.70. Another method was by charging a check as for a less amount than shown by the scratch-book entry. Thus, on June 29, 1900, checks drawn by them were paid which aggregated $631.10, and were properly entered on the scratcher, but posted in this ledger account as $331.10, thus increasing their credit balance by $300. A third method was by false extensions of footings

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and balances. An example is this: On May 7, 1900, by false additions, their credit balance was increased $1,000. This system of false entries was begun and continued for nearly five years, and on May 1, 1900, Connor & Brady had overdrawn their account $50,029, although the account on the ledger did not show any overdraft at all, in consequence of the skill with which fictitious credits had been given them through Lea's methods. Detection had been successfully avoided by methods not necessary to state, and on May 1, 1900, Lea bore an untarnished reputation, and was so represented for the purpose of securing the bond now in suit, which went into force, as of that date, for the term of one year. For the loss which had or might be sustained as a consequence of Lea's dishonest methods prior to the currency of this bond, it is not sought to hold the appellee responsible. For the two years preceding May 1, 1900, a bond with a different surety had been in force, and during that term of two years it is shown that Connor & Brady had increased their overdraft by about $21,000, and for that loss a claim was made against the surety company responsible. This suit is for the loss incurred through the continuance of Lea's dishonest practice during the currency of the bond made by the National Surety Company.

The contention is that, through false entries made after May 1, 1900, the credit balance of Connor & Brady was fraudulently increased to the extent of $3,384.71, and that for this amount the surety company is liable. Lea neither received nor paid out a dollar of the bank's money. He was only a bookkeeper, and his dishonesty consisted only in so falsifying the account of Connor & Brady as to enable that firm to overdraw its account. The mere fact that Lea fraudulently increased the balance in favor of Connor & Brady by any of the methods described is not enough to fasten responsibility upon his surety. The bond is to indemnify the bank against any "loss" through his dishonesty. It follows, therefore, that unless Connor & Brady, through Lea's fraudulent practices, did draw out more money by check than they deposited, no loss would be shown. Now the plaintiff says that this is just what did occur, and that Connor & Brady did draw out $3,384.71 more than they deposited. And so it was shown that between May 1, 1900, and July 16, 1900, the checks drawn by Connor & Brady and paid by the bank exceeded their deposits by $3,384.71. If the account had then been closed and Connor & Brady did not make this overdraft good, a case of a "loss" under the bond would be made out. But the defendant says the account was not then closed, and that Connor & Brady continued to make deposits and draw checks, and that by August 6, 1900, their aggregate deposits after May 1, 1900, had exceeded their checks by more than $500, and that, when the account was finally closed by the bankruptcy in November of 1900, their excess of deposits over checks was more than $10,000, and that the bank did not, after the bond went into effect, sustain any loss by reason of Lea's practices.

During what period of this time was the bond operative as an indemnity? The term contracted for was one entire year. But it was evidently subject to termination by the discontinuance of Lea's services, for in that event there would be no one upon which it could operate. On July 16, 1900, Lea was given a two weeks vacation, in pursuance of a general custom of the bank, during which his salary went on. He was due to return August 1st. He did not return then or at any other time. Whether his vacation was extended does not appear.

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No reason for suspecting his books was entertained when he went away, and the testimony of Mr. Watts, the cashier of the bank, was that between August 8 and 12, 1900, it was ascertained that his books "were out of balance with the general ledger, and thereupon an expert was put upon the books to ascertain whether or not this information was the result of fraud and dishonesty upon the part of Lea." That the bank did not regard Lea as out of its service prior to this discovery is clear, for as late as August 17th the cashier wrote to the surety company, saying, among other things:

"Mr. Lea left our offices recently to take his vacation under custom recently adopted and has not yet returned. There is a chance for his accounts to be irregular and we are now beginning an investigation."

He was absent on leave, and with salary, up to August 1, 1900. Manifestly his employment continued up to that date. The account exhibited shows that up to July 26th there was a gain in deposits over checks paid of $1,767.75, and the cashier testifies that by August 6th the deposits exceeded checks by more than $500. There was no suspicion as to the correctness of Lea's books before August 8th, and no reason for regarding his employment as ended until his absence beyond his leave was explained by discovery of his frauds. We therefore conclude, as an inference of law and fact, that his employment did not terminate prior to the discovery of facts casting suspicion upon his books. The bond was therefore in force at least up to August 6, 1900, at which date the deposits during its currency exceeded checks drawn and paid during same period.

Now, if we are to segregate the account of Connor & Brady during that period beginning May 1, and ending August 6, 1900, no loss resulted from Lea's fraudulent entries, because the deposits durnig that time exceeded checks drawn against the account. But the bank contends that the account of Connor & Brady shows that on July 16, 1900, it was overdrawn $3,384.71, and that this overdraft was made possible only by the concealed fraudulent posting of their account by Lea, and that at that date the bank had actually sustained the loss for which it now sues, and that the deposits made after July 16, 1900, should be applied as payments upon the oldest items of overdraft, and not in satisfaction of the overdrafts occuring during the currency of the bond. This presents a question of appropriation of payments of much perplexity. The account of Connor & Brady did not on its face show any overdraft, either before or after the bond in suit went into effect. The deposits made were not made under any special arrangement. The account was the ordinary running banker's account. Deposits were entered on one side as credits and checks, on the other as debits, and by the custom of the bank a balance was struck at the close of each day. This account ran along in this way for years. If the account had been honestly kept, there would have appeared an overdraft of $50,000 against Connor & Brady on May 1, 1900, and all deposits after that date would, according to the method of keeping such accounts, go in the diminution of the overdraft, in the absence of some other arrangement. But as this overdraft did not appear, the deposits after May 1, 1900, apparently constituted a fund subject to check. Neither did the account as it appeared on July 16th show the overdraft of $3,384.71, which in fact existed, though concealed by Lea's fraud.

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Thus at no time was there even an apparent application of deposits to the payment of an overdrawn account. There was therefore no express or implied appropriation of the deposits made by Connor & Brady by the bank or the depositor to any particular purpose, and counsel for the bank concede that this is a case where "it remains for the law to make the application according to its own notions of justice."

Upon an examination of the decided cases bearing upon the rule which should control a court in making an appropriation when the parties have made none, we confess to a sense of disappointment that the definite principles which should guide a court are so few and subject to so many qualifications. The artificial rules of the civil law have sometimes been applied by American and English courts, but not with such uniformity as to furnish a safe rule of decision. Story, Eq. Jurisprudence, §§ 459c and 459d; Blackmore v. Granbery, 98 Tenn. 277, 39 S. W. 229.

The learned counsel for the bank insists that the general rule laid down in many cases, and particularly in United States v. Kirkpatrick, 9 Wheat. 720, 737, 6 L. Ed. 199, is applicable here. That rule, as stated by Justice Story in the case referred to, is "that, when there are long and running accounts where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, that payments ought to be applied to extinguish the debt according to the priority of time, so that credits are to be deemed payments pro tanto of debts antecedently due." But this rule has many qualifications, and it remains to be seen whether it is applicable under the circumstances of this case. This account was, it is true, a running account. It may also be conceded that the relation of banker and depositor, in the absence of some special arrangement, is that of debtor and creditor, and that when money is deposited it becomes the money of the bank. National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Grissom v. Comm. Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669. So, too, checks drawn by a depositor are not drawn against any particular item of deposit theretofore made, but against the account generally, and between banker and depositor the general rule of appropriation of payments is ordinarily applicable.

In Clayton's Case, 1 Merivale, Ch. R. 572, 608, a question arose as to the liability of a deceased partner in a banking firm for a balance due to a depositor at his death. But it appeared that while the business was being carried on by the supervising partners the depositor continued to make deposits and draw checks. The question in the case was whether checks so drawn were to be treated as drawn against the more recent deposits or those made before the defendant's death. It was held that the money drawn out was presumably that first put in, and the debt for which the deceased partner was liable thus paid off, leaving the surviving partners alone liable for the balance due the plaintiff. Sir William Grant, among other things, said:

"Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day

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has or has not been discharged, by examining whether payments to the amount of the balance appear by the account to have been made? You are not to take the account backward and strike a balance at the head instead of the foot of it."

If this was a case between the bank and its depositor, and the rights of a surety for a limited period of the time covered by the account were not involved, it would be of easy disposition, for in such a case it would be plain that every deposit would be automatically applied to the credit side of the running account, thereby either enlarging the credit balance or diminishing the debtor balance. Every check would presumptively be paid by the first item of deposit, according to the principles of Clayton's Case. But this is not Claytons' Case, and is quite distinguishable from it, by reason of the fact that this is not a question as to the fund out of which a check is presumably paid, but one of the application of deposits, and the more important fact that the rights and equities of a surety for a limited period cannot be ignored when we come to the appropriation of payments. These practices of Lea's ran on for about four years. For the two years preceding the bond in suit he was bonded by a different surety company. Whether he was under bond prior to that time does not appear. If this doctrine of arbitrarily applying every deposit made by Connor & Brady to the oldest item of overdraft is to be followed, it would be difficult to see how any liability could be fastened upon any preceding surety for Lea, for the deposits made during the currency of the last bond were more than enough to discharge any overdraft during the currency of such prior bonds.

That the general rule of applying every unappropriated payment to the oldest item of debt is subject to qualification where the rights and equities of third persons are involved, is the teaching of such cases as U. S. v. January, 7 Cranch, 572, 3 L. Ed. 443; U. S. v. Eckford's Executors, 1 How. 250, 11 L. Ed. 120, and Jones v. United States, 7 How. 681, 12 L. Ed. 870. In U. S. v. January, 7 Cranch, 572, 3 L. Ed. 443, it appeared that the supervisor had kept one general account only against a collector who had served two successive terms under two bonds and with different sureties. At the end of his entire service there was a balance due on this general account of $16,181, for which suits were started on each of the bonds. By terminating the account with the period ending when the second bond was given, it appeared that only $6,483,59 was then due. The surety upon the first bond claimed that subsequent payments by the collector should be applied in discharge of this the oldest item in the account, and evidence was offered to show that the supervisor had promised to apply such subsequent payments in discharge of the original liability, and the circuit judge instructed the jury that whether an entry had been made showing an express application in accordance with this promise was immaterial; that, if he had promised to so apply subsequent payments, the application should be treated as made. The Supreme Court, after stating the general rule in reference to the application of payments, said:

"In this case a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is, where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be

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generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond, and, vice versa, justice between the different sureties can only be done by reference to the collctor's books, and the evidence which they contain may be supported by parol testimony, if any, in the possession of tne parties interested. The court is of opinion that the Circuit Court erred in the opinion given, and that it be reversed."

In U. S. v. Eckford's Executors, 1 How. 256, 11 L. Ed. 120, it appeared that the collector had served three terms under different bonds with different sureties. At the end of the first term a large balance was charged against him arising under the previous term, and at the commencement of the third term a balance was charged against him arising under the second term. Suit was brought upon the second bond, and a question arose as to whether payments made by the collector after his third term had begun should be applied to the discharge of his liability under his bond for the second term. By the system in which the account had been kept by the treasury department, all of the sureties except those for the last term would be discharged, inasmuch as the balance due at the end of one term was carried forward as a charge against the succeeding term, and payments subsequently made credited in discharge of the balance so brought forward. This method was defended as being sanctioned by the general rule which permits the debtor or the creditor to appropriate payments, and Clayton's Case, 1 Merivale, 606, was much relied upon. But the court said that it did not regard the doctrine applicable, but that the case was governed by U. S. v. January, 7 Cranch, 572, 3 L. Ed. 443, different sureties under different obligations being interested. Among other things, the court said:

"The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the right of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

"If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of a collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty — the duty which the sureties have undertaken that he shall faithfully

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perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is a fair result of the doctrine advanced. For if such appropriation is properly made by the treasury, in payment of a defalcation of the collector before the commencement of a current term, it must follow that the sureties for such term are responsible for the amount thus paid."

In Jones v. U. S., 7 How. 681, 688, 12 L. Ed. 870, it was held that, when a running account is kept at the post-office department between the United States and the postmaster, in which all postages are charged to him and credit given for all payments made, this mode of keeping the account amounted to an election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances. But the court, referring to the cases we have cited above, said:

"In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be that the responsibility of the separate set of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract," etc.

It is a mistake to say that these cases decided by the United States Supreme Court are to be regarded as resting upon any peculiar public policy, or that the principle is applicable only to the bonds given by governmental officials. The fundamental idea upon which the cases rest is that the rights and interests of independent sets of sureties for distinct periods of time would be unjustly sacrificed by applying payments arbitrarily to the oldest debt. That the cases all involved public officials and official bonds seems to afford no reason for limiting them to official bonds.

These judgments are undoubtedly in conflict with such cases as Gwynne v. Barnes, 7 Clark & F. Rep. H. L. Cas. 571; New Jersey v. Sooy, 59 N. J. Law, 539; Seymour v. Van Slyck, 8 Wend. 403; Stone v. Seymour, 15 Wend. 19; and Inhabitants of Sandwich v. Fish, 2 Gray, 298 — in all of which cases it seems to have been held that, when an official has held several successive terms under bonds with different sets of sureties, he may apply the revenue arising in one term to the payment of a balance due under a former term, and thus exonerate one set of suretise at the expense of another. Neither does the fact that the official receiving the payment was aware of the source of the money seem to have been regarded as material. In the New Jersey Case the injustice of this unqualified right of the debtor to apply a payment as he pleases, and without regard to its effect upon independent sets of securities, is, in part, put upon the ground that to hold otherwise would subject the public to loss by rascally officials whose honesty had been guaranteed by the complaining sureties.

State v. Smith, 26 Mo. 226, 72 Am. Dec. 204, has also been cited by counsel for the bank as an authority supporting the general right of an official debtor to supply his payments on any one of two or more liabilities. But the Missouri court ruled that, if the treasurer receiving the payment knew that the money arose from current collections, the state would not be permitted to so apply it as to do a wrong to the

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security upon the current bond. This would seem to be a qualification commending itself to the conscience of a court by reason of principles of common honesty. But in the case at bar neither the debtor nor the creditor has made any appropriation, and the deposits made were of the money of the debtor, and unaffected by any equitable charge in favor of either set of sureties, or the bank as the debtor. It was therefore quite within the general rule that Connor & Brady should have the right to apply their deposits to any debt due by them to the bank. But they made no appropriation whatever, and the right and duty of regarding the rights of successive sets of sureties, when the court is called upon to make an appropriation, is conceded in the cases which maintain most strongly the debtor's right to apply his payments without regard to the source of the money or the rights of sureties. Thus, in Seymour v. Van Slyck, 8 Wend. 404, it was held that, where sureties are bound for the payment over of moneys by their principals, and a general account has been kept with the principal in which all debts and credits are entered, the court should not apply the payments to the oldest item of debt, "if in the progress of the account there be a change of sureties," and that in such circumstances, there being no appropriation by either party, "each set of sureties is entitled to the benefit of the moneys received during the period of their respective suretyship." This rule was approved on appeal in Stone v. Seymour, 15 Wend. 19, 33, after an elaborate consideration of the principles upon which the courts should proceed in applying payments. In State v. Sooy, 39 N. J. Law, 539, 546, it was also recognized that, when the court is called upon to appropriate payments, the equities of third persons should be regarded. How these equities should be regarded is, we think, plainly indicated by the opinions of the Supreme Court in U. S. v. January, United States v. Eckford's Executors, and Jones v. United States, heretofore cited.

Having regard to the terms of the bond, we conclude that the surety company is only liable for the difference between the deposits and checks of Connor & Brady during the running of the bond. If the amount they deposited during that period exceeded the amount they drew out, no loss resulted from the fraudulent practices of Lea during the currency of the bond. The account being thus stated, the court below did not err in directing a verdict for the surety company.

Judgment affirmed.

ALLEN-WEST COMMISSION CO. v. GRUMBLES et ux.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1904.)

No. 1,979.

1. GIFT — INTENTION OF DONOR — RENUNCIATION OF DOMINION — DELIVERY.

A fixed intention by the donor to irrevocably divest himself of title, dominion, and control of the subject of the gift at the very time he attempts to make it, the actual accomplishment of that purpose, and the delivery of the subject of the gift, are indispensable conditions of a valid donation.

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2. SAME — CORPORATE STOCK — DELIVERY OF CERTIFICATES.

The delivery of the subject of the gift must be made in the most effectual mode to command dominion over it.

The delivery of certificates of shares of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of stock in a corporation, because the possession of the certificates commands the dominion of the stock in the most effectual way.

3. SAME — DELIVERY OF WRITTEN ASSIGNMENT — EFFECT.

The delivery of a written assignment of stock in a corporation is ineffectual to make a valid gift, while the donor retains the certificates.

4 SAME — EVIDENCE — CONCLUSIONS.

G., the owner of 110 shares of stock in a corporation, delivered a written assignment of his interest in its business to his wife in May, 1899, when he was free from debt. He retained the certificates of the shares, voted them, and received dividends upon them, in money and in stock, until February, 1903, when he had become heavily involved in debt. He then transferred the stock to his wife by an indorsement and surrender of the certificates to the corporation.

Held, G. had no intention in May, 1899, to then divest himself of the dominion and control of the stock, a delivery of the certificates of the stock was indispensable to accomplish such a purpose, and the delivery of the written assignment, while the donor retained and used the certificates to control the stock, was insufficient to complete a valid gift.

5. GARNISHMENT — ORDER ON GARNISHEE TO DELIVER INTO COURT.

Under the statutes of Arkansas, where the garnishee appears by affidavit, and does not appear in person, or submit to an examination, or make default, the plaintiff is not entitled to an order that the garnishee shall deliver the property of the defendant in his possession, or that he shall pay the money which he owes the defendant into court. His remedy is by compelling an examination under oath, or by an action under section 360, Sand. & H. Dig.

(Syllabus by the Court.)

In error to the Circuit Court of the United States for the Western District of Arkansas.

The Allen-West Commission Company, a corporation, brought an action against J H. Grumbles to enforce his liability under the statutes of the State of Arkansas for the debt of a bank of which Grumbles was president, and recovered a judgment of $21,133.35 against him. No attack is made upon this judgment. The indebtedness which it evidences had arisen in the years 1902 and 1903. On March 30, 1903, the plaintiff issued an attachment in its action against Grumbles, and garnisheed Mary E. Grumbles, his wife. The ground of the attachment and garnishment was that Grumbles had disposed of his property with intent to delay and defraud his creditors. The defendant in the action denied this averment. The issue thus made was tried by the court, which made a special finding of facts, dissolved the attachment, and discharged the garnishee, on the ground that there was no proof that Grumbles had disposed of any of his property with intent to delay or defraud his creditors. The writ of error challenges the judgment of dissolution of the attachment and of discharge of the garnishee, and counsel for the plaintiff in error rely upon the following facts to sustain their averment that this judgment was erroneous:

In May, 1899, the Mann-Tankersley Drug Company was a corporation of the State of Arkansas, engaged in the business of dealing in drugs at wholesale and retail at Pine Bluff, in that State, and the defendant James H. Grumbles was free

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from debt, and was the owner of 110 shares of stock in this corporation, of the value of $3,700, which was evidenced by a certificate of his ownership of these shares, which was in his possession. On May 14, 1899, he made and delivered to his wife an instrument in these words:

"Know all men by these presents, that I, J. H. Grumbles, of Nashville, Arkansas, for and in consideration of the sum of five dollars ($5.00) to me in hand paid by Mary Grumbles, and for the further consideration of love and affection that I have for my beloved wife, Mary Grumbles, and for the further purpose of making a division of my property with my wife, the said Mary Grumbles, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and deliver unto the said Mary Grumbles all my right, title, and interest in the Mann-Tankersley Drug Company business, a corporation organized and existing under the laws of the State of Arkansas, and doing business in the city of Pine Bluff, Arkansas, under the corporate name of the Mann-Tankersley Drug Co., said business being a wholesale and retail drug business, and my interest in said business or corporation being of the value of about thirty-seven hundred dollars. To have and to hold the same unto the said Mary Grumbles, and her heirs and assigns, forever. And I, the said J. H. Grumbles, do hereby covenant to warrant and defend the title to said bargained interest in the said Mann-Tankersley Drug Co. business unto the said Mary Grumbles, and unto her heirs and assigns, forever, with all privileges and rights enjoyed by me in said business.

"Witness my hand and seal this 14th day of May, 1899.

"J. H. GRUMBLES."

He kept the certificate for the 110 shares of stock in his possession, and voted and received dividends in money upon it until February, 1903. Prior to this time he had incurred his liability to the plaintiff and had become insolvent. On February 7, 1903, the surplus earnings of the 110 shares of stock entitled it to a dividend of 144 additional shares of stock, and these additional shares were issued to and received by Mr. Grumbles. On February 25, 1903, Grumbles indorsed and surrendered the certificates for the entire 254 shares, and caused new certificates therefor to be issued to his wife, Mary E. Grumbles. On March 14, 1903, Mary E. Grumbles sold this stock to innocent purchasers for $6,032.50. No notice of the May assignment to Mrs. Grumbles was given to the Mann-Tankersley Company until after January, 1903. The stock stood in the name of James H. Grumbles on the books of the corporation until February 25, 1903. The transfers of it subsequent to February 24, 1903, were entered on the books of the corporation, and the certificate thereof was filed with the clerk of Jefferson county, in the State of Arkansas, before the attachment herein was made.

W. B. Smith (J. M. Moore, on the brief), for plaintiff in error.

W. T. Wooldridge (F. G. Bridges, W. P. Feazel, and J. W. Bishop, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The crucial question in this case is: Did the delivery in May, 1899, by the defendant Grumbles to his wife, of the formal bill of sale of his interest in the Mann-Tankersley Drug Company business, constitute a completed gift of his 110 shares of stock in the corporation, in view of the fact that Grumbles retained the certificate of the shares, kept the stock in his own name upon the books of the company, voted and received dividends upon it until after he had become hopelessly in-

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solvent and then transferred it to his wife by an indorsement and surrender of the certificate without the use of the assignment of 1899, of which no notice had been given to the corporation? If this question should be answered in the affirmative, the transfer by Grumbles to his wife in February, 1903, was no evidence of an intent on his part to hinder or defraud his creditors, because the stock had not been his since May, 1899. If, on the other hand, the question should be answered in the negative, that transfer was conclusively fraudulent as against creditors, because it was a voluntary conveyance, without valuable consideration, after the donor had become heavily indebted to his various creditors.

While the assignment recites a consideration of five dollars and of love and affection, counsel for Mr. and Mrs. Grumbles do not claim, nor has the court below found, that this instrument evidences any sale for value of the 110 shares of stock, or that five dollars, or any other sum, was ever paid as a part of the consideration for the execution or delivery of that assignment. Moreover, if that question were presented here for our consideration, the written instrument and the facts disclosed by the findings of the court would lead our minds to the conclusion which counsel for all parties to this litigation have tacitly adopted. At the time the assignment was made the stock was worth about $3,700. It is not a rational inference that property of this value was sold for five dollars. Again, the entire assignment must be read and construed as a whole. When thus read, it declares that it was made for five dollars, for love and affection, and for the purpose of making a division of the property of the grantor. The natural inference from these recitals is that it was a voluntary assignment without valuable consideration, and that the reference to the five dollars is the usual form of recital which is frequently inserted in instruments of this character, when no valuable consideration is actually paid. Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 94, 3 Atl. 286, 57 Am. Rep. 304.

We come, therefore, to the only question to which counsel have addressed their arguments — to the question whether or not, under the law applicable thereto, the facts of this case will sustain the conclusion that the defendant Grumbles made a valid gift of his stock in the Mann-Tankersley corporation to his wife on May 14, 1899, when he delivered to her the assignment in question. In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. Jones v. Falls, (Mo. App.) 73 S. W. 903. Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in præsenti at the very time he undertakes to make the gift (Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Bickford v. Mattocks, 50 Atl. 894, 95 Me. 547; In re Estate of Soulard, 141 Mo. 642, 657, 659, 43 S. W. 617; Newman v. Bost, [N. C.] 29 S. E. 848, 850); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no farther act of dominion or control over it (Basket v. Hassell, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; Cook v. Lum, 55 N. J. Law, 373, 376, 26 Atl. 803); and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one "so far as the subject is capable of it. It must be

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secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject." 2 Kent's Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift. Richards v. Delbridge, L. R. 18 Eq. 11; Knight v. Tripp, 121 Cal. 674, 679, 54 Pac. 267; Miller v. Jeffress, 4 Grat. 472, 480; Matthews v. Hoagland, 48 N. J. Eq. 455, 487, 21 Atl. 1054; Wadd v. Hazelton, 137 N. Y. 215, 219, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; Matter of Crawford et al., 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Liebe v. Battman, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705; Williams v. Chamberlain, 165 Ill. 210, 218, 46 N. E. 250; Gartside v. Pahlman, 45 Mo. App. 160.

Stock in a corporation is a chose in action, and the certificates are the evidence of its existence and of its amount. They bear some analogy to the title deeds of real estate (Com. v. Crompton, 137 Pa. 138, 20 Atl. 417); but they are far more commanding and useful in the handling of the stock they represent than are title deeds in the handling of the land they describe. Because the stock in a corporations is transferred by means of the delivery, or by means of the indorsement and delivery of the certificates, the latter by a sort of mental substitution come to be thought of and dealt in as the stock itself. The stock of corporations is ordinarily transferred on the books of the company only by the surrender of the certificates and the issue of new ones to the grantees. Hence assignments, bills of sale, and conveyances, without the accompanying possession and delivery of the certificates, are much less effectual or available to command the title, the dominion, or the control of the stock than the mere possession of the certificates themselves. The indorsement and delivery, or the mere delivery, of the certificates, without entry of the transfer upon the books of the corporation, is generally held to constitute a valid sale of the stock between vendor and vendee, or a completed gift of it between donor and donee. Such an indorsement and delivery of the certificates generally enables the holder to enforce a transfer of the title to the stock upon the books of the corporation. Basket v. Hassell, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; Com. v. Crompton, 137 Pa. 138, 20 Atl. 417; Hopkins v. Manchester, (R. I.) 19 Atl. 243; Walsh v. Sexton, 55 Barb. 251; Leyson v. Davis, (Mont.) 42 Pac. 775, 793. 31 L. R. A. 429; First National Bank of Richmond v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Stone v. Hackett, 12 Gray, 227, 231; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663.

If, by an indorsement and delivery of the certificates of stock with the donative intention, the defendant had completed his gift to his wife, a court of equity would have compelled the corporation to transfer the shares upon its books. The difficulty with this case is that the certificates of shares were not delivered, no intention on the part of the donor to immediately renounce dominion and control of the stock was formed, and no executed gift was made. This was the

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situation: Grumbles made the assignment of his interest in the drug business to his wife on May 14, 1899. His interest was 110 shares in the stock of the corporation which was operating that business, and he held the certificate of his ownership of these shares while the title to them stood in his name upon the books of the company. The holding of the certificate of shares of stock is the customary and most effectual means of using the rights and privileges which the stock confers. The indorsement and delivery of this certificate is the usual and most efficient way of transferring the stock. Three things were essential to a valid gift of this stock by the defendant: (1) A fixed purpose, at the time he made the assignment to his wife, to then divest himself of all title, dominion, and control of the stock, and to vest these irrevocably to his wife; (2) the immediate and perfected execution of this purpose; and (3) the delivery to his wife of the most effectual means of using and reducing the stock to possession. The indorsement and delivery of the certificate to his wife would have proved all these prerequisites. Such an indorsement and delivery was the true, customary, and most effectual way to evidence the intention to transfer the title, the control, and the dominion of the stock, and to accomplish that purpose. The fact that the defendant did not pursue this plain method is in itself cogent proof that he intended to accomplish no such purpose. He made no indorsement or delivery of the certificate. He made no assignment of the stock by name or description, but simply delivered to his wife an assignment of his interest in the business of the corporation, which she never used to obtain control or dominion of the stock, but which she quietly tucked away and never brought to light until creditors were pressing her husband for the payment of his debts, nearly four years after she received the assignment. Neither Grumbles nor his wife gave notice to the corporation of this nominal conveyance until after his bank had failed, in February, 1903, and his creditors were clamoring for payment. He received annual dividends upon the stock from May, 1899, until February, 1903. In the latter month a stock dividend of 144 additional shares accrued upon his stock, and he took the additional shares in his own name, and finally, after he had become insolvent, he transferred all these shares to his wife in February, 1903, not by the use of the dormant assignment of 1899, but by the usual and most effectual method — by an indorsement and delivery of the certificates. These are all the facts in this case from which the intention of the defendant when he made the assignment of 1899 may be deduced. He knew how to divest himself of title, or control, and of dominion of the stock; for he did so by indorsement and delivery of the certificates in February, 1903. If he ever intended to do so before that time, the evidence of that intention in this record is imperceptible. A man is presumed to intend the natural and probable consequences of his acts. The consequences of the acts of Grumbles here were that, although he delivered to his wife the dormant assignment, he retained the apparent title, the actual control and dominion of the stock, and the enjoyment of every right and privilege it commanded, for nearly four years after he parted with the written assignment, and until the pressing claims of creditors admonished him that his stock was liable to be applied to the payment of his debts, and then for the first time he invoked its aid. The deduction from these facts is irresistible. It is that the defendant Grumbles intended in 1899 exactly what he did in that and the subse-

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quent years. He intended to retain the appearance of title, the actual dominion, control, and beneficial use of his stock, until the claims of creditors or his own decease compelled him to relinquish them. That intention is fatal to the existence of the gift he asserts. Gallagher v. Donahy, (Kan.) 69 Pac. 330.

But, even if Grumbles had intended to renounce dominion and control of the stock, he could not have accomplished that purpose by the mere delivery of this assignment, because it had not that effect, and because he failed to deliver to his wife the most effectual and appropriate means of reducing the stock to possession and use — the certificate of the shares. The assignment was by its terms a conveyance of his interest in the drug business and a covenant to defend the title to that interest, together with all the rights and privileges enjoyed by him in the premises. It did not transfer the beneficial use of the stock, the privilege of voting it and of drawing dividends upon it, because these rights and privileges were transferable only by a transfer of the title of the stock upon the books of the corporation, upon the surrender of the certificate. The possession of the certificate was the sine qua non of that transfer, and the most extensive effect that the assignment could have had was to give Mrs. Grumbles the covenant or promise of her husband that he would deliver the certificate, so that she could transfer the stock and secure its beneficial use. But a gift of a covenant or promise is void, because it is unexecuted, and every valid gift must be executed and complete. Harris v. Clark, 3 N. Y. 93, 112, 51 Am. Dec. 352.

It is said that the assignment gave the donee the right to compel the defendant to surrender the certificate and transfer the stock. But the fact is that Grumbles' possession of the certificate left him the unrestricted power, by the surrender of the certificate and the sale of the stock to a bona fide purchaser, to deprive his wife of every right under the assignment, except a right of action for damages for conversion of the stock. A gift of a right of action for conversion of stock is not a gift of stock. The present transfer of dominion and control of the stock, so that the donor cannot deprive the donee of it, is essential to a valid gift of stock. The gift of a right of action for conversion of it, or of the possibility of compelling a delivery or transfer of it by a suit in equity, is not sufficient, when the donor retains the unrestrained power to place the title, possession, and control of the stock beyond the reach of the donee at any time, and thereby to defeat such a suit in equity. Again, if the assignment had been in terms a conveyance of the stock, it would not have sustained the defendant's claim of a gift, because he failed to deliver the certificate of the shares. The certificate was the usual and most effective means of reducing the stock to possession and use. It was present. It was capable of manual delivery. In this state of the case its delivery was indispensable to a valid gift, and a separate assignment of the stock without a delivery of this certificate was ineffective.

Counsel for the defendant argue that a complete gift may be made by a written assignment or conveyance, without a delivery of the subject of the gift, and cite authorities to support this position. It is true that in cases where manual delivery of the subject of the gift, or of the evidences which command it, is impracticable or impossible, and in cases in which a written conveyance is the most effectual mode of

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divesting the donor of dominion and control of the thing, such a conveyance is sufficient. But it is equally true that a written assignment is utterly inadequate, where the delivery of the subject of the gift or the delivery of the evidences of it is practicable, and the latter is the more ready and efficient way of commanding the dominion and control of the subject of the gift. Thus in Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313, a gift by means of a written assignment of 20 out of 120 shares of stock that were evidenced by a single certificate was sustained; in Bond v. Bunting, 78 Pa. 210, a gift by an assignment of all over $5,600 that should be realized from an insurance policy was maintained; and in Banks' Adm'r v. Marksberry, 3 Litt. 276, a gift by an assignment of the future income of a slave was held valid — without a delivery of the subjects of the gift. But the reason for these decisions is that the delivery of these subjects was impracticable, because others than the donee had rights and interests in them which entitled them to their possession. Again, a gift by means of an assignment made by the owners of a fund that had been collected from an insurance policy and was in the hands of executors of an estate was a good gift without a delivery of the money, because it was not in the possession of the donors, and hence was incapable of manual delivery by them. Matson v. Abbey, 70 Hun, 475, 24 N. Y. Supp. 284. So in Tarbox v. Grant, 56 N. J. Eq. 204, 39 Atl. 378, 380, a trust deed to a third party, trustee, for the benefit of the children of the grantor, of his equitable interest in the property, was sustained as a creation of a trust; and in Walker v. Crews, 73 Ala. 412, a deed of promissory notes which by its terms reserved the right in the donor to retain and collect the notes, and to invest and reinvest their proceeds for the donee, was sustained as a gift and a declaration of trust, without a delivery of the notes. But an instrument like the assignment at bar, which was executed as an absolute conveyance, and which contains no declaration of trust, cannot be sustained as the creation or the declaration of a trust for the benefit of the donee. Wadd v. Hazelton, 137 N. Y. 215, 219, 220, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; Young v. Young, 80 N. Y. 437, 36 Am. Rep. 634; In re Estate of Soulard, 141 Mo. 659, 43 S. W. 617; Richards v. Delbridge, L. R. 18 Eq. 11, 14, 15, overruling Morgan v. Malleson, L. R. 10 Eq. 475, and Richardson v. Richardson, L. R. 3 Eq. 686; Milroy v. Lord, 4 De Gex, Fisher & Jones, 264, 274, in which Lord Justice Turner well said: "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust." Again, a recorded deed of real estate, or a recorded brand of cattle, in the name of the donee, without a delivery of the subjects of the gifts, may well be sustained, because the donor, by placing the record title in the donee, places the property irrevocably beyond his dominion or control. Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Love v. Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; Adams v. Adams, 21 Wall. 185, 191, 22 L. Ed. 504; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757. But "if an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it, and receive new scrip in the name of A., has he by this change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any

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delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not." Matter of Crawford et al., 113 N. Y. 560, 567, 21 N. E. 692, 5 L. R. A. 71. The reason for the difference between a gift executed by a recorded deed of real estate and one unexecuted by a failure to deliver certificates of stock is that the record title to real estate controls and draws to it the possession and dominion of the property and of its title deeds, while, on the other hand, the possession of certificates of shares of stock commands the dominion and control and the record title of the stock.

The clew to the labyrinth of decisions upon this subject is the reason of the rule which makes delivery of the thing, or of the most available means of commanding its dominion and control, indispensable to the validity of a gift. That reason is the imperative necessity of requiring the renunciation by the donor, not only of all possession, dominion, and control of the thing, but of all appearance thereof, lest by such an appearance he should lead creditors, purchasers, and others to believe, and to credit him in the belief, that he is the owner of that which in reality belongs to his donee, and lest by fraud and perjury gifts be proved which never in fact existed. Yancey v. Field, 85 Va. 756, 8 S. E. 721. This reason of the rule conditions the nature of the delivery it requires, and demands that that delivery shall, in every case, whether evidenced by written assignment or oral statement, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift, and thus of the appearance of title, whether that thing be the subject itself, a symbol of the subject, a written assignment of it, or the patent evidences of it whose delivery constitute the most effectual mode of transferring the dominion over it. In the case at bar that thing was the certificate of the shares. The delivery of that certificate was the most effectual mode of divesting the defendant of his title, of his dominion, and of his control of the stock and of the appearance thereof. It was the most efficient way of avoiding the mischief which the rule of delivery was established to prevent, while, on the other hand, the delivery of the dormant and unused assignment, unaccompanied with the delivery of the certificate, was the least effective for these purposes, and the most efficient way of promoting the mischief at which the rule was leveled. The failure to deliver the certificate was fatal to the alleged gift, because without its delivery the dormant assignment did not irrevocably deprive the defendant of the dominion and control of the stock, but left them all perfectly amenable to his will.

This conclusion is not without support in the decisions of the courts. In Basket v. Hassell, 17 U. S. 602, 614, 2 Sup. Ct. 415, 27 L. Ed. 500, a case in which the Supreme Court held that the delivery of a certificate of deposit to an intended donee, with an indorsement upon it to pay it to the latter's order, but not until the donor's death, was not a valid gift, because it did not deprive the donor of the present power of dominion and control. That court declared, as a result of a review of the authorities relative to the delivery of a chose in action, that the rule was —

"That the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably."

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In Knight v. Tripp, 121 Cal. 674, 676, 679, 54 Pac. 267, the Supreme Court of California held a formal written assignment delivered to the donee insufficient to sustain a claim of a gift, and said:

"There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor; but by itself it no more establishes the gift than would the same words orally delivered by the donor. . . . It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

In Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 96, 3 Atl. 286, 57 Am. Rep. 304, the subject of the intended gift was stock in a corporation, the certificate for which remained uncut in the stock book of the company. Thereupon the owner made a written assignment of the stock to his daughter, which recited that it was for value, although no valuable consideration was actually paid, and delivered it to the attorney for the corporation, with instructions to transfer the stock to the daughter on the books of the company as soon as the attorney obtained the consent of the mortgagee of the corporation. The court held that the intended gift was incomplete and void, because the owner had not irrevocably parted with his control and dominion of the stock.

In Matthews v. Hoagland, 48 N. J. Eq. 455, 485, 490, 21 Atl. 1054, 1065, 1067, the court refused to sustain an attempted gift of stock, evidenced by the delivery of the indorsed certificates, without any accompanying assignment, on the ground that —

"The failure of the record owner of the stock to clothe the donee with the means of at once acquiring the benefits of the stock leaves unperformed an act which prevents the gift from taking effect in præsenti, which is vital to a gift inter vivos."

In Snyder v. Snyder, (Mich.) 92 N. W. 353, 354, an attempt was made to sustain a gift of a mortgage by means of a written assignment made by the donor to her son in 1888 and recorded in 1893. But it was defeated, because until she died in 1899 the donor enjoyed the beneficial use of the mortgage, not by virtue of any of the terms of the assignment, but by virtue of an oral agreement aliunde to that effect.

In Snook v. Sullivan, 53 App. Div. 602, 607, 66 N. Y. Supp. 24, affirmed in 167 N. Y. 536, 60 N. E. 1120, an alleged gift, evidenced by an assignment and delivery of the certificate of the stock, was defeated, where the donee, after the assignment, drew the dividends, as he had done before, as attorney in fact of the donor, and presumably applied them to her use.

And in Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 Atl. 637, 642, 643, the Court of Appeals of Maryland held that there was no completed gift of stock by a husband to his wife, although he placed the title of thirty shares of it in her name upon the books of the corporation and issued a certificate therefor in her name, which he subsequently surrendered to the corporation, and although he caused 140 shares of the stock to be transferred to himself and his wife, and caused a certificate therefor to be issued in their names, because during all this time he actually had the dominion and control of the stock by virtue of

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his possession of the certificates. The court declared in words which are peculiarly applicable to the facts of the case before us:

"He, and he alone, voted the 140 shares, and his final assertion of control over the certificate representing those shares was manifested when he transferred it in blank and delivered it to Sperry, Jones & Co. His dealing with the stock, and her acquiescence in what he did, and the fact that he could, and did, as the actual owner of all the property which the company possessed, exercise complete control over those 140 shares, show that he had never surrendered dominion over them, or put it out of his power to revoke the gift of them."

Other authorities almost without limit could be cited in support of the position that this alleged gift was incomplete and invalid, because the defendant failed to renounce dominion and control of its subject; but perhaps our views have already been sufficiently illustrated, and farther discussion will be omitted.

The dormant assignment of May 14, 1899, did not effect a valid gift of the stock of the defendant Grumbles, because he then had no intention to immediately and irrevocably divest himself of the control and dominion of the stock, because he retained the possession of the certificate, and all the rights and privileges which the stock conferred, until February, 1903, and because he failed until that time to irrevocably divest himself of the title, dominion, and control of the stock. As this stock remained his property until many months after his indebtedness to the plaintiff accrued, his voluntary transfer of it to his wife in 1903 was in the eyes of the law a fraud upon the plaintiff, and the judgment of the Circuit Court that the attachment be dissolved, and the garnishee, Mary E. Grumbles, be discharged, cannot be sustained.

The statutes of Arkansas provide that each garnishee summoned shall appear in person or by his affidavit disclosing his indebtedness to the defendant and the property of the defendant in his possession (Sand. & H. Dig. § 357); that he may be required to appear in person and to submit to an examination under oath; that if, when he appears in person and is examined under oath, and when he makes default by failing to appear and the court hears proofs, the court finds that he has in his possession property of the defendant or that he is indebted to the defendant, it may order the garnishee to deliver the property or to pay the amount of the debt into the court. Sections 358, 359, Sand. & H. Dig. The counsel for the plaintiff ask this court to direct the court below to order the garnishee, Mrs. Grumbles, to pay the proceeds of the sale of the defendant's stock which she has received into the Circuit Court upon the reversal of the judgment dissolving the attachment and discharging the garnishee. But the garnishee, Mrs. Grumbles, has not as yet come within the terms of the provisions of the statutes which have been cited. She has not appeared in person or been examined under oath. She has not made default in appearance. She appeared by her affidavit, in which she denied that she was in possession of any of the property of the defendant, and denied that she was indebted to him. In this state of the case the court below may undobtedly compel her to appear in person and to submit to an examination under oath, and then, if the evidence sustains the charge of the plaintiff, it may order her to pay the proceeds of the sale of the stock into court. But, in the absence of any proceeding of this character and of any appearance of Mrs. Grumbles in person, the remedy

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of the plaintiff is to proceed against her by an action under section 360, Sand. & H. Dig., which provides that, when the garnishee fails to make a disclosure satisfactory to the plaintiff, he may proceed in an action against her by filing a complaint and causing a summons to be issued upon it. The time has not yet arrived under these statutes when the plaintiff is entitled to an order on the garnishee to pay the moneys she obtained from the sale of the stock into court.

The judgment of the court below, that the attachment be dissolved, and that the garnishee, Mrs. Mary E. Grumbles, be discharged, must be reversed, and the case must be remanded to the Circuit Court, with instructions to enter a judgment that the attachment is sustained, and to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

HAGAN v. CONTINENTAL NAT. BANK.

81 S. W. 171.

(Supreme Court of Missouri. May 11, 1904.)

PLEDGES — PLEDGE OF CORPORATE STOCK — PUBLIC SALE — FAIRNESS OF SALE — EVIDENCE — PRIVATE SALE — SUIT FOR REDEMPTION — ESTOPPEL — VALUE OF STOCK — EVIDENCE — SUFFICIENCY — EQUITY JURISDICTION.

1. In a suit by the pledgor of corporate stock against the pledgee for redemption, plaintiff alleged that the shares pledged constituted a majority of the capital stock, and that the pledgee had by an unfair sale bought the stock in his own name, caused it to be transferred on the books of the corporation, and that such transfers were so made that defendant still controlled and could produce the stock, but defendant denied that it had caused any transfer. Held, that on the allegations of the bill and answer there was a case for equity.

2. The failure of a pledgor who has pledged property as security for a debt to pay the debt at maturity does not vest the property in the pledgee.

3. In order to secure a debt of $20,000, the debtor pledged corporate stock with his creditor, a bank, under an agreement which authorized the bank to sell the stock, on nonpayment of the debt, at public or private sale, with or without notice to the pledgor. The debt was not paid, and the stock was sold at an exchange to which no one not a member of the exchange could be admitted, and the one who sold the stock on the exchange in offering it for sale did not state to whom it was pledged, or by what authority he was selling it. No public notice of the sale was given in any manner, and the one who sold the stock on the exchange did not inform any one there that the sale would take place until the actual offer was made, and the stock was bid in by the bank for $5,000. Held, in a suit by the pledgor for redemption, that the sale was properly set aside.

4. A court of equity, having acquired jurisdiction, will proceed to do complete justice between the parties, and determine all the matters in issue.

5. A pledgee of corporate stock, authorized by the pledge agreement to sell it at private sale, did so, and caused the stock to be transferred on the corporation books, and new stock to be issued to the purchaser, and received as consideration some cash and the purchaser's note. Subsequently the pledgor of the stock sued for redemption on the ground that the sale had been unfair and fraudulent. Held, that the pledgee was estopped to claim that the price for which it sold the stock was purely

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speculative, and that the proper measure of damages was the difference between the market value and the balance due on the debt, to secure which the stock was pledged.

6. In a suit by a pledgor of corporate stock to redeem the same after a sale by the pledgee, evidence considered, and held to warrant the trial court's finding as to the value of the stock.

7. In a suit by a pledgor of corporate stock against the pledgee for a redemption and accounting, defendant was not entitled to have a jury to estimate the value of the stock.

8. A pledgor of corporate stock pledged to secure a debt sued the pledgee for redemption, alleging that the sale by the pledgee, at which it had itself purchased, was unfair and fraudulent, and on the hearing it appeared that the pledgee had sold the stock to an innocent purchaser, and that the fact was unknown to plaintiff when the suit was commenced. Held, that the court was authorized to render a decree charging defendant with the amount for which it had sold the stock, and deducting therefrom the amount of plaintiff's debt, without any amendment of the plaintiff's pleading.

9. Where a pledgee of corporate stock pledged to secure a debt, after selling the same, denied the pledgor's right to redeem, and claimed that the bailment had been extinguished, the pledgor might maintain suit for redemption without first tendering the whole amount of the debt.

Marshall, Burgess, and Fox, JJ., dissenting.

In banc. Appeal from St. Louis Circuit Court; S. P. Spencer, Judge.

Suit by Oliver L. Hagan against the Continental National Bank. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Seneca N. Taylor, Dickson, Smith & Boyle, and Priest & Lehmann, for appellant.

Robert L. McLaren and Hiram J. Grover, for respondent.

GANTT, J. In 1891 the Hagan Opera House Company was organized as a corporation under the laws of this State with a capital stock of 1,000 shares of the par value of $100 each, and aggregating $100,000. On this capital stock $83,000 was at once paid in. A long-term lease was secured by the corporation on a lot of ground at the corner of Tenth and Pine streets, in St. Louis, having a front of 125 feet on Pine street. A building was constructed, in which there were stores and offices on the ground floor fronts, and also on the upper floors, and a large theatre in the central back portion. This building and the equipment of the theater cost $156,000. After the completion of the building, the capital stock of the corporation was increased to 1,500 shares; that is to say, to $150,000. Of these 1,500 shares Hagan held 770 shares, a clear majority, which gave him the control of the corporation and all of its financial affairs. As is usual with the holder of the majority of shares in corporations, Hagan elected a board of directors, which latter elected him president, with a salary. The corporation made a profit from its rents and from its theatrical department, conducted along the line of the "legitimate," prior to the theatrical season of 1896-1897. The "continuous show" craze had reached St. Louis, and had had a profitable run. Some of the stockholders in the Hagan Opera House thought the "legitimate" show too slow; that it did not earn money fast enough; and, after bookings had been made on old lines for the season, these stockholders insisted upon

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their abandonment, and upon a resort to the "continuous." Hagan and Havlin unwillingly yielded to the pressure, and the character of the entertainment offered to the public was changed December, 1896. It turned out, however, that the "continuous" show business was on the wane, at least in first-class theaters, and the corporation, instead of making its profits and dividends, made a loss on the season of $2,700, and there was a temporary cessation of income to the stockholders. Hagan had been a customer of the Continental National Bank for some years prior to this. At various times the bank had loaned him money, as much as $40,000 at one time, and as security for the loan Hagan had pledged to the bank his 770 shares of stock of the Hagan Opera House Company, accompanied by a collateral contract in which there was embodied a "power" as follows: "Now, in the event of nonpayment of said note when due, or of nonpayment at maturity of any other note or claim held by said bank against the maker of the above note, * * * the said Continental Bank, by its officers or agents, is hereby invested with full power and authority to use, transfer, hypothecate, sell, and convey the said property, or any part thereof, at public or private sale, with or without notice to me or us, at such place and on such terms as it may deem best, and to deliver the property sold, and to transfer on the books of the company the stocks named to the purchaser or purchasers of the same. The bank shall also have power at such sale to bid for and purchase said property, or any part thereof, in its own name and for its own use and benefit. * * *" Some time previous to 1897 Hagan had also delivered to the bank some second deeds of trust on real property, and some shares of stock in an underground service company. Prior to the 1st of January, 1897, Hagan had reduced his indebtedness from $40,000 to a sum exceeding a little over $23,000. This indebtedness was represented by a single note, executed by Hagan, for $15,340, and the balance of the $23,000 was represented by two notes, made by Hagan, indorsed by Havlin, approximating in the aggregate $6,500, and by another note for $1,500. The interest was all paid up. As the season progressed under the new form of entertainment, the bank appeared to be uneasy about its security, and in March, 1897, began to press Hagan to reduce his indebtedness. It did not demand of him the payment of all of it. On March 4, 1897, the bank addressed a letter to Hagan, renewing his note for $15,340, which matured that day, but stated to him that the renewal was made upon the express condition that another note of Hagan's for $1,500, indorsed by Havlin, which would become due on March 10, 1897, should be paid at maturity, and that the bank would require the Havlin note to be paid when due. On March 17, 1897, the bank wrote another letter to Hagan, calling his attention to an overdraft and to the past-due Havlin note of $1,500, and telling him he must pay both of them. On March 29th, the bank sent another letter to Hagan, calling his attention again to the overdraft and to the fact that the $1,500 Havlin note still remained unpaid. This letter contained the first threat made by the bank, for they notified him that unless this matter — the overdraft and the Havlin $1,500 note — were attended to immediately, the bank would put Hagan's affairs into a broker's hands, as Baker said, "and see if I cannot get this matter attended to, as we are unwilling to carry overdrafts for any one." The bank also notified him, if the Havlin note was not attended to, they would take steps to collect it by law.

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All those letters are found in the record. On May 12, 1897, the bank wrote to Hagan that it had received an intimation that he had sold his property — presumably the stock — and asking information on that subject. The letter proceeded to state, "We are still holding a $1,500 note of yours past due, indorsed by Havlin, which I have notified your attorney must have attention." The reference to Hagan's rumored disposition of his property seems to have arisen out of some hint received by the bank of Jannopoulo's offer of 50,000 to Hagan for his stock.

The first demand made by the bank for the payment of the $15,340, for which the 770 shares of stock were pledged, was made June 10, 1897, at which time the bank formally demanded payment, not only of this large note, but of a $1,500 note and a $5,000 and a $1,500 note indorsed by Havlin. Pressed to pay his indebtedness, Hagan employed Bauer, a broker, to see what could be done with his stock in St. Louis, which resulted in Jonnopoulo's offering $50,000 for Hagan's 770 shares, providing the bank would take his notes for the amount of Hagan's indebtedness, and take the stock as collateral, and he would give Hagan his notes for the remainder of the $50,000, and secure him by a second lien on the stock. This proposition came to the knowledge of the bank prior to June 10, 1897. It seems the bank was willing to make this arrangement, but Hagan declined it because it brought him no cash, and because he would thus lose all his voice in the control of the theater while his money was invested in it. Mr. Baker, the president, says that he personally notifiel Hagan that his stock would be sold at public sale. The answer of the bank in this case alleges that this stock was sold at public sale, and it is clear that the bank intended, after the demand of June 10, 1897, to give Hagan notice that his stock would be sold at public sale. The bank followed the demand of June 10, 1897, with the letter dated the 12th of June, giving Hagan a notice that his stock would be sold on the Merchants' Exchange on June 18th, between the hours of twelve and one o'clock. Hagan testified that this action of the bank was entirely unexpected, and greatly shocked him. In the few days accorded him he endeavored to find a purchaser, and among others applied to Mr. Scullin for assistance. Scullin went with him to the bank, and said to Mr. Baker that he wanted a week or ten days to look into the matter. Mr. Baker referred it to his board, and they granted an extension from the 18th to the 22d of June. Within that time Mr. Scullin said that he could do nothing. Whether it was because he had not sufficient time, or for some other reason, does not appear. A few moments before twelve o'clock on June 22d, 1897, Hagan called at the bank, and pleaded with Mr. Baker to postpone the sale, and give him a chance to turn around, but Mr. Baker refused, and while he was yet there Mr. Marshall, the cashier, took the papers, and started to the exchange. The Merchants' Exchange is accessible to its own members only. Only members are allowed to buy and sell on its floors. Hagan was not a member, and could not be, and was not present at the sale of his stock, nor could any other citizen who was not a member. Although Mr. Baker testifies that he had told Hagan the stock would be sold at public sale, no notice whatever was given to the public that the stock would be sold — either of the sale announced for the 18th of June or for the sale for the 22d of June. Baker says there was no advertisement whatever informing the public that the stock

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would be sold, or announcing the terms of the sale, or the authority by which the sale would be made. In fact, there was no attempt by the bank to advertise the sale, or to give public notice of it. Baker says further that he did not himself personally notify any one that the sale was to be made. Marshall says he did not notify anybody that the sale was to be made. The only persons who know that a sale was to be made, down to the very moment of the sale, were Baker, Marshall, Hagan, Scullin, and Wernse, the broker whom Marshall called upon on his way from the bank to the exchange, and asked to come and do the auctioneering at twelve o'clock. Marshall was on the floor of the exchange for some time before twelve o'clock with Hagan's stock and notes, but did not inform a single person there that the sale was to take place. Neither did Wernse, after he arrived there, go around and inform a single member of the exchange that the sale was to be made. Wernse mounted a little rostrum or platform on the floor of the exchange, and gave out the first information that the 770 shares of the stock of the Hagan Opera House Company were to be there immediately sold. His announcement was as follows: "The Court: Just give the announcement you made that day. A. 'We will offer for sale, for cash, to the highest bidder, for the account of whom it may concern, 770 shares of the Hagan Opera House stock, par value $100 per share.' I also announced that, unless I knew the bidder to be a responsible party, I would require $2,500 or $5,000 in cash or certified check immediately on the bid being closed. I also announced, I may say here, that, if any one desired (this is the customary announcement) to have small lots put up, that I would put it up in ten-share lots, or any multiple that might be desired. Q. Now, was that the announcement you made in this case? A. Yes, sir. Q. And that was all the announcement? You didn't make any further announcement in this particular case? A. No, sir; I believe not. Q. Did you state specifically who was the owner of this stock? A. No, sir; I didn't know who was the owner. Q. Did you state specifically to whom the stock had been pledged? A. No, sir. Q. Did you state specifically by what authority you were selling? A. No, sir. By the way, I never did that yet, in all my sales." Mr. Marshall, the cashier of the bank, was the only bidder, and he bid $5,000 for the stock, and it was knocked down to him. The bank, prior to the alleged sale, had a claim against Hagan for $23,340. For this it had as collateral security 770 shares of the stock of the Hagan Opera House Company. It had Havlin as an indorser for $6,500 of that amount. It also had some second deeds of trust and some shares of Underground Service Company stock. After the sale of Hagan's stock, it had on hand to represent this debt of $23,000 the following:

(1) A claim against Hagan on his note for about	$17,000
(2) Jannopoulo's note for	30,000
	$47,000

Security.

(1) It had the same stock in its possession	$77,000
(2) It had Havlin's indorsement for	6,500
	$83,500

(3) The second deeds of trust and the Underground Service stock.

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The bank took the position that this was a bona fide sale, and that it broke down the contract of bailment, and terminated Hagan's relation to the stock. It marked the $1,500 note "Paid," and the balance of its bid, less Wernse's commission, amounting to about $3,400, it credited on Hagan's note for $15,340. It claimed then to own the stock divested of Hagan's interest, and, as such owner, in a few days sold the stock for $30,000 to the same Jannopoulo who, the bank knew, had shortly before offered Hagan $50,000 for it. It denied that Hagan was entitled to any portion of the $30,000. It never credited any part of it on any of his notes, but claimed that the whole $30,000 belonged to the bank.

After the sale, McLaran, Hagan's attorney, saw a notice of the sale in the early afternoon papers of the 22d of June. He called at the bank the same afternoon. McLaran thinks he saw Baker that afternoon, but he is certain that he saw him next day. There is no dispute as to what passed between them. McLaran told Baker that if the sale had been made on the Merchants' Exchange, and in the manner and under the circumstances and under the requirements reported to him, the sale was illegal, and could not stand. He asked Baker to set aside the sale, and allow Hagan to redeem the stock. Baker refused the request. In refusing the request he declared that the sale was bona fide and valid, and that the bank would stand by it; that Hagan had no further interest in the stock, and the bank refused to recognize him as having any interest in it. The stock belonged to the bank absolutely as its own property, and the bank would sell the stock for its own use and benefit to whom it pleased, without any further reference to Hagan or his wishes. McLaran said then he would have to bring a suit to set aside the sale, and left. Before filing the suit McLaran called again upon Baker, and told him that he had drawn the papers for the suit, and asked him again if he would recognize Hagan's interest in the stock. Baker said he refused to recognize Hagan's equity or rights in the property, and would stand by the sale. Baker says he remembers this last call of McLaran's, and when McLaran told him that he was going to bring suit Baker said. "Fire away."

The proofs as to the value of the stock satisfactorily established that there was no market value as such. It had never been on the market. As to the actual value, Hagan testified that, in his opinion, the 770 shares were worth $60,000. On the other hand, the bank insists that the stock was only worth $50,000. The stock represented in part a building that cost $156,000, located in the central portion of the city of St. Louis, and held by a long lease at a ground rent. The testimony tended to show that the net rental value of the theater was $15,000, and of the remainder of the building, $8,400 — $23,400. Against which were the following fixed charges: Ground rent, $6,750; taxes, $2,400; insurance, $1,700; interest on $20,000 deed of trust, $1,200 — $12,050; or a balance of $11,350 over and above fixed charges. The bank sold it for $30,000. Other evidence may be noted in the course of the opinion.

On the hearing the court found that the sale on the floor of the exchange could not be sustained on account of the clearly inadequate price obtained for the stock, the defendant being the sole and only bidder, and by reason of the other circumstances attending the sale,

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the relation of the bank to the stock was the same after that sale as before it was made. The court further held that the subsequent sale to Jannopoulo was bona fide, and within the power granted to the bank to sell at private sale, and that there could, therefore, be no redemption from the purchaser at said second sale, and, as Jannopoulo was not a party to this suit, he could not be affected by this suit. The court further held that, as the stock hod been sold to Jannopoulo, and hence could not be redeemed, the failure of plaintiff to tender the amount of the note and interest would not bar any equitable relief which the pleadings and evidence would justify. It thereupon set aside the sale on the Merchants' Exchange, and decreed an accounting, and required an accounting as to the amount due the bank, and required any excess to be paid over to the plaintiff, pledgor of the stock, and in its decree ascertained that excess to be $6,796.85, and awarded plaintiff judgment for that sum and costs, with execution therefor. From that decree defendant prosecutes this appeal.

1. It is insisted that plaintiff's remedy, if any, is by an action at law for conversion, or for money had and received. We are referred to the statement in Jones on Pledges, § 556, to the effect that "in general a bill in equity does not lie to redeem property from a pledge because the remedy at law upon a tender of money is ample, the remedy at law being either a possessory action to recover the thing pledged or an action of trover to recover its value." A special ground for proceeding in equity must be shown, as that a discovery is necessary or that an account is wanted, or that there has been an assignment of the pledge. Counsel for defendant argue that the facts disclosed in the record do not bring it within any recognized head of equity jurisdiction. The author of the statement above cited obviously did not attempt in that excerpt to exhaust the various heads of equity which would authorize a court of equity to grant relief to a pledgor of a chattel. The rule distinguishing the cases in which legal and equitable remedies may be resorted to is stated both by the courts of last resort and by the text-writers. "If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his damages. But where the value of the stock is not easily ascertainable, or the stock is not to be had readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted for to be delivered, a court of equity will decree specific performance, and compel the vendor to deliver the stock." Thus where the value of the stock is not easily ascertainable, as in this case, where it had no market value, and where plaintiffs holding carried with it the management of the opera house, and gave him a controlling voice in the business. Jones on Pledges and Collateral Securities, § 558, asserts that: "Where the property pledged is stock in a corporation, and the shares have been transferred upon the books of the company to the name of the pledgee, so that he has the legal title, equity alone can restore possession of the shares to the pledgor by an order of delivery. The transaction is a pledge, although the legal title passes to the pledgee; but it partakes of the nature of a mortgage, and it would seem that the remedy for redemption should be the same as upon mortgages." In White Mts. R. R. v. Iron Co., 50 N. H. 57, the defendants insisted, as here, that plaintiffs had a

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plain and adequate remedy at law to maintain trover after an improper sale by pledgees; but the Supreme Court answered: "But the existence of a legal remedy is not necessarily decisive against equitable jurisdiction, and in the present case a bill in equity may be maintained. However the rule may be in ordinary cases of pledge, there is authority for sustaining a bill to redeem where an account is wanted, or where there has been an assignment of the pledge." Story on Eq., § 1032; Hasbrouck v. Vandervoort, 4 Sandf. 74; Kemp v. Westbrook, 1 Vesey Sr. 278; Hart v. Ten Eyck, 2 Johns. Ch. 62. In Colorado the jurisdiction in equity is firmly maintained. Colburn v. Riley, 11 Colo. App. 184, 52 Pac. 684; Dunne v. Stotesbury, 16 Colo. 91, 26 Pac. 333. See also Johnson v. Brooks, 93 N. Y. 337; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679.

Nowhere is the law more tersely stated than in Bryson v. Rayner, 25 Md., loc. cit. 433, 90 Am. Dec. 69, wherein it is stated: "Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instument known to the law as such, with condition of defeasance, yet it is given in certain cases, as in this, as a security for a debt, and therefore partakes of the nature of a mortgage. It is also subject to redemption. The pledgor, in payment of the debt or tender, is entitled to a return of the identical property pledged, and there can be no good reason why equity should withhold its aid for this purpose in a case in which the law cannot accomplish it. Where the article pledged is a specific chattel, the law can afford an ample remedy by replevin if the pledgee retains possession, or by trover or assumpsit in case he has parted from it. But in a case like the present — that of stock of an incorporated company — when the shares have been transferred upon the books of the coporation, and stand in the name of the pledgee as legal owner, the law falls short of the remedy asked and to which the pledgor is entitled. Equity alone, in such a case, can afford relief by an order of retransfer. If a pawnee has two remedies — to sell at law after failure and notice or to foreclose in equity (2 Kents Com. 582, 583) — no reason exists why the pledgor should not be furnished with the equitable remedy to redeem."

In the case at bar the pledgor has alleged not only that the property pledged is stock in a private corporation, but that the shares pledged constituted a majority of the stock in an opera house, giving to the holder necessarily the power to control the management of said theater; that the pledgee had by a fraudulent, unfair, and unjust and pretended sale bought the same in its own name, and caused the same to be transferred on the books of the corporation in the names of other parties; but that said transfers were so made that defendant still controls and can produce the same, and prays to be allowed to redeem the same by paying into court the debt for which they were pledged, together with interest and all proper charges and for general relief. It will be observed that the bill necessarily also calls for an accounting and discovery, which is everywhere recognized as another ground for equitable relief. In its answer the defendant denied that it had caused a transfer of the stock. Upon these allegations in the bill and answer there can be no doubt that the pleadings stated a case falling under a well-established head of equity jurisprudence.

The plaintiff having pledged his stock as security for a loan made

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to him by the defendant, we next inquire what were the rights of the defendant upon default by the plaintiff in the payment of the debt? That defendant might sell at a public or private sale is not questioned, but "the failure to pay the debt at maturity did not vest the property in the pledgee. The pledgees possession is not regarded as adverse to the pledgor, and does not bar his right to redeem, unless it has continued so long a time as to raise the presumption that the pledgor has relinquished his title in satisfaction of the debt." White Mts. R. R. v. Iron Co., 50 N. H. 60. While, therefore, the right of defendant to sell is not questioned, the plaintiff had the right to have a fair sale made. As said by this court in Laclede National Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528: "Such a power [i. e., the power to sell the pledge], given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as other contracts affecting equities of redemption, be construed favorably for the interests of the pledgor so far as consistent with the rights of the pledgee, and a sale must not be forced for barely enough money to secure the payment of the debt;" and adds: "It devolves upon the pledgee in the exercise of the powers given under the pledge to so conduct the sale as not to sacrifice the securities held by him, and, in the event the pledgee unfairly or unnecessarily prejudices the rights of the pledgor the sale will be set aside." In that case the referee declared the sale invalid because the printed notice of the sale did not state upon what authority or by virtue of what power the sale was to be made. No reference whatever having been made to the pledge or power under which Mott, the agent of the bank, was acting in making the sale, nor was any mention made of the ownership of the collaterals, nor was it stated upon what terms the sale would be made — whether for cash or on time. Besides, there was nothing in the published notice indicating that the sale of these securities was made in behalf of the bank. All of which this court unanimously approved in that case. The Circuit Court required the bank to account for all the notes purchased by it at such sale, finding in favor of the bank only for the amount remaining due after such accounting, and this court affirmed the judgment of the Circuit Court.

In view of these just and well-settled principles of equity, it must be held that under the power given the bank, the defendant in this case, to sell at public or private sale, with or without notice, it still remained its duty to make the sale fairly, and with a view to make the securities sell to the advantage of the pledgor, the plaintiff herein, as well as for its own interest. This trust, broad and ample as it was, was not intended as a power of attorney to go through a meaningless form by which plaintiff's stock was to be sacrificed without any regard to fairness. Keeping in view the equitable doctrines announced by Robinson, J., in Laclede National Bank v. Richardson, supra, what were the facts attending this sale? We need notice only the testimony of Wernse, the broker employed by the defendant to make the sale, and that of Mr. Baker, the president. Mr. Baker says there was no advertisement whatever informing the public that the stock would be sold, or announcing the terms of the sale, or the authority by which the sale would be made. In fact there was no attempt whatever by the bank to advertise the sale or to give public notice. Both Mr.

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Baker and Mr. Marshall, the cashier, testify that they did not notify any one the sale was to be made. Just before noon Mr. Marshall took the stock, and started to the Merchants' Exchange, and on his way called upon Mr. Wernse, a broker, and requested him to go with him to the Merchants' Exchange, and auction the stock at twelve o'clock. Mr. Marshall was on the exchange for some time before twelve o'clock, with Hagan's stock and notes, but did not inform a single person there that the sale was to take place. Wernse, after he came, did not inform any member that the sale was to be made. At noon Wernse mounted a little rostrum or platform on the floor of the exchange and made this announcement: "We will offer for sale, for cash, to the highest bidder, for the account of whom it may concern, 770 shares of the Hagan Opera House stock, par value $100 per share." "I also announced that, unless I knew the bidder to be a responsible party, I would require $2,500 or $5,000 in cash or certified check immediately on the bid being closed. I also announced that if any one desired to have small lots put up, that I would put it up in ten-share lots, or any multiple that might be desired." That was all the announcement made. Asked by the Circuit Court if he stated who was the owner of the stock, he answered he did not. He did not know who was the owner. "Did you state to whom it was pledged?" "No, sir." "Did you state by what authority you were selling?" "I did not." Under these circumstances Mr. Marshall, the cashier of the defendant, was the only bidder, and bid $5,000, and it was knocked down to him. Recurring now to Laclede Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528, this court said: "In the circumstances of the case, we are of opinion that it devolved upon the pledgee in its notice of sale to refer to or state the power and authority under which the sale was to be made; but it is contended by counsel for appellant that, inasmuch as no notice was provided for by the collateral notes, the bank was at liberty to act as it saw fit in this regard, provided some notice was given to the public of the sale. This, as already seen, is not the law. The clause authorizing the sale of the securities in question without notice must, we think, be held to refer to a waiver of notice only so far as the pledgor was concerned, and has nothing whatever to do with a public sale. 'The latter, as we have seen, could not be made without some due notice to the public.' Otherwise, what could reasonably be anticipated but a sacrifice of the security for want of bidders duly informed upon the subject?" Again, referring to the notice made by Mr. Mott that he would "sell for the benefit of whom it may concern" — the exact form adopted by Wernse in this case — this court condemned that practice, saying: "If the advertisement had been in the name of the bank, or so framed as to state upon what authority or by virtue of what power the sale was to be made, the public would thereby have been apprised that the bank was seeking to sell certain securities upon which it had loaned money, and its known financial standing in the community would doubtless have called more bidders together, and resulted in a more advantageous sale." In that case some notice was attempted, but, because of the failures noted this court held the sale invalid, and required the bank to account for the securities. In this case no notice whatever was attempted. It requires little discrimination to see that this was a more unreasonable and unfair exercise of the power conferred to sell at public sale. It cannot be doubted that defendant was attempting

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to make what it considered would be a compliance with the power to sell at public sale, and it seems to us no one can fail to condemn it as inequitable and unjust to plaintiff, and a ruthless sacrifice of his stock. Moreover, if the bank intended to execute the power to sell at a public sale, as all the evidence tends to show, it was bound to pursue those methods ordinarily adopted in making public sales; and such a sale presupposes a sale at a public place — a place to which the public can have access. Such a place the Merchants' Exchange, from which the public is barred, is not. The by-laws of the exchange, read in evidence, prohibited any and all persons not members of the exchange from buying or selling on its floors. To hold such a place a public place within the legal or equitable acceptation would be repugnant to all of our customs in conducting such sales, and to all our statutes providing for their conduct. But a public sale also implies a notice to the public, in order that purchasers may advise themselves of its terms and the title to the property, and be enabled to bid intelligently. The evidence of the president, cashier, and the broker who cried the sale leave no doubt whatever that they gave no notice of their intention to sell this stock when they did to any one but the pledgor, and he was not a member of the exchange, and could not be present, and, had he been present, could not have bid at the sale. The result was such as can always be anticipated under such circumstances. The stock which the bank took as security for over $20,000 indebtedness sold for $5,000. The Circuit Court was clearly right in setting aside the sale, and we have no doubt whatever of the jurisdiction of a court of equity to avoid such sale. On this ground plaintiff had a firm standing in equity, especially as the bank afterwards asserted title under that sale, and insisted that the equity of redemption was forever foreclosed. It was necessary for plaintiff to remove this barrier in a court of equity before he could require the bank to account to him for the proceeds of the subsequent sale at Jannopoulo. A court of equity having acquired jurisdiction for one purpose, it is a maxim of equity that it will proceed to do complete justice between the parties, and proceed to a final determination of all the matters in issue. 1 Pomeroy's Eq. Juris. § 181, and the cases cited; Keeton v. Spradling, 13 Mo. 321; State of Missouri v. McKay et al., 43 Mo., loc. cit. 598; Real Estate Savings Inst. v. Collonious, 63 Mo. 290. The allegations as to the unfairness of the sale brought the case within the jurisdiction of a court of equity, and, the evidence having fully substantiated the charges in the bill, the Circuit Court properly held that the bank stood in relation to the stock after the sale just as it did before the sale.

But the bank had the power to sell the stock at private sale, and after it had gone through the form of a sale to itself it still held it as a pledge, and had the power to sell, as it did, to Jannopoulo. When charged with having had it issued to Jannopoulo and others on the company's books, but at the same time retaining possession and control of it, it denied it in its answer. On the trial it appeared it had in fact sold it to Jannopoulo for $30,000, and that he was an innocent purchaser for value and without notice. The Circuit court, under the evidence, found itself unable to decree redemption in kind, but under the prayer for general relief it required the bank to account for the amount of the purchase money, and deducted plaintiff's indebtedness from the $30,000, and gave judgment for plaintiff for the balance.

It is urged with much zeal that this was, first, inequitable, because

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it is said that said sale was "purely speculative," and the bank should not be held to account for that sum; that the measure of damages is the difference between the market value and the balance due on the debt. As the bank stood in the relation of trustee to the plaintiff in the sale of his stock in Jannopoulo, upon the plainest principle of equity it will not be permitted to manage the trust so as to gain an advantage to itself beyond its legitimate claim for its debt and necessary expenses, and a court of equity will closely scrutinize all its dealings with the trust fund. Having assumed to sell this stock at private sale to Jannopoulo for $30,000; having transferred the stock on the corporation books, and caused new stock to issue therefor to Jannopoulo and others, received part of the consideration in actual cash, and taken Jannopoulo's notes for the debt, and extended the time for its payment, and without a scintilla of evidence that it did not intend to hold Jannopoulo to his agreement, under any and all circumstances, to the payment of the $30,000 he had agreed to pay for it — the plea that this was merely a "speculative" sale cannot be entertained when the bank is called upon to account for the proceeds of that sale. There was no evidence that Jannopoulo was insolvent, or that would absolve him from paying the $30,000 for the stock, and there is nothing to justify a finding that he could not be compelled to pay the whole amount he had agreed to pay. Having dealt with the stock as its own, and agreed to accept Jannopoulo's promise for the $30,000 without the assent or intervention of plaintiff in any manner to the arrangement, we are clear the bank is now estopped to deny that the price for which it sold the stock was not its real value. It cannot hold onto Jannopoulo's notes and the stock upon that basis, and account to plaintiff on the basis of its market value. The extensions it granted Jannopoulo does not make its sale to him less absolute and binding. It assumed to grant him those favors with full knowledge of the value of the stock and property. This court, in Brinkerhoff-Farris Trust & Savings Company v. Lumber Company, 118 Mo. 447, 24 S. W. 129, held that, while the measure of damages for the conversion of stock is generally its market value, yet, when it has no market value, resort may be had to other modes to establish its real value, such as proof of its earning capacity, the value of the assets of the corporation, and individual sales of stock not under compulsion; and the same doctrine was approved and reaffirmed in Greer v. Lafayette Bank, 128 Mo., loc. cit. 575, 30 S. W. 319. In view of all the evidence as to the cost of theater building, its rental value, the offer of $50,000 by Jannopoulo just a short time prior to this time, and the fact that it constituted the majority of the stock, enabling its holder to control and manage the property, we are unable to say the Circuit Court erred in accepting the value which the defendant placed upon the stock when it sold it to Jannopoulo as the true value of the stock for the basis of an accounting between plaintiff and defendant. None of it had been sold on the market, and it had no market value.

But, secondly, it is said defendant was entitled to a jury to estimate the value of the stock; that there was no basis for the finding of the court in the pleadings; that such an issue was not tendered. Having, as we think, demonstrated that both the pleadings and the evidence established a case falling under a well-recognized head of equity, to wit, a case entitling plaintiff to the remedy of an accounting and redemption, it goes without saying that there was no right to a jury in an equity case. It is settled law that the right of trial by jury does not extend to

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the trial of equity causes. O'Day v. Conn, 131 Mo. 321, 32 S. W. 1109; Conran v. Sellew, 28 Mo. 320; Well v. Kume, 49 Mo. 158; Estes v. Fry, 94 Mo. 266, 6 S. W. 660. As already said, the Circuit Court having acquired jurisdiction as a court of equity for one purpose, it was competent to dispose of any and every issue that arose therein, and, moreover, there was no demand for a jury in the case, and it would have been properly refused if made.

But again counsel urge there was no allegation on which to base the judgment of the court allowing a money judgment. This is untenable for two reasons. There never has been any want of power in a court of chancery to render a money judgment on an accounting or in a case where its power to compel the return of specific property results from the misconduct of the defendant, which was unknown to plaintiff when the suit was instituted. Holland v. Anderson, 38 Mo. 55; McDaniel v. Lee, 37 Mo. 204; Ryan v. Dunlap, 111 Mo. 610, 20 S. W. 29; Hamilton v. Hamilton, 59 Mo. 232; 3 Pomeroy, Eq. § 1410; Watermann on Spec. Perf. §§ 514, 515; Woodman v. Freeman, 25 Me. 531. In this case the impossibility of a redemption in kind was disclosed on the hearing, when for the first time it appeared that Jannopoulo was an innocent purchaser, and defendant could not, therefore, be compelled to return the stock in kind, and plaintiff was ignorant of this when he brought his suit. Under these circumstances there was no occasion whatever for amending the pleadings as to the amount of damages. The whole facts were before the court, and both sides were fully heard as to the value of the stock, and the chancellor was vested with full power to adjust the balance due. But in fact the discussion of the right to award damages as such is not properly in the case. The court took the view most favorable to defendant, and merely charged the defendant with the amount for which it sold the stock, and deducted therefrom the amount of plaintiff's debt, and adjudged the balance to plaintiff, the amount for which in equity and good conscience it was bound to account to plaintiff. Having held as we have, that defendant was estopped after selling this stock for $30,000, from saying its transaction with Jannopoulo was a mere speculation, and was bound to account for the balance in its hands over and above the plaintiff's debt to it, the case is one merely of accounting in equity, and there can be no doubt of the jurisdiction of equity in such a case. Laclede National Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528. When the bank sold to Jannopoulo at a private sale as it had the right to do notwithstanding its futile effort at a public sale, it was bound in equity to apply the proceeds to the payment of the notes for which it held plaintiff's stock as a pledge, and account to plaintiff for the excess after satisfying its debt; and this is all the Circuit Court required at its hands.

As to the only remaining proposition — that plaintiff could not recover because he did not first tender the whole amount of debt and interest — it is sufficient to say this is a bill in equity to be allowed to redeem after defendant had expressly denied such a right, and, as a tender under such circumstances would have been an idle ceremony, a court of conscience will not turn him out of court for a failure to perform a useless and ineffectual act.

The decree must be and is affirmed.

ROBINSON, C. J., and BRACE and VALLIANT, JJ., concur. MARSHALL, BURGESS, and FOX, JJ., dissent.

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JOHNSON et al. v. AMBERSON.

37 So. 273.

(Supreme Court of Alabama. June 14, 1904.)

TRUSTS — STOCK CERTIFICATES — OMISSION OF NAME OF BENEFICIARY — PAROL EVIDENCE — ADMISSIBILITY — RIGHTS OF PURCHASER — COSTS — NONPAYMENT — SUBSEQUENT SUIT — STAY OF PROCEEDINGS — JUDGMENT — RES JUDICATA.

1. Where shares of stock are subscribed for in the name of a person as trustee without disclosing the name of the beneficiary, the declarations of the trustee made at the time of subscription, as well as his declarations made while in possession of the stock, are admissible to prove the identity of the beneficiary.

2. The word "trustee" written on the face of a certificate of stock after the name of the person to whom the certificate was issued is sufficient to put a purchaser of the stock on inquiry as to the nature of the holder's ownership.

3. The payment for and taking stock by a parent in his name as trustee for his son is a complete declaration of the trust in favor of his son, which a court of equity will enforce.

4. Where a creditor receives stock from his debtor, to be applied as a credit on an indebtedness existing previous to the issuance of the stock, the creditor is not a bona fide purchaser for value without notice, it appearing that the stock was issued in the name of the debtor as trustee, though the name of the beneficiary was not written on the face of the stock.

5. Where an action at law relative to the ownership of a stock certificate was determined against the plaintiff on the ground that whatever relief he was entitled to would have to be enforced in equity, the judgment in the action at law is not a bar to a suit in equity.

6. Where one action is legal and the other equitable, the rule to stay proceedings in the latter until the costs in the former are paid will not be applied.

Appeal from Chancery Court, Etowah county; Richard B. Kelly, Chancellor.

Suit by Ernest Amberson against T. L. Johnson and the Queen City Bank to compel the transfer to the complainant on the books of the bank of certain of its stock, and to enjoin defendant Johnson from claiming the same. From a decree for complainant defendants appeal. Affirmed.

The bill in this case was filed by the appellee, Ernest Amberson, against the appellants, T. L. Johnson and the Queen City Bank, of Gadsden, and had for its purpose having declared a trust estate in certain shares of the capital stock of the Queen City Bank in favor of the complainant, and to have the same enforced. It was averred in the bill that in 1891 the Queen City Bank, a banking institution incorporated under the laws of Alabama, and located at Gadsden, Ala., issued to T. H. Amberson, trustee, a certificate of a certain number of shares of stock in said bank; that some time after the issuance of said certificate Amberson indorsed the same on the back thereof as trustee, the indorsement being as follows: "T. H. Amberson, Trustee," that the certificate issued on September 23, 1891, was issue in lieu of a certificate formerly issued on January 18, 1890, the first certificate having become worn and dilapidated, and that the said first certificate was issued to "T. H.

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Amberson, Trustee," and was in all respects the same as the last certificate, with the exception of the date and the number of the memoranda. It was then averred in the bill that the said T. H. Amberson was the father of the complainant, and was now dead; that said T. H. Amberson declared orally to various persons and at divers times and places, while having possession of the said certificate dated September 23, 1891, that he held the same for the benefit of the complainant; that the complainant was a deaf and mute person, and had been such all of his life, and was, at the time of the issuance of said certificate, a minor under twenty-one years of age, and resided with his father from the time of his birth to the time of his father's death in July, 1895; that the complainant was and is the beneficiary in each of said certificates, and that his father, said T. H. Amberson, had each of said certificates issued to himself as trustee for the benefit of complainant. It was then averred in the bill that the respondent T. L. Johnson had by some means obtained possession of said certificate issued on September 23, 1891, from T. H. Amberson, during his lifetime, and now claimed said certificate as his own, and demands that the Queen City Bank transfer the same to him on its books, and pay to him the accrued dividends on same. It was then averred that said T. L. Johnson had instituted a suit against the bank to recover $350 accrued dividends on said certificate prior to March 21, 1898; that in said suit the bank deposited the money in court, and the complainant intervened, and claimed said money; that Johnson recovered a judgment therefor, and the money was paid to him; that subsequent to that time other dividends had accrued on said certificate, which dividends belonged to the complainant, but said bank declines to pay said dividends to complainant, and further declines to transfer to him said certificate on its books on account of the contention of said Johnson. The prayer of the bill was that upon the final hearing the court should declare that the complainant was entitled to said certificate issued on September 23, 1891; that the bank should be compelled to transfer the same to complainant upon its books, and to issue to him the certificate therefor, and to pay to the complainant the accrued dividends on said certificate, and that the said T. L. Johnson be perpetually enjoined from claiming said certificate, and from taking any steps at law or any equity to compel said bank to transfer to him said certificates, or to collect any of the accrued dividends thereunder. There was also a prayer for general relief. The defendant Johnson demurred to the bill upon the ground that there was a misjoinder of parties respondent; that it was shown by the bill that the question of contention was res adjudicata; that the bill seeks to create a trust estate by parol, and that the bill fails to show that the complainant had any interest or estate in said certificate. The respondent Johnson also moved to stay the proceedings in the cause upon the ground that in the suit heretofore brought by said Johnson to recover dividends, which suit involved the title to the bank stock now in controversy, complainant was made a party defendant by his own act, and that in said suit judgment was recovered by the plaintiff therein, who was a respondent, against the complainant in the present suit, and that the complainant was taxed with the costs, which he had failed to pay, and therefore the proceedings in this case should be stayed until the complainant had paid said costs. The respondent also moved to dismiss the bill for the want of equity. On the submission of the cause upon the demurrers and the motions,

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the chancellor rendered a decree overruling each of them. The respondent Johnson then filed an answer to the bill, in which he averred that the certificate of stock described in the bill of complaint had been duly and regularly transferred to him by said T. H. Amberson; that at the time of such transfer he did not know that the complainant had any interest in said certificate, or that said Amberson had purchased the same as trustee for the complainant; that said Amberson told him that the certificate was issued to him as trustee for his own benefit, and that said Amberson paid for the stock with his own money. The respondent further averred that he had purchased said certificate of stock by giving the said Amberson credit on an account which Amberson owed the respondent; that in giving this credit he allowed him the market price and fair valuation of said stock; that, after the said Amberson told the respondent that the certificate of stock was issued for his own benefit, he assigned the same by indorsing it "T. H. Amberson, Trustee," and that the acceptance of said certificate of stock by the respondent was a bona nde transaction in allowing T. H. Amberson a credit on the account which was due from said Amberson to the respondent. The Queen City Bank, as respondent, answered the bill, and disclaimed any interest in the matter of controversy, except that the stock be transferred to its rightful owner. There was testimony introduced by the complainant, which tended to show that at vraious times and on many occasions the said Amberson stated to different parties that he had purchased the stock in controversy for his son, Ernest, who was the complainant in the present bill. There was also evidence introduced for the complainant that at the time of the purchase and issuance of said stock the said Amberson stated that he was purchasing it for the benefit of the complainant, and for that reason had it issued to him as trustee. The respondent reserved separate exceptions to each portion of the testimony so introduced. The evidence for the defendant T. L. Johnson tended to prove the averments set forth in his answer. On the final submission of the cause on the pleadings and proof the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered accordingly. From this decree the respondents appeal, and assign as error the interlocutory and final decree.

George D. Motley, for appellants.

Aiken & Martin, for appellee.

DOWDELL, J. It seems to be well adjudicated that a trust in personal property may be declared and proven by parol. See 27 Am. & Eng. Ency. Law, (1st ed.) p. 54, where authorities are cited in note. We do not understand that the appellants controvert this proposition. The declarations of T. H. Amberson at the time he paid and subscribed for the stock in the defendant bank were admissible in evidence to show the creation of trust in the stock, and for whom the trust was created, the certificate having been issued to "T. H. Amberson, Trustee," omitting the name of the beneficiary. So, too, were his subsequent declarations while in the possession of the stock, to the effect that he had subscribed and paid for the stock for his minor son Ernest, and that it belonged to his said son, etc. 9 Am. & Eng. Ency. Law, (2d ed.) p. 12, and note; Wheeler v. Glasgow, 97 Ala. 700, 11 South. 758; Gillispie's Adm'r v. Burleson, 28 Ala. 551.

The word "trustee," written in the face of the certificate after the

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name of the person to whom such certificate was issued, was sufficient to put a purchaser of the stock on notice as to how the stock was held. In Cook on Stock and Stockholders and Corp. Law, (2d ed.) § 325, p. 359, the rule is stated as follows: "A vendee or pledgee of stock directly from a trustee is or is not protected in his interest in the stock, according as he is or is not chargeable with notice of the fact that the stock belongs to a trust estate. Anything that is sufficient to put a party on inquiry is considered equivalent to actual notice if inquiry be not made and reasonably satisfied. The law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence would have apprised him. This is called constructive notice, and has the same effect as an actual notice of the trusteeship. The most common instance of a constructive notice that stock being sold belongs to a trust estate is where the word 'trustee' or 'in trust,' either with or without the name of the cestui que trust, are written on the certificate of stock after the name of the person in whose name it stands on the corporate books. It is well established that such words, indicating a trustee ownership, are notice to the purchaser that his vendor is selling trust property, and that he must ascertain whether the trustee has any power to sell the stock." Wolffe v. State, 79 Ala. 201, 58 Am. Rep. 590; Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107 (see, also, note to the last citation); Hall & Farley v. Henderson, 126 Ala. 486, 28 South. 531, 61 L. R. A. 621, 85 Am. St. Rep. 53. The payment of the money by T. H. Amberson, and taking the stock in his name as trustee, was a complete declaration of the trust in favor of the complainant, Ernest Amberson, and which a court of equity will enforce. Minor v. Rogers, 16 Am. Rep. 69; Walker, Guardian, v. Crews, 73 Ala. 412; Sayre v. Weil, supra; Shaw v. Spencer, supra; Gerrish v. N. B. Ins. for Saving, 35 Am. Rep. 365; Martin v. Funk, 31 Am. Rep. 446; Railroad v. Durant, 94 U. S. 576, 24 L. Ed. 391. It is admitted by the defendant Johnson, appellant here, that he received the stock from T. H. Amberson, to be applied as a credit on a pre-existing indebtedness from said Amberson to him, Johnson. This was clearly a misappropriation by Amberson of the trust property, and Johnson cannot, under the circumstances, be considered a bona fide purchaser for value, without notice. Shaw v. Spencer, supra.

There is nothing in the contention that there has been a former adjudication of the subject-matter of this suit. The former suit was one at law, where only the legal title was involved; and we said, in effect, in that case, that the complainant here would have to resort to a court of equity for the enforcement of whatever equity he might have in the stock. Amberson v. Johnson, 127 Ala. 490, 29 South. 176.

Where one action is legal and the other equitable, the rule to stay proceedings in the latter until the costs in the former are paid will not be applied. 23 Am. & Eng. Ency. Law, (1st ed.) p. 528. The court properly denied this motion.

We find no error in the decree, and the decree will therefor be affirmed. Affirmed.

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INDUSTRIAL TRUST CO. v. SCANLON et al.

(Supreme Court of Rhode Island. June 17, 1904.)

58 Atl. 786.

GIFTS — DELIVERY — BANK DEPOSIT — JOINT TITLE.

1. Where a deposit in the bank was redeposited in the names of the original depositor and his brother, and the brother, though not present at the time, was afterward given the book by the depositor, and told that it was his, and that he could draw the whole or any part of the deposit, as he pleased, the brother became a joint owner of the deposit, and was entitled to it on the death of the original depositor.

Bill by the Industrial Trust Company against Dennis F. Scanlon and others. Decree rendered.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Van Slyck & Mumford, for complainant.
Tillinghast & Carr, for respondent Perry, administrator.
Charles P. Robinson, for respondent Elizabeth F. Scanlon.
Frederick A. Jones, for respondent Dennis F. Scanlon.

STINESS, C. J. This is a bill of interpleader to determine the ownership of a savings bank deposit, which is claimed by three parties.

In December, 1890, Patrick Scanlon had deposited the sum of $1,900 in his name in the Bristol Institution for Savings, and he then redeposited it in the names of "Patrick Scanlon or Dennis F. Scanlon, and payable to either or the survivor of them." In December, 1900, the complainant succeeded to the business of the Institution for Savings, and a new book was issued in the same money for the purchase of real estate in the name of Dennis. It is therefore clear that the gift was both intended and completed.

The opinion in Whitehead v. Smith, 19 R. I. 135, 32 Atl. 168, does not show that the book had been delivered to the claimant during the lifetime of the original depositor, but the agreed statement shows that fact, and also that the claimant had drawn money on the joint deposit. Under these circumstances the decision is not open to the criticisms made by counsel for the administrator in this case. On the contrary, the decision is in line with the great weight of authority in such cases.

The argument against the vesting of a joint title in a donee is that, because the donor can defeat the gift by drawing the deposit, control of the deposit is thereby retained, and so the gift is not absolute or complete. To this it may be replied that the donee has the same power, if he has possession of the book. Both parties cannot hold the book at the same time, and the mere fact that one has possession of it ought not to be conclusive against the rights of the other. In this case the question of the effect of possession by the donor does not arise, since the donee had constant possession of the book, except as we have stated. Some cases go so far as to hold that the entry on the book of joint title is self-operative, and that delivery of the book is not necessary (McElroy v. National Sav. Bank, 8 App. Div. 192, 40 N. Y. Supp. 340), and that the retention of the right to draw the money deposited does not affect the

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validity of the gift (Dennin v. Hilton, [N. J. Ch.] 50 Atl. 600). This case is not in the New Jersey Reports, but the decision was referred to in Hoboken Bank v. Schwoon, 62 N. J. Eq. 503, 50 Atl. 490, and in Pennsylvania R. Co. v. Stevenson, 63 N. J. Eq. 634, 54 Atl. 696. Dunn v. Houghton, (N. J. Ch.) 51 Atl. 71, also an unreported case in New Jersey, is cited in Carter v. Carter, 63 N. J. Eq. 726, 53 Atl. 160. We think it is clear in the case at bar that the title to the deposit is in Dennis F. Scanlon. This being the only question raised by the bill, we are of opinion that the other questions sought to be raised by her upon her antenuptial contract are not properly before the court.

Decree accordingly.

ZEIGLER v. HALLAHAN.

131 Fed. 205.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 25.

PRINCIPAL AND SURETY — DISCHARGE OF SURETY — ALTERATION OF CONTRACT — EFFECT OF ALTERATION — CONTRACT OF SURETYSHIP — RECITAL OF CONSIDERATION.

1. Where defendant became surety for the performance by a tenant of the covenants of a lease for ten years, which bound the tenant to keep and pay rent for the premises, and, at the expiration of the term, deliver them in good condition, a modification of the contract before the tenant took possession, without the knowledge or consent of defendant, by the insertion of a provision that, in the event of the total or partial destruction of the premises by fire or other casualty, rendering the same untenantable, the lease from such time should become void and should be surrendered to the lessor, constituted a material alteration, which operated to discharge defendant from liability.

2. In determining whether a surety is discharged by an alteration of the principal contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it effected a material alteration of the agreement to which his undertaking of suretyship related; and if it did he is discharged, even though the change may have been beneficial to him.

3. The rule as to the discharge of a surety by an alteration of the principal contract without his consent is not affected by the fact that his undertaking recites that it was made by him for a valuable consideration.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 126 Fed. 788.

Wm. Jay Turner and Samuel Dickson, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The decision of the court below was based upon a case stated as follows:

"The plaintiff, Mary Helen Zeigler, on April 2, 1901, made, executed, and delivered to one Moses H. Lichten an indenture of lease for the premises known and

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numbered as No. 50 North Eighth street, in the city of Philadelphia, of which indenture a copy is hereto attached, marked 'Exhibit A,' and made a part hereof, and the defendant, Peter T. Hallahan, by writing, became surety for the fulfillment of all the obligations of said Moses H. Lichten under and by virtue of said indenture of lease; said contract of suretyship being indorsed on Exhibit A. On or about April 29, 1901, an agreement supplemental to said indenture of lease, without consultation with or approval of the defendant, was executed by and between the plaintiff and the said Moses H. Lichten, as follows:

"'It is hereby mutually agreed between M. Helen Zeigler and Moses H. Lichten, the parties to the foregoing indenture of lease, that the following shall become part and parcel thereof with like effect, as if the same were embodied in the foregoing agreement.

"'It is hereby further covenanted and agreed in the event of the total or partial destruction of the within demised premises, rendering the same untenantable by reason of fire or other casualty, this lease shall from such time become absolutely null and void and the within lease shall be surrendered by the lessee to the lessor.

"'In witness whereof the parties hereunto set their hands and seals this 29th day of April, A. D. 1901.

"'MARY HELEN ZEIGLER. [Seal.]
"'MOSES H. LICHTEN. [Seal.]'

"Said Moses H. Lichten violated the covenants and conditions of said lease by subletting the premises thereby let and demised, and by assigning said lease without the consent of the plaintiff, and by cutting a passageway through the south party wall of said premises into the adjoining premises, in consequence whereof, on January 4, 1902, the plaintiff, by virtue of the warrant of attorney to confess judgment in ejectment contained in said lease, entered a judgment in ejectment against said Moses H. Lichten in the Court of Common Pleas, No. 3, for the county of Philadelphia, of December term, 1901, No. 2,180, and issued a writ of habere facias possessionem against Moses H. Lichten for the recovery of possession of said premises. Said Moses H. Lichten thereupon filed his affidavit, of which a copy is hereto attached, and obtained a rule in said Court of Common Pleas to show cause why such judgment in ejectment should not be opened, and said Moses H. Lichten let into a defense, all proceedings to stay. To said affidavit of Moses H. Lichten the plaintiff filed her answer as required by the rules of said Court of Common Pleas, and thereafter depositions were taken by the said Moses H. Lichten and the plaintiff. On March 31, 1902, said Court of Common Pleas discharged said rule. On April 19, 1902, the said Moses H. Lichten caused to be issued a certiorari from the Supreme Court of Pennsylvania to said Court of Common Pleas, but did not file any bond as required by the laws of the commonwealth of Pennsylvania for the purpose of making said certiorari act as a supersedeas. On April 30, 1902, the plaintiff issued an alias writ of habere facias possessionem under the aforesaid judgment in ejectment, and, by virtue of said writ, recovered possession of said premises, which until said date remained in the possession of said Lichten. On May 8, 1902, the record in said action of ejectment was duly certified to the Supreme Court of Pennsylvania, and on February 10, 1903, the said record was returned to said Court of Common Pleas, with a remittitur certifying that the judgment of said Court of Common Pleas was affirmed. The rent for said premises reserved in said indenture of lease was paid by said Moses H. Lichten up to January 1, 1902. On January 6, 1902, the agents of said Moses H. Lichten mailed to the plaintiff's attorney a check for the month's rent, in advance, of said premises, due January 1, 1902; but said check was returned to said agents of Lichten on January 9, 1902, accompanied by the following letter:

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"'Philadelphia, Jan. 9th, 1902.

"'Dear Sirs: I beg to return herewith check to the order of Mary Helen Zeigler for $500, sent her on January 6th, in settlement of one month rent for premises No. 50 North Eighth street, due in advance January first.

"'I have adivsed Miss Zeigler not to accept this check in view of the fact that she has canceled the lease with Mr. Lichten and has begun an action in ejectment for the purpose of obtaining possession of the premises. You are fully advised regarding the reasons for this course of procedure. Will you be good enough to acknowledge receipt of check enclosed, and oblige,

"'Yours very truly, WM. JAY TURNER.

"'To Mess. A. J. & L. J. Bamberger.'

"Between January 1, 1902, and April 30, 1902, the plaintiff received no compensation for the use of said premises. The yearly rental value of said premises is agreed to be $6,185.

"Should the court be of opinion that the defendant, Peter T. Hallahan, is indebted to the plaintiff, M. Helen Zeigler, by virtue of the contract of suretyship above set forth, under the foregoing facts, then judgment shall be entered for said plaintiff in the sum of $2,047.51, with interest thereon from April 30, 1902, or for so much less than that amount as the court shall determine shall be entered, if it shall be of opinion that any allowance shall be made by reason of the tender of $500 set forth in the statement of facts. Should the court be of opinion that the defendant, Peter T. Hallahan, is not indebted to the plaintiff, M. Helen Zeigler, by virtue of the contract of suretyship above set forth, under the foregoing facts, then judgment shall be entered for the defendant. The right to sue forth a writ of error to the United States Circuit Court of Appeals for the Third Circuit for the purpose of having a review of the judgment entered in accordance with the opinion of the court is hereby expressly reserved unto both parties in this proceeding."

The lease need not be set out in full. We may accept the statement made in the brief of the plaintiff in error that:-

"The conditions of this lease that are of importance in the present case are that Lichten should keep the premises, and, at the expiration of his term, deliver them up in good order; that he should not assign his lease, nor underlet the premises, without the written consent of the plaintiff in error; and that if he did assign his lease or underlet the premises without such consent, or fail to keep the other conditions of the lease, the plaintiff in error might terminate the lease and recover possession of the premises."

The contract of suretyship was as follows:

"For the valuable consideration heretofore received, I, Peter T. Hallahan, of the City of Philadelphia, for myself, my heirs, executors and administrators do hereby covenant and agree to and with the above named lessor, her heirs and assigns, that if the foregoing agreement entered into by and between the lessor and the lessee therein named, shall not be well and faithfully performed on the part of the lessee for and during the term of three years, eight months and fifteen days from the first day of May, A. D. 1901, that then the said agreement shall be promptly performed by me and that I will pay all damages arising of any breach of said agreement. And, further, that if the said lessee, his heirs, executors or administrators or any of them, shall fail to pay the rent reserved in the aforesaid agreement punctually, at the days and times the same shall fall due, that then immediate recourse may be had and made to me by demand, suit or otherwise.

"And I do further agree that all the remedies, actions and right to any judgment or judgments by said lease, yielded and reserved to the lessor therein named, and all

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conditions and covenants in the said lease relative thereto, and the waiver of all rights by the said lessee, including the waiver of the benefit of the law exempting property from levy and sale under execution, shall be deemed and held applicable to and enforceable against me with the same effect as if here fully inserted and mentioned.

"And also I do further agree that my liability under the aforesaid agreement of Lease between the lessor and the lessee shall continue according to the terms thereof so long as the liability of the said lessee shall continue for and during the term above mentioned.

"Witness my hand and seal the Second day of April, A. D. 1901.

"H. F. Turner. P. T. HALLAHAN. [L. S.]"

The Circuit Court entered judgment for the defendant, and, to maintain the averment that the judgment should have been for the plaintiff, two propositions have been submitted to this court, which will be separately considered:

1. It is said that "the defendant in error was not only not prejudiced or damaged, but could not possibly have been prejudiced or damaged, by the execution or operation of the supplemental agreement." This assertion is not unquestionable, but it need not be questioned, for, in our opinion, the true subject of inquiry in such a case as this is not as to whether the change made in the principal contract without the surety's assent was or could be prejudicial to him, but it as to whether it effected a material alteration of the agreement to which his undertaking of suretyship related. If it did, as in this case is indubitable, he was relieved from liability, and for the obvious reason that the identical contract to which alone his obligation attached had ceased to exist. In Bonar v. McDonald, 3 H. L. Cas. 226-238, the rule was stated to be "that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety." In Reese v. U. S., 9 Wall. 14, 19 L. Ed. 541, Reese was surety in a recognizance conditioned that one Limantour "should personally appear at the next regular term of the Circuit Court to be held in the city of San Francisco, and at any subsequent term to be thereafter held in that city." At the next subsequent term of that court the district attorney moved for and obtained a postponement of Limantour's trial, to which postponement he assented. The court below held that in this there was no ground for exemption of the bail from liability on the recognizance; but the Supreme Court, in an opinion delivered by Mr. Justice Field, reversing the judgment, said:

"The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. . . . The stipulation to postpone . . . was inconsistent with the condition of the recognizance. . . . The stipulation, in other words, superseded the condition of the recognizance. . . . The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of the obligation. It has released him from the obligation with which they covenanted he should comply, and substituted another in its place. . . . And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent,

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discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In Cross v. Allen, 141 U. S. 537, 12 Sup. Ct. 67, 35 L. Ed. 843, the court stated the rule, of which it was "not unmindful," to be "that any material change in the contract on which he is a surety, made by the principal parties to it, without his assent, discharges the surety, even though he may be benefited by such change; the reason being that he has not assented to the contract in its altered form, and has a right to stand upon the very terms of his undertaking." There is nothing in the opinion of the Supreme Court in Roach v. Summers, 20 Wall. 169, 22 L. Ed. 252, which, when read with its context, does not appear to be in harmony with the other deliverances of that court. It was there said, it is true, that a certain arrangement "could not work a discharge of the sureties, unless it placed them in a different position from that which they occupied before it was made;" but that, in saying this, it was understood that the arrangement referred to would have placed them in a different position if it had changed the principal contract, is plainly shown by the observation which almost immediately follows, that "it (the arrangement) was no alteration of the original contract, and had no effect upon it." The decisions of the Pennsylvania courts are in accord with those of the Supreme Court of the United States. The rule in that State was declared, in Nesbitt v. Turner, 155 Pa. 431, 26 Atl. 750, to be:

"When the principal party modifies his contract, it is fatal to its validity, as against the surety, whose assent has not been obtained, even if it be for his benefit, or if it do him no harm."

And in Bensinger v. Wren, 100 Pa. 505, it was said that:

"Any alteration of a contract by the principal parties, without the assent of the surety, is fatal to its validity, as against the surety. Even if he sustains no injury by the change, or if it be for his benefit, he has a right to stand upon the very terms of his obligation, and is bound no further. Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him. Miller v. Stewart, 9 Wheat. 680 [6 L. Ed. 189]; Smith v. United States, 2 Wall. 219 [17 L. Ed. 788]."

2. It has been, however, further contended that "the contract of suretyship shows on its face that the general law, by which such contracts are to be construed strictly in favor of the surety, has no application to this case;" and Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. —, has been cited in support of this contention. But it does not sustain it. The court there said that it had been —

"Argued with much persuasiveness that this rule of strictissimi juris, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary considerations, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract."

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But the court declined to express an opinion upon this subject, and remarked that:

"It is at least open to doubt, however, whether any relaxation of the rule should be permitted, as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of strictissimi juris, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

Hence it is evident that it was not really decided that the rule in question should be relaxed, even as against a company which, as matter of business and for compensation, assumes obligations like that upon which this action was founded; and we are not prepared to say that such companies are any less entitled to rely upon the protection which that rule affords than is the "ordinary guarantor," who lends his signature without pecuniary consideration. But even if guaranty companies were excluded from that protection, it would not follow that it should be denied to the surety in this case. He certainly is not a guaranty company, nor does it appear that he undertakes as a matter of business to become surety; and there is nothing to indicate that in this particular instance he received any compensation for doing so, unless it be the formal mention of "valuable consideration" in the instrument itself, and this, in our opinion, should not, for the present purpose, be regarded as proof that he was in fact compensated. Clearly, as it seems to us, the question discussed, but not decided, in Guaranty Co. v. Brick Co., has no application to such a state of facts as is disclosed by the record before us.

The judgment of the Circuit Court is affirmed.

SHELTON v. AMERICAN SURETY CO. OF NEW YORK.

131 Fed. 210.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 32.

BUILDING CONTRACT — SURETIES — DEPARTURE — DISCHARGE.

1. In the absence of special contract or custom, the duty of a common carrier of in each case the contractors shall have delivered to the owner a satisfactory release of liens against the premises, and the owner makes payments without requiring vouchers or releases, such payments constitute a substantial departure from the contract, to the prejudice of the contractor's surety, and discharge it from liability for a loss resulting therefrom.

Acheson, Circuit Judge, dissenting, in view of the special conditions of the surety bond and the facts.

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NATIONAL CITIZENS' BANK OF CITY OF NEW YORK v. TOPLITZ.

(Court of Appeals of New York. May 31, 1904.)

NOTE — ACTION AGAINST SURETY — PLEADING — DEFENSES.

1. In an action on a note against a surety, where the defense is an agreement extending the time so as to discharge the surety, the consideration of such agreement must be pleaded and proved.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the National Citizens' Bank of the City of New York against Emma I. Toplitz. From a judgment of the Appellate Division (81 N. Y. Supp. 422), affirming a judgment for plaintiff, defendant appeals. Affirmed.

The action is brought to recover the balance due on a promissory note made by the defendant on the 26th day of December, 1899, to the order of L. Toplitz, Son & Co., for $5,000, payable in five months after date. The payees and indorsers of the note are the defendant's sons, and the note was discounted by the Ninth National Bank of New York, from which the plaintiff herein derived its title. The answer of the defendant alleges, in substance, that she signed the note for the accommodation of the payees, without consideration; that, with knowledge of this fact, the Ninth National Bank discounted the note for value; that after the maturity of the note the Ninth National Bank, without the consent or knowledge of the defendant, "entered into an agreement with the said firm of L. Toplitz, Son & Co., whereby it extended the time to said firm . . . for the payment of said promissory note for a definite time, and agreed to and with the said firm that for a certain fixed time it would not collect or enforce payment of said note as against said firm." Upon the trial the plaintiff admitted all the facts set up in the answer, as well as the repetition thereof in the opening of defendant's counsel, and then asked for the direction of a verdict in favor of the plaintiff. This motion was granted, and the defendant excepted.

Richard L. Sweezy, for appellant.
Charles Blandy and Frederick A. Card, for respondent.

WERNER, J. (after stating the facts). The learned trial court and the Appellate Division were of the opinion that, under sections 3 and 55 of the Negotiable Instruments Law (Laws 1897, pp. 720, 728, ch. 612), the facts set forth in the answer did not constitute a defense. The question whether these sections of the statute referred to have made a change in the liability assumed by an accommodation maker of a promissory note is an interesting one, which we do not deem it necessary to discuss at this time, because we have reached the conclusion that the answer does not present a legal defense in any aspect of the case. The defendant claims to be released from liability on the note in question because the holder thereof, with knowledge of the fact that she was an accommodation maker, and merely a surety for the payees, gave the latter an extension of time of payment without defendant's knowledge or consent.

Prior to the enactment of the Negotiable Instruments Law it was the

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well-settled rule in this State that a valid and binding agreement to extend the time of payment between the holder of a promissory note and the principal debtor, without the knowledge or consent of the surety, operated to release the latter, provided the holder knew of his true relation to the note. Whether that rule has been changed by the Negotiable Instruments Law is a question that will have to be decided when it is fairly presented. To have the effect of discharging the surety, however, it has always been the rule that such an agreement must be upon a valid consideration, and must be sufficient to preclude the creditor, during the extended period, from enforcing the debt against the principal. Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685. The answer of the defendant and her counsel's opening address disclose that an agreement was made between the plaintiff and the principal debtors for an extension of time, but there is neither allegation nor statement of any consideration for such agreement. That a valid consideration is an essential element of such an agreement cannot be doubted. Parmelee v. Thompson, 45 N. Y. 58, 6 Am. Rep. 33. Where an action or defense is based upon a contract, the pleading in which it is set forth should allege all the material facts. Consideration is a material and indispensable element of every contract. "In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration, as a bill of exchange or promissory note, or expressly to state the particular consideration upon which it is founded." 1 Chitty on Pleading, (13th Am. ed.) 292, and cases cited; Moak's Van Santvoord's Pleading, 164; Bliss on Code Pleading, (2d ed.) § 268; Beach on Modern Law of Contracts, vol. 2, § 1691; Bailey v. Freeman, 4 Johns. 280; Dolcher v. Fry, 37 Barb. 152. "Where a consideration is not implied, or a request is essential to the defendant's liability, it is of the gist of the action, and must be specially averred." Spear v. Downing, 34 Barb. 522; Gould Pleadings, 176.

Under our Code of Civil Procedure a complaint must contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. Section 481, subd. 2. An answer must contain "(1) a general or specific denial of each material allegation of the complaint controverted by the defendants . . . (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." Section 500, Code Civ. Proc. This is nothing more than a restatement of the rule as it existed prior to the adoption of the present Code. While it is no longer necessary, as it was under the old system, to plead the conclusions of law which followed the facts previously stated, it is essential to set forth every material fact which forms a part of the cause of action or defense. This was so under the old Code of Procedure (People ex rel. Crane v. Ryder, 12 N. Y. 433), and it is still the rule, as the present Code has made no change in this respect. Under our liberal practice, a very broad and general allegation of consideration has been held sufficient — as, for instance, in Prindle v. Caruthers, 15 N. Y. 425, where it was held that the words "for value received" constituted a good averment of consideration, and a demurrer to the complaint was overruled, although it was held that a motion to have the complaint made more definite would have been proper. In the case at bar there is no averment in the answer, and no statement in the opening of the defendant's counsel, of any consideration whatever. The contract alleged is not one

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which necessarily imports a consideration, and, without an averment of consideration, it cannot be assumed that it is such a contract as will constitute a defense to plaintiff's cause of action.

We think the judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur.

Judgment affirmed.

CAMPBELL v. NATIONAL BROADWAY BANK.

130 Fed. 699.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 162.

BANKS — DRAFTS ISSUED BY CASHIER TO INDIVIDUAL CREDITOR — IMPLIED AUTHORITY.

1. A bank cannot recover the amount collected on a cashier's draft issued by its cashier and made payable to his individual creditor, where it is shown that the cashier had on numerous previous occasions drawn similar drafts in payment of his own debts, and such acts had continued for a period sufficiently long to establish a settled course of business in the conduct of the bank which had been sanctioned by its officers, and was known, or should have been known, to its directors.

In error to the Circuit Court of the United States for the Southern District of New York.

On writ of error to the United States Circuit Court for the Southern District of New York, to review a judgment in favor of the defendant in error, who was defendant below, entered upon the verdict of a jury.

George W. Wickersham, for plaintiff in error.

William J. Curtis and Francis D. Pollak, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This action was commenced by the plaintiff, as ancillary receiver, to recover $12,150 and interest, being the amount due on three cashier's drafts, drawn by George M. Valentine, cashier of the Middlesex County Bank, of Perth Amboy, N. J., on its New York correspondent, the National Park Bank of New York, to the order of the defendant, the National Broadway Bank. These drafts were given by Valentine in payment of his individual obligations to the said Broadway Bank.

It is argued that "the court erred in instructing the jury that if during a series of years sufficiently long, and in business transactions sufficiently numerous to make out a regular course of business in the conduct of the bank, the cashier had been accustomed to sign the checks of his bank payable to his own order, or to the order of his creditors, then the defendant was entitled to a verdict." The instructions excepted to are in accord with the decision of this court in Gale v. Chase National Bank, 104 Fed. 214, 43 C. C. A. 496, which cannot be distinguished, on principle, from the case at bar. In the Gale Case a cashier's draft, given to discharge his individual debt, was under consideration, and it was

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decided that where it appears that the cashier had, on numerous previous occasions, drawn similar drafts to pay similar debts, and such acts had continued for a period sufficiently long to establish a settled course of business which had been sanctioned and ratified by the officers of the bank, it might be inferred by the jury that such acts were known, or should have been known, to the directors of the bank and that the cashier's acts were authorized. This, in substance, was the proposition charged in the present case and the jury were told that the burden was upon the defendant to show that the drafts in question, which on their face were calculated to excite suspicion, were drawn in the ordinary business of the bank. The charge was as favorable to the plaintiff as the facts and the law warranted. The Gale Case was again considered by this court (108 Fed. 987, 46 C. C. A. 683), and subsequently by the Supreme Court (188 U. S. 557, 23 Sup. Ct. 372, 47 L. Ed. 594), but the law of the first decision, in so far as it relates to the questions now under consideration, has not been changed or modified. It is the law of this court to-day and we see no reason why it should not be followed. It seems to be conceded by the plaintiff that if the court adheres to its former decision it is conclusive of the principal question involved. In order to show a course of business at the Middlesex Bank which permitted the use of the cashier's checks in payment of his personal obligations, that such business was open and notorious and that the president of the bank had actual knowledge of what was being done, the defendant was permitted to prove a number of such checks previously drawn by Valentine, as cashier, to the order of a broker who represented Valentine in stock speculations. The defendant also proved that this broker, when the first cashier's draft was offered to him by Valentine, declined to receive it until assured that it was authorized; that he had a conversation with the president of the bank, informed him of the unusual character of the draft, asked if the cashier had authority to give such a draft and was informed by the president that he had. The objections of the plaintiff to this evidence, and to other evidence of similar import, are inconsistent with his theory that it was necessary to show knowledge in the directors, and the objections were properly overruled. If actual knowledge were necessary it is not perceived how it could be proved more conclusively, as to the president at least, than by showing that he knew of Valentine's acts, was informed that they were unusual and suspicious and, thereafter, declared them to be authorized and permitted them to continue. The cause was carefully tried and no error was committed of which the plaintiff has a right to complain.

The judgment is affirmed, with costs.

BURR v. ADAMS EXP. CO.

58 Atl. 609.

(Supreme Court of New Jersey. June 22, 1904.)

CARRIERS OF GOODS — DELIVERY — NOTICE OF ARRIVAL — APPEAL — REVIEW.

1. In the absence of special contract or custom, the duty of a common carrier of goods is not completed upon the mere arrival of the goods at destination, but includes the duty of delivery to the consignee.

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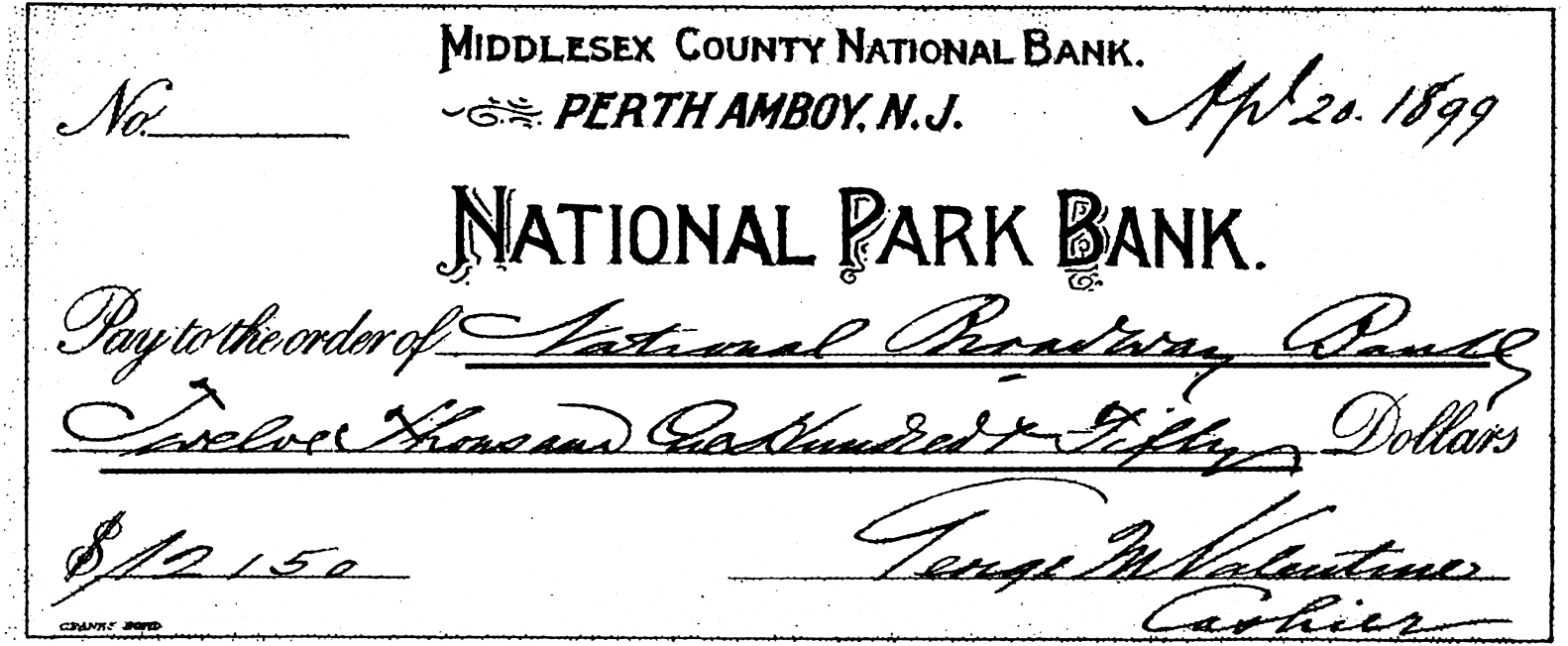

MIDDLESEX COUNTY NATIONAL BANK.

No. _____ PERTH AMBOY, N.J. Apl 20. 1899

NATIONAL PARK BANK.

Pay to the order of National Broadway Bank

Twelve Thousand One Hundred & Fifty Dollars

$12150 George M. Valentine

Cashier

GRANT'S PRINTED

Check: Payment: Notice: Right of Cashier of Bank to Draw Its Checks in Payment of His Individual Debts.

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George M. Valentine was cashier of the Middlesex County Bank. He proved to be a defaulter to the bank in a very large amount. Much of the money taken from the bank was abstracted by his drawing the checks of the bank, signed by himself as cashier, on the bank's New York correspondent. He drew three such checks, aggregating $12,150, to the order of the National Broadway Bank, to pay his individual notes held by such bank. After the failure of the Middlesex County Bank, its receiver sued the National Broadway Bank for this $12,150, under the theory that when the latter bank received these checks drawn by Valentine, as cashier of his bank, in payment of his individual debts, it had notice that the agent was using the funds of his principal for the agent's own purposes, and, if this act was not authorized by the principal, the beneficiary of the unlawful act could not, with such notice, hold the funds as against the principal. Under this theory the receiver had recovered $7,500 in the New Jersey State Courts, from a bank that received the $7,500 in substantially the same manner as the National Broadway Bank received this $12,150.

In the case here under consideration, it was proved to the satisfaction of the Court that "during a series of years sufficiently long, and in business transactions sufficiently numerous to make out a regular course of business in the conduct of the bank, the cashier had been accustomed to sign the checks of his bank, payable to his own order, or to the order of his creditors." With this fact established, it was held that the National Broadway Bank could retain the money. Proof of this "course of business in the conduct of the bank" was made in part by showing a number of similar checks drawn by Valentine, as cashier, to the order of a broker through whom he was speculating, and by showing that when the first of such checks was offered to the broker he declined to take it until he had called the attention of the president of the bank to it and its unusual character, and received assurance from the president that the cashier had authority to issue such checks. This defense is not new in law, but it has not been successfully urged in many of the numerous recent cases of this character. A late harsh case of this general character is illustrated in B. 13, Page 200a of this volume.

McMaster's Com. Cases, Vol. 1905, 130 Fed. 699.

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2. Where the contract of carriage contemplates delivery of the goods upon the carrier's premises at the terminus of the route, and no time for the arrival of the goods or for their delivery is stipulated for, the duty of making delivery to the consignee involves either the allowance to the consignee of a reasonable time within which to make inquiries respecting their arrival, or else the duty on the part of the carrier of giving notice of arrival to the consignee; and also involves, in either case, the allowance to the consignee of a reasonable time and opportunity, after notice of arrival of the goods, within which to take them away.

3. The question what is reasonable time or opportunity, where the facts are in dispute, or the inference to be drawn from undisputed facts is in doubt, is a question of fact, and not of law.

4. The appeal from the District Court to the Supreme Court, under Act April 3, 1902 (P. L., p. 565), is limited in its scope to questions of law only. This court will not reverse a judgment of the District Court that is based upon its conclusion upon a mixed question of law and fact, if the conclusion is legally inferable from the facts proven.

(Syllabus by the Court.)

Appeal from District Court of Camden.

Action by Lily L. Burr against the Adams Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November Term, 1903, before FORT and PITNEY, JJ.

John F. Harned, for plaintiff.
S. Stanger Iszard, for defendant.

PITNEY, J. This action was tried in the District Court without a jury, and resulted in a finding and judgment in favor of the plaintiff. From this judgment defendant appeals, pursuant to the Act of April 3, 1902 (P. L. 1902, p. 565). By the terms of that act the appeal is limited in its scope to questions of law only. The action was brought to recover the value of certain articles received by the defendant from the plaintiff to be carried from Red Bank to Merchantville, in this State. In the agreed state of the case it is set forth that at the trial the following facts appeared and were undisputed, to wit: "That on February 13, 1903, plaintiff delivered to defendant, at Red Bank, a leather grip containing, among other things, the articles whose value is sought to be recovered, and also a bundle, for carriage for hire to Merchantville, in the name of the plaintiff. The goods arrived in Merchantville at 5:30 P. M. on the same day. About 8 P. M. the plaintiff, who lived at Pensauken, called at defendant's office in Merchantville to inquire whether the goods had arrived, and was informed by defendant's agent that they had arrived. Plaintiff then paid the expressage on the goods for their carriage from Red Bank to Merchantville, and asked the agent to deliver them to the local expressman on the following morning for carriage to her house, which the agent consented to do; the house of the plaintiff being outside of the delivery limits of the defendant company at Merchantville. The local expressman was an independent carrier. Some time during the night following the defendant's office at Merchantville was broken into and robbed, and the plaintiff's grip, with its contents, taken therefrom. Said grip and a part of the contents were afterwards found by an officer of the law, and delivered to the plaintiff, the grip being mutilated, and of no real value. Upon the above state of facts the defendant requested the court to enter judgment in its favor and

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against the plaintiff on the ground that, as a matter of law, the defendant's liability as a common carrier had ceased at the time the goods were stolen, which request the court refused, holding that the defendant was still liable as a common carrier at the time of the robbery. Thereupon the court gave judgment in favor of the plaintiff."

The single question raised by the defendant's appeal is whether, from the facts recited, it necessarily results as a conclusion of law that the defendant's duty as carrier, with its consequent liability as insurer, had ended at the time the goods were stolen. If it had ended, and the defendant at the time was acting as warehouseman, and not as a common carrier, there was no liability, in the absence of negligence; and, since the case showed no negligence, a finding and judgment in favor of defendant would be compelled. In the excellent article entitled "Carriers of Goods," in 5 Am. & Eng. Ency. Law, (2d ed.) p. 263, it is said: "There is a decided conflict in the authorities as to when the carrier's liability as such ceases and its liability as warehouseman attaches. One class of cases, adopting what is known as the 'Massachusetts doctrine,' hold that the carrier's liability as insurer ends with the completion of the transit, the unloading of the goods from the cars, and their safe deposit upon the platform or in the warehouse of the company. The carrier is not bound to give notice to the consignee of the arrival of the goods, but is entitled to assume the liability of warehouseman upon the completion of the transportation and a safe storage of the goods. Another class of cases, following what is known as the 'New Hampshire doctrine,' hold that the carrier's liability as insurer continues after the arrival of the goods at their destination until the consignee has had a reasonable time in which to call for and remove the goods. The carrier is bound to notify the consignee of the arrival of the goods, and the reasonable time does not begin to run until such notice, where practicable, has been given. The doctrine of the English cases is substantially the same as the New Hampshire doctrine. The consignee of goods shipped by railway is entitled to a reasonable time, after the goods have arrived at their destination, within which to take them away, and during such time the goods are in the hands of the railway as carrier, and subject it to all the liabilities which attach to that character. But when such reasonable time has elapsed, the company becomes liable as warehouseman merely." The text-writer cites numerous decisions from the reports of the different States, and also several English cases. He treats New Jersey as occupying a doubtful position in this judicial controversy, because of something supposedly equivocal in the decision of this court in Ayres v. Morris & E. R. Co., 29 N. J. Law, 393, 80 Am. Dec. 215. It is true that in the syllabus of that case it was said: "After the goods are safely stored and protected from the weather and from trespassers, and ready for delivery, they become warehousemen, liable only as bailees without hire, and only responsible for ordinary neglect." But a previous paragraph in the syllabus is to the effect that it is the duty of the carrier to store the goods until the owner or consignee has a reasonable time to remove them. And in the body of the opinion of Mr. Justice Haines this language is used: "The obligation of common carriers by railway is safely to transport the goods to the place of destination, to deposit them without delay and without additional charge in their warehouse until the owner or consignee has a reasonable time to remove them. . . . Having the merchandise in good order, and safely stored and protected from the

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weather and from trespassers, and ready for delivery, allowing a reasonable time for the owner or consignee to remove them, their duty as carriers ceases, and they are no longer liable as carriers. After that they become warehousemen, with the liability only of bailees without hire, and responsible only for ordinary neglect. (Citing authorities.) After so depositing them in their warehouse, they keep the goods for the exclusive benefit of the owner, whose duty it is to remove them in a reasonable time." The Ayres Case did not turn at all upon the question whether the carrier's liability as such continued during any particular length of time after the arrival of the goods at destination. The question at issue was the reasonableness of a regulation of the carrier, the effect of which was to require the consignee to give to the carrier a receipt for the whole of the goods before he removed any part of them. The case therefore is not a clear authority upon the present controversy. At the same time the language of the opinion is inconsistent with the so-called "Massachusetts doctrine." No other decision from the courts of this State has been called to our attention. The conflict of authority in this country is referred to in Angell on Carriers, (5th ed.) § 303, note "a," where it is said: "The rule that there is no change in the nature of the liability of the carrier until the consignee has had reasonable opportunity to take the goods away has been adopted in many States, and seems to us more correct," citing many cases. See, also, 6 Cyc. Law & Proc. 454, 459.

The law in England seems well settled. Garside v. Trent Navigation, 4 T. R. 581, is cited in support of the so-called 'Massachusetts doctrine' in the leading cases in that State. Thomas v. Boston & Prov. R. R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Norway Plains Co. v. Boston & Maine R. R., 1 Gray, 263, 61 Am. Dec. 423. In the Garside Case the defendant had undertaken to carry the goods to Manchester, and house them there in order that they might be forwarded to Stockport by another carrier. The goods were destroyed in defendant's warehouse at Manchester before any carrier came from Stockport to whom they could be delivered. On motion to set aside a verdict for defendant the Court of King's Bench held that the keeping of the goods in the warehouse was for the convenience not of the carrier but of the owner of the goods, and thereupon refused to disturb the verdict. But the evidence showed a course of business that materially modified the general duty of the carrier, and it was upon this that the decision was based. The case was distinguished on this ground by Buller, J., in Hyde v. Trent Navigation, 5 T. R. 389, at p. 398. In the latter case the duty of the carrier to make delivery to the consignee in the absence of usage or agreement to the contrary was asserted. That the duty of the carrier as such includes (in the absence of special usage) the duty of making delivery to the consignee, entitling the latter to notice of arrival of the goods and a reasonable time for their removal, was expressly adjudged by the Court of Exchequer Chamber and by the House of Lords in Bourne v. Gatliffe, 3 Man. & Gr. 643, 687; 11 Cl. & Fin. 45; 8 Eng. Reprint, 1019. And in Chapman v. Great Western Ry. Co., 5 Q. B. Div. 278, the goods were addressed to the plaintiff at a certain station on defendant's railway, and were marked "To be left till called for." It was held that defendant's liability as common carrier had ceased because plaintiff had suffered more than a reasonable time to elapse before calling for the goods. But the court (Cockburn, C. J.) said that, notwithstanding the special direc-

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tion, the liability as carrier continued for a reasonable time after arrival of the goods at destination.

In our opinion, it is clear that the duty of the common carrier is not completed upon the mere arrival of the goods at destination. Delivery to the consignee, or to some place of deposit expressed in the contract or implied from the usage of the business, is a part of the carrier's duty as such. Angell on Carriers, (5th ed.) § 282. Where the contract of carriage requires delivery at the stated address of the consignee, the liability of the carrier continues, of course, until such delivery is made. Where, as in the present case, the contract contemplates their delivery upon the carrier's premises at the terminus of the route, and no time for the arrival of the goods or for their delivery is stipulated for, it seems to us plain that the duty of making delivery necessarily involves either the allowance to the consignee of a reasonable time within which to make inquiries respecting their arrival, or else the duty on the part of the carrier of giving to the consignee notice of arrival (Angell, § 315); and also involves, in either case, the allowance to the consignee of a reasonable time and opportunity after notice of the arrival of the goods within which to take them away. Whether the consignee has had reasonable time and opportunity for their removal depends upon all the circumstances, including the question whether notice was received during business hours, when facilities were at hand for their removal. Angell on Carriers, (5th ed.) §§ 287, 288. In this, as in all cases where questions of reasonable time, opportunity, or the like are at issue, the determination of what is reasonable, where the facts are in dispute, or the inference to be drawn from undisputed facts is in doubt, is a question of fact and not of law. In the present case no notice was given to the plaintiff of the arrival of the goods at destination until she called at eight o'clock in the evening. There is nothing to show that she had been previously informed of the time when arrival was to be expected. It cannot be held, as matter of law, that she unreasonably deferred calling for the information. Unless, therefore, it conclusively appears that she accepted delivery of the goods, or that she delayed beyond a reasonable time before removing them, it cannot be held, as matter of law, that the contract of carriage had been performed by the defendant. Mere payment of the charges for transportation does not amount to acceptance of delivery, the goods not having been removed. Whether she was bound to remove them at once depends upon whether the goods in bulk, weight, and the like were of such a character that it was incumbent upon her to carry them away upon her person, or whether she had other means at hand for their removal. Upon these questions the case is silent, except that it is fairly to be inferred that the employment of a local carrier was in contemplation, and that there was no local expressman or other carrier by whom the plaintiff could have the goods removed at that hour of the night.

The finding of the trial court that at the time the goods were stolen the defendant was still liable as a common carrier is a finding upon a mixed question of law and fact, and involves, among other things, a finding that there was nothing to show that the goods were of such a character as to render it incumbent upon the plaintiff to carry them away upon her person, that the employment of a local carrier was reasonably necessary, and that between the time she was notified of their arrival and the time they were stolen a reasonable time had not elapsed to enable

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her to have them removed by a local carrier. We cannot say, as matter of law, that the finding was not a reasonable inference from the facts proven. Upon this appeal, limited as it is to questions of law only, this court will not reverse a judgment that is based upon a conclusion of the District Court upon a mixed question of law and fact if the conclusion is legally inferable from the facts proven. Rogers v. Kershaw, 64 N. J. Law, 213, 44 Atl. 844, and cases cited.

We find no legal error in the record, and the judgment must be affirmed, with costs.

STONE v. ROTTMAN et al.

82 S. W. 76.

(Supreme Court of Missouri, Division No. 2. July 2, 1904.)

BANKS — DIRECTORS — NEGLIGENCE — LIABILITY.

1. Where, in an action by the receiver of a bank against the directors for negligence in managing the bank, certain specific charges of negligence were made in the petition, plaintiff was confined to them.

2. In an action by the receiver of a bank against the directors for negligence in managing the bank, the five-year statute of limitations was applicable.

3. Aside from statutory liability, which creates an individual cause of action in favor of creditors as a class, the directors of a corporation are not liable to creditors for mere nonfeasance.

4. The director of a bank is only required to act in good faith and to exercise such a degree of care as a reasonably prudent man would exercise under the same circumstances; not that which a prudent man would exercise in his own business.

5. The custom of appointing discount and examining committees to attend to the details of the management of the business of a bank is a reasonable one.

6. A statute declares that a bank may sell all kinds of property coming into its hands as collateral security for loans, but forbids an investment of funds in trade or commerce. A bank, on a sale of corporate stock of a corporation which it held as security, purchased the stock, and through its officers ran the company, which traded in coal, for four years at a continual loss. Held, that the directors of the bank were liable for the loss in a suit by the receiver.

7. Where, in a suit by the receiver of a bank against the directors, the pleadings alleged that certain overdrafts were "negligently" permitted, the allegation was sustained by proof of illegal overdrafts.

8. In a suit by the receiver of a bank, the directors were liable for sums loaned borrowers who were at the time insolvent, to the knowledge of the directors.

Appeal from St. Louis Circuit Court; W. C. Douglass, Judge.

Suit by William J. Stone, as receiver of the Mallanphy Savings Bank, against John H. Rottman and others. From a judgment for plaintiff defendants appeal. Affirmed.

Johnson, Houts, Marlatt & Hawes, for appellants.
Granville S. Hoss and Manton Davis, for respondent.

FOX, J. The judgment in this cause is predicated upon the first count in the petition, which sets out "the appointment and qualification

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of the plaintiff as receiver. In it the plaintiff charges that the defendants were negligent in the performance of their duties to the bank; that they neglected to observe the by-laws; that they failed at their meetings to faithfully and diligently inquire into the affairs of the bank, and to ascertain the condition of the accounts and property of the bank; that the discount committees grossly neglected their duty, in that they approved of improvident and worthless loans to irresponsible and insolvent persons and companies; that the president and directors left the entire management of the bank to the cashier, who loaned the money of the bank as he saw fit to wholly irresponsible and insolvent persons, his personal friends, without security; that in the exercise of ordinary care in the performance of their duty the defendants could have prevented the cashier from paying out large sums of money to financially irresponsible persons and corporations. These general charges of negligence are limited by certain specifications of negligence with reference to the accounts of four persons, to wit: Consumers' Coal Company, Schwartz Bros. Commission Company, Nolte & Dolch Fertilizer Company, and T. S. Teuscher.

The plaintiff alleges: That on the —— day of November, 1886, there was organized what was known as the "Consumers' Coal Company," to sell coal, operate coal mines, etc. That the organization and launching of said enterprise was purely a speculative venture on the part of its promoters, and that certain of the directors of said bank during the whole time of its operation and existence were owners, proprietors, and managers of said coal company. The said corporation was started without capital, or the capital necessary to operate the same. The said corporation, being insolvent from the beginning, the defendants herein, certain of whom were directors and officers of said coal company, in order to procure the necessary money wherewith to maintain the existence of said coal company, procured overdrafts to be drawn on the part of said coal company on the bank, which overdrafts were honored and cashed by the cashier of the bank. That from the 1st day of December, 1886, until the 1st day of March, 1896, said overdraft account gradually increased from month to month and from year to year until on the 1st day of July, 1895, said account aggregated the sum of $80,927.61. That after said sum was settled by note said coal company was again permitted to overdraw its account in the sum of $62,000, said last-mentioned overdrafts extending over a long period of time, and on that account $142,927.61 was and is lost to said bank and its creditors. That from the time of the organization of said coal company until it finally ceased to do business it was an insolvent and bankrupt concern, and so known to be by those in charge of its management, as well as by the defendants herein, and that during the entire time of the existence of said company it was a sink hole into which the money of the Mullanphy Savings Bank was being poured at the instigation and with the consent and upon the advice of the defendants herein, for the purpose of endeavoring to extricate it from its insolvency and to save the money previously spent in the enterprise.

Further complaining: That one F. S. Teuscher, of St. Louis, Mo., then and ever since insolvent, had an account with the bank extending from the 1st of January, 1894, to April 6, 1896. That Teuscher was engaged in speculating in futures, buying and selling grain, whiskies, and other commodities for future delivery. That said business was highly

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speculative and hazardous. That the defendants were fully acquainted with the character of the business, and could have ascertained the same at any time by examining into the character of said Teuscher's account and of the vouchers from which the same was made up, as shown by the books of said Mullanphy Bank. That, having the permission and consent of the defendants herein so to do, the said cashier of said bank permitted said F. S. Teuscher to become indebted to said bank without security by overdrawing his account with said bank in the sum of $175,000. That the total amount of the security required of said Teuscher for all of said indebtedness was not worth more than the sum of $30,000, thus leaving a net loss to said Mullanphy Savings Bank on account of said line of loans to said Teuscher in the sum of $145,000. That on account of the grossly careless and negligent conduct of the defendant in permitting said Teuscher to so get possession of the money of said bank without security, the sum of $145,000 was lost to said bank and its creditors.

That Schwartz Bros. Commission Company had had a running account with the bank from the year 1886, and prior thereto, to the date of the failure of the bank. That said commission company was engaged in the business of dealing in futures, buying and selling grain and other commodities for future delivery, on account of their customers and also on their own account. That the business was purely speculative and admittedly hazardous. That the character of their business was known to the defendants for more than ten years last past, but that, notwithstanding that fact, the cashier of the Mullanphy Bank, with the express and implied consent of the defendants, permitted said company to continue from the year 1890 to continually overdraw its account without giving any security therefor, knowing at the time that the entire amount of said indebtedness was liable to be lost on account of the hazardous and speculative business in which said commission company was engaged. That said commission company would be permitted to overdraw its account with said bank until said overdraft account reached from $20,000 to $25,000, when a note would be taken for the account of said overdraft and said note approved by the defendants, whereupon said commission company would again be permitted to overdraw its said account until it would again run up to thousands of dollars, when a new note would be taken for the second overdraft, which said note would also be approved by the discount committee and sanctioned by the directors, defendants herein; the indebtedness increasing each year, until on the 1st day of July, 1894, the indebtedness of said commission company to said bank, in the matter of overdrafts alone, amounted to the sum of $31,000. That it was again permitted to overdraw its account, extending over a period of three years from that date, until said last-mentioned overdrafts reached the sum of $55,000, which was due and owing from said commission company and said bank at the date of its seizure. That of all this indebtedness of Schwartz Bros. to said bank the defendants took little or no security, or such securities as might have been known by, and were known by, defendants to be worthless or wholly inadequate to secure the credit extended to said commission company. That said Schwartz Bros., at the time of contracting said indebtedness, was insolvent. That the sum of $86,000, loaned negligently and unlawfully, in the manner aforesaid, to said company, has been lost to the bank on account of the gross negligence of the defendants.

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That on or about the ——— day of ———, 1891, the Mullanphy Bank became the owner of a certain plant and machinery used and operated for the purpose of manufacturing fertilizing material, used in enriching, cultivated lands, acquired in the collection of debts for which said plants, machinery, etc., had been given as security. That said bank sold for $60,000 the same to what was known as the "Nolte & Dolch Fertilizer Company," then and ever since insolvent, a corporation in which Nolte, a director in the bank, and Kammerer, the cashier, were large stockholders. That said plant, machinery, etc., was sold by said bank for more than its actual value upon a credit, consisting of its eight several promissory notes, aggregating $60,000, and delivered its deed of trust on said property to secure $30,000. Other than this, said Nolte & Dolch Fertilizer Company gave to said bank no security for said indebtedness. That said fertilizer company was, from the date of its purchase of said plant, an insolvent concern, which fact was well known to all the defendants; but that, notwithstanding said fact, they negligently permitted said fertilizer company to overdraw its account without security in large sums of money continuously every month, and many times every month, and many times each month, from the year 1893 down to the 1st day of March, 1897. That the indebtedness of said fertilizer company was largely increased, from the original amount of $60,000 to $80,000, thereby making the loss sustained by said bank on account of said overdrafts $20,000 on account of the negligence of these defendants. That during the entire period of time, when defendants negligently permitted said overdrafts on the part of the insolvent persons and corporations aforesaid to be paid, the defendants herein, with a view to concealing said fact from the bank, the public, and the officers of the law, so manipulated their books, and so permitted the same to be manipulated, that none of said overdrafts appeared upon the general daily balance book of said bank. That said conduct on the part of these defendants in so permitting the books of said Mullanphy Bank to be so kept as not to show a true and correct condition of the bank's affairs was an act wrongfully and grossly negligent on their part, and showed a total disregard of their duties to the stockholders and creditors of said bank. That on account of the grossly negligent, careless, wrongful, and unfaithful conduct of the defendants as set forth the bank has been damaged in the loss of its assets in the full sum of $250,000, for which and for costs plaintiff, as receiver of said bank, prays judgment.

To this count the defendants pleaded the general denial and the five-year statute of limitation running from April 2, 1893. On October 21, 1898, this cause was by proper order of record referred to Judge James A. Seddon as referee to try all the issues. The referee proceeded to hear the evidence, and, having completed such hearing, he, on March 4, 1901, filed with the court the testimony taken in the cause, together with his report and findings thereon. The referee recommended in his report that a judgment be entered in favor of plaintiff and against the appellant in this cause for the sum of $57,665.16. Defendants duly filed exceptions to the report of the referee, which were by the court overruled and judgment rendered upon the report. From this judgment, the appeal in this cause was prosecuted, and the record is now before us for review.

This action is predicated upon negligence of the directors and officers of the bank, and the first count of the petition restricts the acts of negligence to the four accounts mentioned in the petition.

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(1) Consumers' Coal Company: This was a corporation, the entire capital stock of which was hypothecated with the bank to secure a loan to one William Freudenau, amounting to $21,977.22. In 1889 this collateral was sold, the bank becoming the purchaser thereof at a price equaling the amount of the loan, $21,977.22. This amount was then carried to the bank's investment account. One share each of this stock was transferred to defendants Elbrecht and Klages, who were put in as representatives of the bank to operate the coal company. "The bank actually sanctioned the extension of the business by leasing a new mine." This coal mining and selling corporation was then run by the bank, through the directors, as officers of the coal company; the necessary funds being withdrawn from the bank in the form of overdrafts. "From the time the bank began to operate the coal company the business steadily ran behind. It was a losing venture from the start, and that fact became more and more apparent every day and every month of its operation." In the operation of this business, from its beginning in June, 1889, to January, 1891, there was lost to the bank, in addition to its original outlay, the sum of $54,639.48; from this time until August 7, 1891, there was a further loss of $10,140.01; from this time until December 2, 1892, the bank lost an additional $14,901.98; and in the three months from December 2, 1892, to April 2, 1893, a further loss of $5,426.13 accrued. On April 2, 1893, the original investment of $21,977 had so increased by subsequent losses that it then had reached the sum of $106,944.81. At this time the total assets of the coal corporation, as valued by these defendants themselves, did not exceed $55,000, but, not content with this enormous loss, they continued operations, and thereafter a further loss of $31,106.89 accrued up to November 2, 1894; of $17,078.96, to January 18, 1895; of $6,247.36, to February 1, 1895. There was a recession of $925.02 between February 1 and February 16, 1895, but this was more than offset by March 1st. Losses thereafter were, up to July 5, 1895, $3,410.13; up to January 10, 1896, $9,927.42; up to April 16, 1896, $1,779.80, when the total outlay, original investment and losses amounted to $159,611.85, when operations seemed to have ceased, as the figures did not change from then until the close of the bank on March 1, 1897. The total assets of this corporation, as estimated by the defendants, were not of value exceeding $55,000 at any time. Klages, whose administrator is the only remaining appellant, was a director of the bank the whole time, and was on every examining committee save one, and was on the discount committee the whole time, with the exception of six months in 1895, which last committee was the "managing committee of the bank," and which committee, with the president and cashier, the referee finds "studiously suppressed all information in relation to the accounts of the Consumers' Coal Company, and concealed it from the directors who were not members of the committee." He was also the treasurer and a director of the coal company throughout.

(2) Schwartz Bros. Commission Company: This company was engaged in the building and operating of grain elevators. They also owned all the stock of a steamboat line. As early as January, 1891, which is as far back as the inquiry of the referee went, it had an overdraft with the Mullanphy Savings Bank of $4,773.55. In December, 1892, it was $26,939.44; on April 1, 1893, $27,015.39; on October 26,

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1894, $24,584.94, when notes were given covering it. Immediately thereafter another overdraft began to accumulate, which, on April 2, 1895, was $536.59, increasing later to $697.87, when notes were again given. Another overdraft, amounting to $1,154.18, had accumulated July 5, 1895, when notes were given for it. The account was again almost continually overdrawn until the close of the bank, when there was an overdraft of $3,566.40. On the several notes taken covering the different items of indebtedness of this company there was lost to the bank the sum of $66,953.26, and from the collateral given to secure them but $19,185.92 was realized. Yet the referee finds the "discount committee acted with proper care and prudence as a board in accepting them." The referee finds that this company had a credit balance as late as May 18, 1896, on its open account, and also finds that neither the company nor its members were in such financial credit as to entitle them to any advance after January, 1896. But, regardless of this, they were allowed, after May, 1896, to wipe out their deposit and accumulate an overdraft, amounting at the time of the bank's failure to $3,566.40. "But the referee finds that, though the overdrafts were taken up from time to time by good notes, and the overdraft at the close of the bank was only $3,566.40, the cashier disregarded all rules of prudence in reference to the entire overdraft account of this company. That the company owed the bank $3,566.40 at its close was due to his gross carelessness."

(3) Nolte & Dolch Fertilizer Company: The bank became the owners of a fertilizer plant by sale of some collateral held by it. A corporation was organized by Louis Nolte, a director of the bank, and one E. W. Dolch; Kammerer, the bank's cashier, taking two shares nominally. To the Nolte & Dolch Fertilizer Company, the corporation so formed, the bank sold the fertilizer plant for $60,000 in notes — $30,000 signed by the corporation and secured by a deed of trust on the property purchased, $15,000 signed by Louis Nolte and secured by fertilizer company stock as collateral, and a like amount signed by E. W. Dolch with same security. This corporation had no cash as a working capital. This corporation lived off the bank. On the first day of its existence it had an overdraft of $1,208.60, which was increased gradually until on January 1, 1892, it amounted to $13,027.38. On January 14, 1892, it was $14,641.81, when it was reduced by a note for $10,000, secured by a mortgage of the debtor's stock in trade. On January 28, 1893, the overdraft again reached the proportions of $23,173.49, which later was reduced by a note for $12,300, secured as the first. The overdraft, beginning again, reached the sum of $11,139.16 in January, 1897; but similar notes were taken later, so that the corporation's final overdraft at the bank's close amounted to but $487.52.

(4) T. S. Teuscher: This party was a whisky merchant in St. Louis. On April 2, 1893, he was a debtor of the Mullanphy Savings Bank in the sum of $33,470.02 on unobjectionable commercial paper and $233.04 on overdraft. The overdraft seems to have been kept within reasonable bounds until June 15, 1894, when he was allowed to overdraw his account $16,955.58, which overdraft continued in slightly varying amounts until June 29, 1894, when the overdraft was paid. After this, and until August 1, 1894, overdrafts in amounts varying from $5,449.64 to $50,057.09 existed against this party. Between July

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16, 1894, and August 21, 1894, Teuscher was allowed to withdraw from the bank the sum of $218,547.36. This was on worthless checks made by Teuscher, paid by the bank, and refused by the drawee, $55,000; cashier's checks issued by the bank, $9,000; worthless drafts on nonresident drawees, $43,547.36; and withdrawals of deposits credited, but never actually made, $111,000. This so-called "defalcation" was reduced to $175,000 by payments forced from Teuscher, and for this sum his unsecured notes were taken. After these transactions, and when Teuscher was known to be insolvent, he was allowed from time to time to make further overdrafts, and when the bank closed in 1897 an overdraft of $944.20 existed. The allowing of these overdrafts, the referee finds, "is not consistent with sound business principles, . . . improvident, and hazardous," and the conduct of the cashier in allowing T. S. Teuscher to overdraw his account between August 1, 1894, and December 11, 1895, was "grossly careless and reprehensible." The referee did not believe any liability arose against the defendants for any of the Teuscher claim, except the final overdraft of $944.20, and on this theory judgment was rendered.

Among the findings of the referee the record discloses the following which is applicable to the appellant in this cause:

"The members of the examining committee as a committee were grossly negligent in not making the proper examinations of the conditions of the bank, and in not reporting the same, and in not reporting the facts known to them relating to the conduct of the cashier in making loans and the facts relating to these four accounts. If they had done their duty with even the slightest care, and had insisted upon the affairs of the bank being managed on prudent business principles, it would never have failed. The members of the discount and examining committees were grossly negligent of their duties in their individual capacities as directors in not properly supervising the action of the cashier and the president, and in permitting the reckless conduct of these latter in allowing the bank to sink large sums in the coal business and in making loans to customers, especially to Schwartz Bros. Commission Company, Nolte & Dolch Fertilizer Company, and T. S. Teuscher, in the way of overdrafts without first having them approved by the discount committee, and in failing to have the board take the proper action in reference to these matters. Messers. Marks and Klages, from January 1, 1891, to February 27, 1897, knew of the conduct of the cashier in allowing overdrafts to customers as he saw fit. They knew all about the bank engaging in the coal business, and assisted in embarking it in the enterprise. Klages, as cashier of the coal company, drew the money out of the bank which it invested in this enterprise. They knew about the overdrafts of the Nolte & Dolch Fertilizer Company, Schwartz Bros. Commission Company, and T. S. Teuscher, though they did not know of the defalcation in July and August, 1894, until it had occurred. They were closely associated with the active management of the affairs of the bank. None of the committee or directors ever made any formal report to the board showing the illegal conduct of the cashier in allowing overdrafts or the condition of these four accounts, and took no steps to have the cashier removed or to cause him to amend his conduct. They practically left the management of the bank to the cashier, or president, except in the matter of discounting paper, which was done by the discount commttee.

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"In the absence of any evidence to the contrary, the referee finds that the discount committee was not chargeable with any neglect in the matter of discounting any note or notes in the account of the Schwartz Bros. Commission Company. They were all secured by collateral. In the absence of any evidence to the contrary and as to the value of said collateral, the referee finds that they were well secured, and that the discount committee acted with proper care and prudence in their action as a board in accepting and discounting them. But the referee finds that, though the overdrafts were taken up from time to time by good notes, and the overdraft at the close of the bank was only $3,566.40, the cashier disregarded all rules of prudence in reference to the entire overdraft account of this company. That the company owed the bank $3,566.40 at its close was due to his gross carelessness. The discount committee, though charged only in the by-laws with the duty of discounting paper, were looked upon and acted as the managing committee of the bank. They had full opportunities to know the condition of the large accounts of the bank, and especially the account of the Consumers' Coal Company, Schwartz Bros. Commission Company, Nolte & Dolch Fertilizer Company, and T. S. Teuscher. If they did not know the history and the condition of these accounts, their ignorance was the result of gross neglect. They examined frequently the overdrafts on the individual daily balance book. The cashier did not undertake to discount paper, but with this exception the management of the bank was practically left, by all of the other officers and directors, in the hands of the cashier 'as the principal man.' He did undertake to loan to the customers of the bank, and especially to the four parties above mentioned, loans to any amount that he thought fit in the way of overdrafts. This course of conduct was not confined to these four accounts. It was known to the president and to the defendants, who were members of the discount committee and of the examining committee. Had it not been known by them it would have been because of the grossest negligence upon the part of the members of these committees in the performance of their duties. The president from time to time objected to the conduct of the cashier in assuming to loan the money of the bank in the shape of overdrafts. He frequently made these objections, and instructed the cashier to have the overdrafts made good and not allow any more. This was specially true in regard to the overdrafts of the Consumers' Coal Company, Schwartz Bros. Commission Company, Nolte & Dolch Fertilizing Company, and T. S. Teuscher. Klages and Marks both admitted that they knew of this course of conduct of the cashier, and that they themselves frequently spoke to the cashier about it; but he persistently ignored all instructions and warnings all the time from January 1, 1891, to the close of the bank. They were ignored almost daily, to the knowledge of the president and the members of the discount committee, and also of the examining committee, yet the president did not remove the cashier, nor did the president and members of the committee ever bring the matter to the attention of the board of directors, or take any steps to remove the cashier, or to cause him to desist from such illegal actions in loaning the money of the bank without the approval of the discount committee, or to protect the bank against loss."

This is a sufficient reference to the findings of the referee to indicate the correctness or incorrectness of his conclusion of law.

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Opinion.

The conclusion of the referee, as disclosed in his report, is that the appellant in this cause was guilty of such negligence in the discharge of the duties imposed upon him, by reason of the position he occupied in the bank, as rendered him liable to the plaintiff, who is the representative of the bank corporation. The proposition confronting this court upon this appeal is simply narrowed down to the one question: Are the conclusions of law by the referee, predicted upon his finding of facts, correct or incorrect? The referee in this cause, after referring to the essential allegations in the first count in the petition upon which this judgment is based, proceeds in his report, as applicable to this case, to state his conclusions. They are thus clearly stated:

"The referee is of the opinion that the general charges of negligence are confined to the specific charges of negligence made in reference to the accounts of the Consumers' Coal Company, Nolte & Dolch Fertilizer Company, Schwartz Bros. Commission Company, and T. S. Teuscher. Waldhier v. Hannibal, 71 Mo. 514. All of the parties acted upon this theory, as no attempt was made to establish negligence in reference to any other particular account than the four accounts above specified. To this count the defendants pleaded the general denial and the five-year statute of limitations running from April 2, 1893. The referee holds that, this being an action for negligence, the five-year statute of limitations is well pleaded, and that the defendants cannot in any event be held liable for losses which resulted to the bank from the negligence of the defendants prior to April 2, 1893. Williams v. Halliard, 38 N. J. Eq. 373; Wallace v. Lincoln, 89 Tenn. 648, 15 S. W. 448, 24 Am. St. Rep. 625; Brinckerhoff v. Bostwick, 99 N. Y. 194, 1 N. E. 663; Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684. The question, then, on the first count, is whether the defendants are liable for the losses to the bank on these four accounts accruing since the 2d of January, A. D. 1893.

"The first question to be solved is, what is the degree of care which the directors of a bank are bound to exercise in the performance of their duties? They may be liable for misfeasance, or positive and active wrongdoing, or nonfeasance, the passive neglect to perform their duty. There is a marked difference between the duty which the directors of a bank owe to the bank and that which they owe to strangers or creditors. Much of the confusion in the cases will be removed, if they are examined with this distinction kept thoroughly in mind. In some of the cases the two duties have been hopelessly confounded. The relation of a corporation to a depositor is that of debtor and creditor arising from contract. Aside from statutory liability, which creates an individual cause of action in favor of creditors as a class, the directors of a corporation are not liable to creditors for mere nonfeasance. 'Aside from statutory liabilities, they are not liable individually to depositors for mere nonfeasance. Nothing short of actice participancy in a positively wrongful act intendedly operating injuriously to the party complaining (creditor) will give origin to individual liability.' Fusz v. Spaunhorst, 67 Mo. 256. Judge Marshall, in a very able opinion rendered in the case of Utley v. Hill, (Mo. Sup.) 55 S. W. 1098, 49 L. R. A. 323, 78 Am. St. Rep. 569, said: 'The relation of a depositor to a bank is that of an ordinary debtor and creditor. "The relations between the creditors and the corporation 'is that of contract and not of trust.'" Briggs v. Spaulding, 141 U. S.

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132, 11 Sup. Ct. 924, 35 L. Ed. 662, followed in Bank v. Hill, 148 Mo., loc. cit. 386, 49 S. W. 1012, 71 Am. St. Rep. 615. "But there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors." Id. Accordingly it was held in Bank v. Hill, supra (which was a suit by the creditors of this same bank against these same defendants to recover the deposits lost by the creditors by reason of the negligence of the defendants in managing the affairs of the bank), that there could be no recovery by depositors against directors of the bank because of negligence of the directors in managing the affairs of the bank; that the directors are liable for negligent performance of duty to the bank, or to its assignee, or to a receiver thereof, but not to the creditors, because of want of privity of contract of duty between them. So, also, in Fusz v. Spaunhorst, 67 Mo., loc. cit. 264, 265, the same doctrine was announced by this court, speaking through Sherwood, J., and it was further pointed out that, aside from statutory liability, directors were not liable individually to depositors for nonfeasance; that "nothing short of active participation in a positively wrongful act, intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability;" that the injury must be "occasioned by the malicious or fraudulent act of the party complained of." Doubtless in a proper case the creditors might bring a suit in equity to subject to the payment of their demand claims of the corporation against directors for nonfeasance. But such a suit would be like any other suit to reach other older assets of the bank. Such a suit would be really prosecuted in the right of the bank. In this sense the receiver represents the creditors, as well as the bank and stockholders. Zane on Banking, § 86. The referee is of the opinion that the evidence in support of the first count does not show a case of fraud, or such gross negligence as amounts to fraud or wilful neglect of duty, and that there is shown in this count no individual liability of the defendants to the creditors. If there is any action at all against the defendants it arises from a mere omission to perform their duty. Nonfeasance consists in passive neglect to exercise the proper degree of care of directors in the performance of their duty.

"The referee is of the opinion that the directors of a bank are not to be charged as strict technical trustees. In a certain sense they are undoubtedly to be considered trustees, but only in that sense in which an agent or bailee intrusted with the care and management of property is considered a trustee. A director more nearly resembles a managing partner. Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684. The degree of care directors are bound to exercise cannot be better stated than in the opinion of Chief Justice Fuller in the leading case of Briggs v. Spaulding, 141 U. S. 132, loc. cit. 150, 11 Sup. Ct. 924, 930, 35 L. Ed. 662: 'No one of the defendants is charged with the misappropriation or misapplication of, or interference with, any property of the bank, nor with carelessness in respect to any particular property, but with the omission of duty which, if performed, would have prevented certain losses, in respect of which complainant seeks to charge them . . . Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed, in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequences

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of omission on their part. . . . In any view the degree of care to which these defendants are bound is that which ordinarily prudent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances.' And again, in the same case (page 165, 141 U. S., page 935, 11 Sup. Ct., 35 L. Ed. 662), he says: 'We hold that directors must exercise ordinary care and prudence in the administration of the affairs of the bank, and that this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business as defined to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention.' Judge Hughes said, in Trustees v. Bossieux, (D. C.) 3 Fed. 818 (s. c. [D. C.] 3 Fed. 387): 'If, by reckless inattention to the duties confided to them by their corporation, frauds and misconduct are perpetrated by officers, agents, and codirectors, which ordinary care on their part would have prevented, then I think it may with truth be said that it is now elementary law, to be found in all the books, that directors are personally liable for the losses resulting; i. e., for gross negligence, or what the jurists call "crassa negligentia."' Stapleton v. Odell, (Sup.) 47 N. Y. Supp. 15; Savings Bank v. Caperton, (Ky.) 8 S. W. 885, 12 Am. St. Rep. 488.

"The referee is of the opinion that the director of a bank is only required to act in good faith, and to exercise such a degree of care as a reasonably prudent man would exercise under the same circumstances. He is not bound to exercise the same degree of care which a prudent man would exercise in his own business. This is too high a standard. 'To expect a director under such circumstances to give the affairs of the bank the same care that he takes of his own business is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.' Swentzel v. Penn Bank, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718. A director is expected to attend the meetings of the board with reasonable regularity, and to exercise a general supervision and control. He is not required to know the details or contents of the books and papers. 'The framers of the organic and of the statute law must be held to have understood how the business of a bank is conducted. They must have known that the directors are drawn from the busiest men in the community; men who have carved success out of chaos, who have succeeded where the great multitude have failed; men who are not expected and could not afford to give their whole time to the business of the bank. The lawmakers knew that the active management of a bank usually devolves upon the president and cashier, and that to the latter is usually intrusted the management of the details. They knew that few directors had the time, and fewer still the capacity, to examine the books of a bank and

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ascertain its solvency; that even in their own business they could not take off a trial balance from the books they employed experts to keep for them, either because they had not the time to do so themselves or because they did not have the capacity to do so.' Utley v. Hill, (Mo. Sup.) 55 S. W. 1091, loc. cit. 1100, 49 L. R. A. 323, 78 Am. St. Rep. 569; Queen v. Hincks, (cited in Thompson on Liability of Agents, etc., p. 474); Dunn v. Kyle's Ex'r, 14 Bush, 134; Savings Bank v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488. The custom of appointing discount and examining committees to attend to the details of the management of the business of a bank is a reasonable one, and one almost necessary in the conduct of banks in large cities, where directors are drawn from the busiest men in the community, who cannot be expected to give sufficient time to grasp the details of the business. Morse on Banking, (3d ed.) §§ 115, 116; Thompson on Liability of Officers and Agents, etc., § 3998.

"Upon the organization of the Mullanphy Savings Bank by-laws were adopted. These provided for the creation of discount and examining committees, to whom were intrusted the duties of looking after details of the business management. These by-laws were afterwards, in January, 1880, early in the history of the bank, formally ratified by the stockholders. This mode of conducting the business of the bank was well established long before any of the defendants became members of the board. It is too late now to charge that it was not proper. The directors of a bank should exercise the greatest care and prudence in appointing the president, cashier, and the members of the managing committee, and, having used such care to select honest and capable men, they cannot be held liable as insurers of their fidelity. Clews v. Bardon, (C. C.) 36 Fed. 621. In the case of Percy v. Millaudon, 6 Mart. (N. S.) 616, 17 Am. Dec. 196, cited with approval by the plaintiff in his brief, the court said: 'If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.' Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Movius v. Lee, (C. C.) 30 Fed. Rep. 298. In the absence of any just ground of suspicion that there is something wrong or dishonest going on in the bank, it is not negligence in the other directors to accept the statement of those specially charged with the duty of making those statements. As was said by Judge Monk in Queen v. Hincks, supra: 'The ordinary director must have confidence in his codirector until he suspects that there is something wrong or dishonest going on in the bank.' On this point we can adopt the language of the highest court in this country as applicable to the case at bar with equal force as in the case in which it was used: 'They (directors) are not required to adopt any system of espionage over their officers (and committeemen), or to entertain any suspicion without some apparent reason, and until some circumstance transpires to awaken a just apprehension of their want of integrity. They have a right to assume that they are honest and faithful. . . . Should any circumstance transpire to awaken the just suspicion of their want of integrity, and it is suffered to pass unheeded, a difference would prevail.' Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

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"In treating his conclusion of the liability of the defendants under the facts found, the referee has been guided by the principles of the decision laid down in the case of Briggs v. Spaulding, supra, rather than by those laid down in the dissenting opinion in that case. Mr. Rottman was the president of the bank. He knew, and, if he did not know, he could have known by the exercise of the slightest attention to his duties, the whole history of the account of the Consumers' Coal Company with the bank, and that the bank was carrying on a coal business which was like a rat hole, into which its money was being poured. The conduct of Rottman and of all the other parties, who permitted the bank to invest the money which it did in this company, was utterly reprehensible. It was entirely illegal to permit the bank to carry on this business one day after there had elapsed a reasonable time to enable the bank to dispose of the property and realize on the collateral which it had been forced to take in. The statutes of Missouri expressly forbid that the money of a bank should be invested, directly or indirectly, in any trade or commerce. This statute is merely declaratory of the common law. The statute provides 'that a bank may sell all kinds of property which comes into its possession as collateral security for loans,' etc. This implies that a sale should be made within a reasonable time. The bank purchased all the stock of the Consumers' Coal Company in 1889. Certainly it should have disposed of the property and wound up its business, if it was necessary to conduct the business at all, long prior to 1893. The referee thinks that the defendant Rottman, owing to his gross neglect of duty as president of the bank, is liable for all money which the bank invested in this business between the 2d day of April, 1893, and the 16th day of April, 1896, when it wound up the business of the coal company, thus putting an end to the loss. The indebtedness of the coal company on April 16, 1896, was $159,611.85; on April 2, 1893, it was $106,944.81. There was an increase, therefore, in the indebtedness between those dates, of $52,667.04. The referee is of the opinion that J. H. Rottman is liable for this increase, to wit, the sum of $52,667.04. He is also of the opinion that the pleadings are sufficient to support a judgment in his view that the investment of the money lost in the coal business was illegal. The money drawn by the coal company took the shape of overdrafts. The pleadings allege that the defendants negligently permitted these overdrafts. The fact that the overdrafts were illegal is consistent with and tends to sustain the allegation that the defendants were negligent in permitting them.

"There is no evidence that there was any negligence of the defendants in reference to the original indebtedness of the Nolte & Dolch Fertilizer Company, and of Louis Nolte and J. W. Dolch to the bank, which was created at the time of the sale by the bank to the company of the plant, or that there was any evidence of negligence of the defendants in failing to collect this indebtedness. The cashier allowed this company to overdraw its account from the beginning. They should not have been permitted to overdraw their account at all, but the overdrafts were afterwards settled by notes which were secured by collateral, with the exception of the overdraft which existed at the closing of the bank, $487.52. There is no evidence that these notes were not well secured and good at the time they were taken. The referee is therefore of the opinion that the defendant Rottman is not liable for any of the losses which the bank may have suffered upon the account of Nolte & Dolch

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Fertilizer Company, except for the overdraft, $487.52, for which he is liable. The referee is of the opinion that defendant Rottman is liable for the overdraft of $3,566.40, which existed against Schwartz Bros. Commission Company at the close of the bank, but that he is not liable for the overdrafts of this company, as they were afterwards fully settled by notes, as in the case of Nolte & Dolch Fertilizer Company. For the same reasons which are stated in reference to the latter company, Rottman should not be held liable for subsequent losses by the bank on these funded overdrafts. The overdraft of $3,566.40 was allowed after Schwartz Bros. Commission Company was in financial straits, and should never have been allowed at all by the cashier. The referee is of the opinion that defendant Rottman is liable for the amount of the overdrafts existing on account of T. S. Teuscher at the close of the bank, to wit. $944.20. It occurred after the defalcation transaction, and after Teuscher was in desperate financial straits. It was made by the cashier, and should never have been permitted. The other indebtedness of T. S. Teuscher to the bank consisted of two accounts.

"For the same reasons stated in reference to the defendant Rottman, the referee is of the opinion that defendants Klages and Marks are liable for the same amounts for which the defendant Rottman is liable."

It is made apparent from the expression of the views of the referee that he bases his conclusion of liability of the defendant Klages, who was one of the directors of the Mullanphy Bank, as well as a member of the discount and examining committees of said corporation, upon the gross negligence and inattention to the duties imposed upon him by reason of his relative position to the bank. In support of his legal conclusions the referee cites one of the leading cases upon the subject, Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. In fact, he expressly states that he was guided in his legal conclusions as to the liability of defendants by the principles announced in that case. We have given the legal conclusions reached by the referee our most careful attention, have considered the authorities cited by learned counsel for appellants and respondent in their able and exhaustive briefs now before us, and we are of the opinion that his conclusions, based upon his finding of the facts, are correct. This court has plainly indicated its views upon this proposition. In Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615, Burgess, J., in discussing the conduct of the directors in that case, said: "And while it is not pretended that they misappropriated any of the funds of the bank, or that they were guilty of any fraudulent conduct, they were guilty of gross neglect in leaving the entire management of the business of the bank to the cashier. And it is no excuse for the want of diligence to say that they had no benefit from it, and that their services were gratuitous, when by the exercise of ordinary care they could have prevented the disastrous consequence which flowed from the want of such care."

While in that case it will be observed that the court held that the directors were not liable in the suit of the general creditor, during the course of the opinion the clear announcement of the rule, as applicable to this case, was made. It was there said: "The directors having been guilty of negligence in the discharge of their duties, by reason of which losses were sustained by the bank, they were liable in an action at law to the corporation while a going concern for losses due to such loans, or to the assignee after the assignment, or in equity to the stockholders,

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in the event of the declination of the assignee to bring suit." This case was approved in Utley v. Hill, 155 Mo., loc. cit. 259, 55 S. W. 1091. Marshall, J., speaking for the court in that case, after pointing out the relation between the creditor and the bank, citing Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, and Bank v. Hill, supra, said: "Accordingly it was held in Bank v. Hill, supra (which was a suit by the creditors of the same bank against these same defendants to recover the deposits lost by the creditors by reason of the negligence of the defendants in managing the affairs of the bank), that there could be no recovery by depositors against directors of a bank because of the negligence of the directors in managing the affairs of the bank; that the directors are liable for negligent performance of duty to the bank, or to its assignee, or to a receiver thereof, but not to the creditors, because of want of privity of contract or duty between them." In view of these plain expressions of this court upon the proposition of liability of directors for negligence in the management of the business of the bank, we deem it unnecessary to burden this opinion with a review of all the authorities on this subject. It is sufficient to say that the conclusion reached in this cause is supported by the overwhelming weight of authority. Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Marshall v. Savings Bank, 85 Va., loc. cit. 684, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Morse on Banks and Banking, (4th ed.) § 128; Brinckerhoff v. Bostwick, 88 N. Y. 52; Bank v. Hill, 148 Mo. 389, 49 S. W. 1012, 71 Am. St. Rep. 615; Cook on Stock & Stockholders, (52d ed.) § 703; Bank v. Bossieux, (D. C.) 3 Fed. 817; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775, and the same case in 46 N. J. Eq. 25, 18 Atl. 824.

It is contended by appellant that there was a fatal variance between the allegations of the petition and the proof, so far as it refers to the indebtedness of the Consumers' Coal Company, in this: that the averment relates to negligence, and the proof, if any, is that of intentional injury. We are unable to give our assent to this contention. It will be noted that, even after the purchase of all the stock of the coal company, a separate existence of the two corporations continued. The investment of money by the bank in the coal business was illegal, and the illegality of that investment was accomplished through overdrafts, and the negligence complained of is in permitting these overdrafts. The overdrafts were illegal, and it was negligence in the management of the bank, with full knowledge of the business of the coal company, to continue to recognize and honor them. While the referee finds that the investment of the bank in the coal business and the carrying on of that business was illegal, and so far as as those acts were concerned were intentional, yet he does not find that the injury resulting from such acts was intentional and wilful, but simply the result of negligence. In other words, the finding, in effect, is that there was no dishonesty practiced in the transaction with the coal company, but that permitting the overdrafts, in view of the surrounding conditions of the coal company, was in fact gross negligence. The referee, in his conclusions, finds that the pleadings were sufficient to support a judgment, and he says that "the investment of the money lost in this coal business was illegal. The money drawn by the coal company took the shape of overdrafts. The pleadings allege that the defendants negligently permitted these overdrafts. The fact that the overdrafts were illegal is consistent with and

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tends to sustain the allegation that the defendants were negligently permitting them." We are of the opinion that this conclusion was correct, and that there was no variance between the proof and the averment in the petition respecting this subject.

It is unnecessary to pursue this subject further. The conclusions reached by the referee upon the other accounts involved were correctly based upon his finding of the facts, and, finding no reversible error in the action of the trial court in approving the report of the referee and entering judgment in accordance with the facts found by him, the judgment should be affirmed; and it is so ordered. All concur.

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FIDELITY & DEPOSIT CO. OF MARYLAND v. M. RICH & BROS. (two cases).

50 S. E. 338.

(Supreme Court of Georgia. March 25, 1905.)

GUARDIAN AND WARD — NECESSARIES — PURCHASE ON CREDIT — GUARDIAN'S BOND — LIABILITIES OF SURETY.

1. A guardian is not permitted by law to bind the estate of his ward by a contract for the purchase of goods on credit, even though the goods be for the use of the ward, and properly classed as necessaries.

[Ed. Note. — For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 126, 219.]

2. The surety on a guardian's bond is only prima facie bound by a judgment against the estate of the ward, to which he was not a party.

3. In a suit against the principal and surety on a guardian's bond, where it affirmatively appears from the petition as amended that the alleged breach of the bond consisted of the refusal of the principal to pay a judgment against the estate of the ward obtained in an action on open account for clothing sold the guardian for the benefit of the ward, a general demurrer to the petition should have been sustained.

(Syllabus by the Court.)

An Indorsement, "Pay to Any Bank or Banker," Held to Be an Indorsement for Collection Only: Payment: Protest: Collections: Negotiable Instrument.

H. H. Hagan, of Guthrie, drew his draft for $700 on Kemper, Bowman & Hillix, of St. Joseph, and the Bank of Indian Territory gave him the money on it. The draft is shown, in effect, in accompanying illustration.

The draft was forwarded through Wichita and Kansas City banks to St. Joseph, and presented by a bank there to Kemper, Bowman & Hillix, and they gave their check for it, and the draft was stamped, paid and surrendered to them, and the St. Joseph bank credited the amount to the Kansas City bank, from which it was received.

Kemper, Bowman & Hillix had no funds of Hagan with which to pay the draft, but they did so, expecting that Hagan had made a shipment of cattle to them. No cattle came, and the day after paying the draft they saw in the papers that Hagan had killed himself, and going to the bank to whom they had paid the draft they asked if the bank could not help them out. The check that they had given on another bank in payment of the draft not yet having been presented for payment they stopped payment on it, and the collecting bank surrendered it and took back the cancelled draft, and protested and returned it, cancelling the credit that it had made to the Kansas City Bank.

When the draft got back to the owner, the Bank of Indian Territory,

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it objected to this latter proceeding, as it had paid out to Hagan's order nearly all of the $700, and it sued the St. Joseph bank for the amount of the draft. It was beaten in the lower court, but won on appeal.

If there had been no collusion between the St. Joseph bank and the payors of the draft, and their check had been worthless, and the bank had promptly ascertained that fact and demanded the return of the cancelled draft and protested the draft, whether returned or not, there is good authority for the statement that it would not have been liable for the amount. 42 N. Y. 538, 52 N. Y. 545.

There was a technical objection raised on the trial that will interest bankers in its bearing on other instruments.

The Bank of the Indian Territory indorsed the draft: "Pay to any Bank or Banker, or order; all previous indorsements guaranteed. Bank of the Indian Territory. H. W. Painter, Cashier."

This indorsement, it was held, was a restrictive indorsement, an indorsement for collection only, an indorsement that stopped the negotiation of the draft regardless of any indorsement that followed it. Such an indorsement would not bind the bank to all of the liabilities of an indorser.

The court said on this point:

"Respondent's final contention is that there was no evidence that plaintiff was the owner and holder of the draft. The evidence shows that plaintiff was the original owner and holder, and it made the following indorsement on the draft: 'Pay to any Bank or Banker or order; all previous indorsements guaranteed' The next indorsement was by the Fourth National Bank of Wichita, Kan., and was as follows: 'Union National Bank of Kansas City, Mo., or order, previous indorsements guaranteed.' The latter indorsed it as follows: 'Pay order of any bank or banker; all previous indorsements guaranteed'— and sent it to defendant, who, in its answer, alleges that it protested the same and returned it to plaintiff. The defendant claims that the said indorsements place the title to the bill in the Union National Bank of Kansas City, and therefore plaintiff was not the owner of the bill. An indorsement of a bill for collection is not a transfer of the title of the instrument to the indorsee, but merely constitutes him the general agent of the indorser to present the paper and receive payment and remit the proceeds. Eaton & Gilbert on Com'l Paper, p. 329. As a rule, the title of a negotiable instrument passes by an ordinary indorsement, whether special or general. Id. 318. And if the indorsee holds the instrument merely as an agent, the agency may be annulled at the pleasure of the indorser. Id. 330. The indorsement of plaintiff, 'to pay to any bank or banker or order,' was not such an indorsement as to pass the title to the bill. It merely authorized any bank or banker into whose hands it might come to collect and remit the proceeds. In other words, it was only authority to collect — therefore a restrictive and not an unconditional indorsement passing the title. We think this is clear. The title remained in the plaintiff (Bank of Indian Territory — the payee), *and no subsequent indorsement could affect such title.*"

(See Decision No. 804.)

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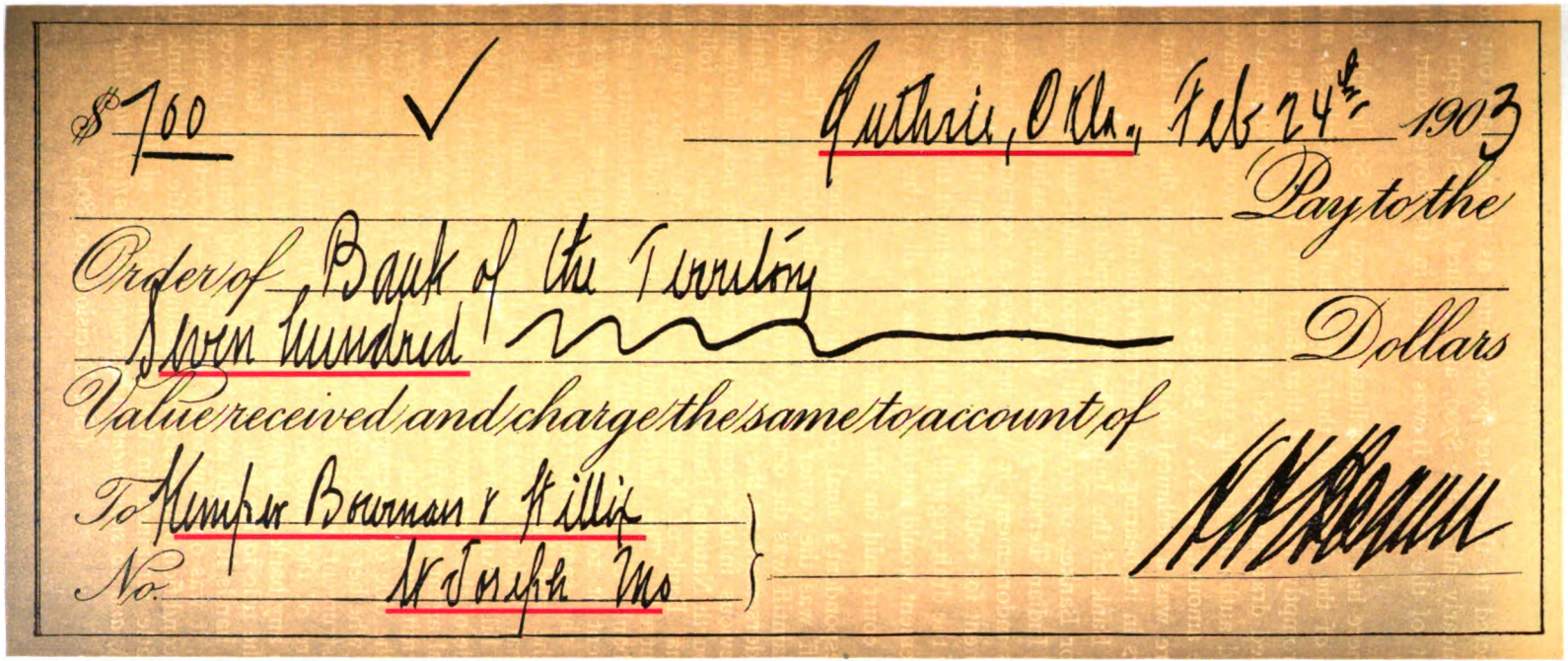

$ 700 ✓

Guthrie, Okla., Feb 24th 1903

Pay to the Order of Bank of the Territory

Seven Hundred Dollars

Value received and charge the same to account of

To Kumpe Bowman & Killin

No. Ft Smith Ark

B. 1. "Pay to Any Bank or Banker" — Restrictive Indorsement.

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"Pay to any bank or banker or order; all previous indorsements guaranteed.
Bank of the Territory; Guthrie, Okla."

"Union Bank of Kansas City, Mo., or order, previous indorsements guaranteed.
Fifth National Bank, Wichita, Kan."

"Pay order of any bank or banker; all previous indorsements guaranteed.
Union Bank, Kansas City, Mo."

This draft was paid to the First National Bank, March 3d, by Kemper, Bowman & Hillix, under the belief that Hagan, who had no credit with them, had shipped them some cattle. It was paid by their check on another bank, and the amount was placed to the credit of the bank from whom the First National Bank received it. On the morning of March 4th, it was ascertained that Hagan had killed himself and that he had shipped no cattle, and K. B. & H. induced the First National Bank to return the money, cancel the credit and protest the draft. This the court said could not be done against the objection of the Bank of the Territory, which had paid Hagan the amount of the draft before it was paid.

It was held in effect in 42 N. Y. 538; 52 N. Y. 545, that if the bank had surrendered the draft to K. B. & H.—taking their check in payment and credited the proceeds to the owner, and then had promptly ascertained that the check was worthless, that they could have demanded the return of the draft—and protested the draft, whether returned or not, and cancelled the credit,—but, of course, this case presents different facts.

The court here decided that the indorsement
"Pay to any bank or banker or order"
is an indorsement for collection—a restrictive indorsement—one that does not pass title to the instrument nor bind the indorser to the liabilities of an ordinary indorser. This decision means that the form of indorsement—"Pay to any Bank or Banker", which is growing in use, is as objectionable as the long since rejected form "Pay to First National Bank or order for collection for account of, &c."

McMasters Com. Cases, Vol. 1905, 83 S. W. 537.

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Partnership: Sale of Partnership Property After One Partner's Death: Secret Bonus Received by His Estate.

Joseph B. Comstock and his two brothers owned a timber tract in Canada. Joseph B.'s interest was an undivided one-ninth, the three brothers being partners. Joseph B. died.

After his death Peter Ryan offered $500,000 for the land. The surviving brothers wished to accept the offer but the widow of Joseph B. objected to the price on the ground that the land was worth more.

Ryan then made the widow and the brother's estate a secret offer of a bonus of $44,444.45 if she would consent to the sale for $500,000. She accepted the offer and the sale was made for $500,000 and the money paid.

Some time after this the surviving brothers heard of this secret bargain and the payment of the $44,444.45 to the widow and the deceased brother's estate, and they brought an action to have this amount turned into the partnership funds as part of the purchase price. They were beaten in the lower court but won, by a divided court, on appeal. The court said in part:

"It seems to be admitted that the arrangement between Ryan and defendant, whereby his one-ninth interest was made to produce $44,444.45 more than an equal share of the purchase price, was kept secret, and did not come to the knowledge of the complaintants, until some time after the transaction was closed and the sale confirmed. Upon the hearing of this cause the matter was brought to the attention of the Circuit Court, which, acting under direction of this court (see 126 Mich. 155, 85 N. W. 579), considered the question of the accounting; and a claim was made by complainants that this sum of $44,44.45 should be treated as an asset belonging to the copartnership. The Circuit Court held otherwise, and the complainants have appealed.

"Counsel for the defendant say that a dissolution of a copartnership by death makes the surviving partners trustees for the representatives of the deceased, but that there is not a similar reciprocal relation, and that the representative, having none of the authority of a copartner, has none of the obligations of such. If it be admitted that the representative has no active share in the settling of the partnership business, we think that it does not follow that he owes no duty toward his interstate's copartners, but is at liberty to seek the furtherance of his own interests to the injury of theirs. If it is true that he may sell his interest in each individual piece of property owned by the firm (which we do not affirm), and captiously insist on a bonus over and above his share of the proceeds of each piece of property that the surviving partners may seek to sell, enforcing the claim by a denial of their authority to sell, and threats to prevent it by litigation, it is not difficult to see that serious embarrassment, if not loss, to the others would result. In the present case the defendant appears to have been correct in the opinion that the complainants were offering this property at too small a price and no fault can be found on account of their objection to the sale. The sequel has proved that the property was worth much more. Their opinion was confirmed by Ryan's willingness to pay a large additional sum. Had this been communicated to the complainants, it is not improbable that it would have resulted in their selling

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the property for a sum more nearly approximating its value; but, instead of this, defendant acted upon assumption that he might sell his assent to the contract to sell for $500,000, and thus keep all of the additional price offered, to the exclusion of the other interested parties, who were allowed to complete the sale in the honest belief that the price was $500,000, whereas in fact it was $544,444.45.

"The theory that this was a sale of the defendant's interest is fallacious. It is plain that it could not have been sold to Ryan, who wanted the entire property or none; and the agreement shows that the consent was to the sale of all, and payment of the $44,444.45 was conditional upon it. It is not difficult to see that defendant might not have been able to realize as much out of the property in any other way; for it is shown that Ryan would not have given $900,000 for the property, and a sale for anything less than that sum would have made defendant's legitimate share less than $100,000. There was, therefore, a premium upon secrecy, both for Ryan and the defendant. Ryan bought the property for a low price, while defendant got the benefit of a high price; and this was accomplished by leading the complainants to believe the property was going for $44,444.45 less than the real price. If we are to say that the defendant in this case had the right to make such a contract as this, it is not easy to see why any copartner, not actively engaged in settling the partnership affairs or his representatives or assigns, may not do the same; and that would mean that it is legitimate for copartners and their representatives to speculate out of copartnership assets at the expense of their copartners, and the consequences can readily be imagined. We must treat this property as sold for the full amount received for it, and the bonus received by defendant as an asset of the firm, to be accounted for by defendant."

(See Decision No. 811.)

Extension of Time of Payment: Surety Released.

James Grant had a contract with the city of Detroit for the construction of certain sewers. He gave a bond with two sureties, as required by statute, to secure payment for labor and materials that went into this public work. The C. H. Little Company sold Grant, on thirty days' time, material that went into these contracts. The materials were sold to him from time to time and were charged to him in an open running account. On February 1, 1902, a balance was due of $3,031.32. On the 7th of February, Grant gave the company his note for thirty days, which was credited to this account. This note was renewed for thirty days. The acceptance of these notes was held to be an extension of time of payment which released the sureties on the bond to the amount of the notes.

The court said in part:

"Upon the maturity of the note of February 7th, Grant paid the interest, and gave plaintiff a second note in renewal, payable thirty days after date; and upon April 6th he paid the interest, and again renewed the note. When the note of February 7th was taken, plaintiff made an entry upon its cashbook as follows: 'James Grant on acct. $1,500.' The amount was credited to Grant's account on the ledger, deducted from

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monthly balance, and never charged back to the open account. It was debited to 'Bills receivable,' to offset the credit entry. Grant had several contracts with the city of Detroit at this time, materials for which he purchased from the plaintiffs. An action was brought on these bonds, which resulted in a directed verdict against Grant for $1,593.77, without costs, and against all defendants for $682.99, with costs. The plaintiff has appealed.

"The contest arises over an item of $1,500 and interest, for which the court held that the sureties were not liable; the judge being of the opinion that they had been discharged from their obligation by the acceptance of plaintiff's notes mentioned. It is contended, first, that these notes did not extend the time beyond the period of credit given defendant Grant, and therefore that the sureties are not discharged; second, that there was no consideration for an extension of time, as there was no agreement by Grant not to pay before the maturity of the note, nor by plaintiff not to sue the original claim.

"We think these positions untenable. Defendants say in regard to the former that these goods were bought on thirty days' time, and that the thirty days did not begin to run until the last item of the account was purchased. We think this is not so. The arrangement was to sell materials for various jobs on thirty days' time. That meant thirty days' time from date of invoice. If we may not take judicial notice of so uniform a usage of trade, it is the only reasonable construction to place on the language, in view of the circumstances.

"As to the latter contention, the case differs from one where there is a mere agreement to forbear suit for a given time, to give the debtor an opportunity to pay, as in the recent case of Ferris v. Johnson (Mich.), 98 N. W. 1014. Here the debtor gave his promissory note, whereby he promised to pay at a given time a debt that he had previously incurred. Under ordinary rules, he had no right to pay it before it was due, if it was a note based upon a consideration, and of that there is no doubt. An existing debt is a good consideration for a promise to pay, and it would be a surprise to business circles, were we to hold that a note given for an existing debt, whether due or not, was not based on an adequate consideration; and it would be equally a surprise were we to hold that, notwithstanding the note, the debtor might pay, or the creditor enforce payment, at any time. The inference to be drawn from the circumstances is that Grant was largely in debt on February 7th to the plaintiff. It was not convenient for him to pay money, and he was asked to give bankable paper, which he did, and it was negotiated. There can be no doubt that both parties expected and understood that the amount represented by that note should not be paid or collected sooner than the time fixed in the note, and contracted to that end, as the terms of the note itself implied. We are aware that there is a want of harmony in the authorities upon this point, but we think the weight of authority sustains our conclusion. It is probable that the amount for which the note was given was due on February 7th, but, if not due at that time, as plaintiff's counsel agree, an additional consideration for the extension was the promise to pay interest before the expiration of thirty days. The case is fairly within the rule of Smith v. Shelden, 35 Mich. 46, 24 Am. Rep. 529, and Sweet v. Newberry, 92 Mich. 521, 52 N. W. 1005. See Shaylor v. Giddins, 122 Mich. 660, 81 N. W. 552, and Ferris v. Johnson (Mich.) 98 N. W. 1014."

100 N. W. 1006.

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Indorser Held as Maker: Negotiable Instruments Law.

The note described, in effect, in accompanying illustration was presented to the president of the Merchants' National Bank for discount, but he declined to take it unless the president and treasurer would add their individual names to it, and in accordance therewith they wrote their names on the back thereof before the note was discounted.

The note was not paid at maturity and it was not protested. The court held that S. Davies Warfield and Henry B. Keyser were co-makers of the note and were not entitled to notice of non-payment. This is in accordance with many decisions in other States in relation to these irregular indorsements. Since the rendering of many of these decisions the negotiable instruments law has been adopted in such States, and it is possible that thereby such irregular indorsers will be held to be indorsers, and as such charged with all the liabilities of an indorser and entitled to all of his benefits, which in this case would mean the discharge of Warfield and of Keyser.

The negotiable instruments law says on this subject: "A person placing his signature upon an instrument, otherwise than as maker, drawer or accepter, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." It also says:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

It will be noticed that this second paragraph, ("Where a person not otherwise a party," etc.) section 83 of the Maryland law, states the status of any one, not otherwise a party to the instrument, who places (anywhere) thereon his signature in blank before delivery. Is it not possible that under a construction of this law by some courts it may be held that if John Jones had, before delivery, placed his name on the face of this note, under that of the maker, that he would be entitled to all the privileges of an indorser, and that if the note was not protested he would be released, as would be an indorser. The law here says, "he is liable as indorser," and no indorser is liable unless the instrument is protested, unless he has waived that proceeding. There cannot be much doubt but that it was the intention of those who drafted this section to have its application limited to irregular indorsers, who

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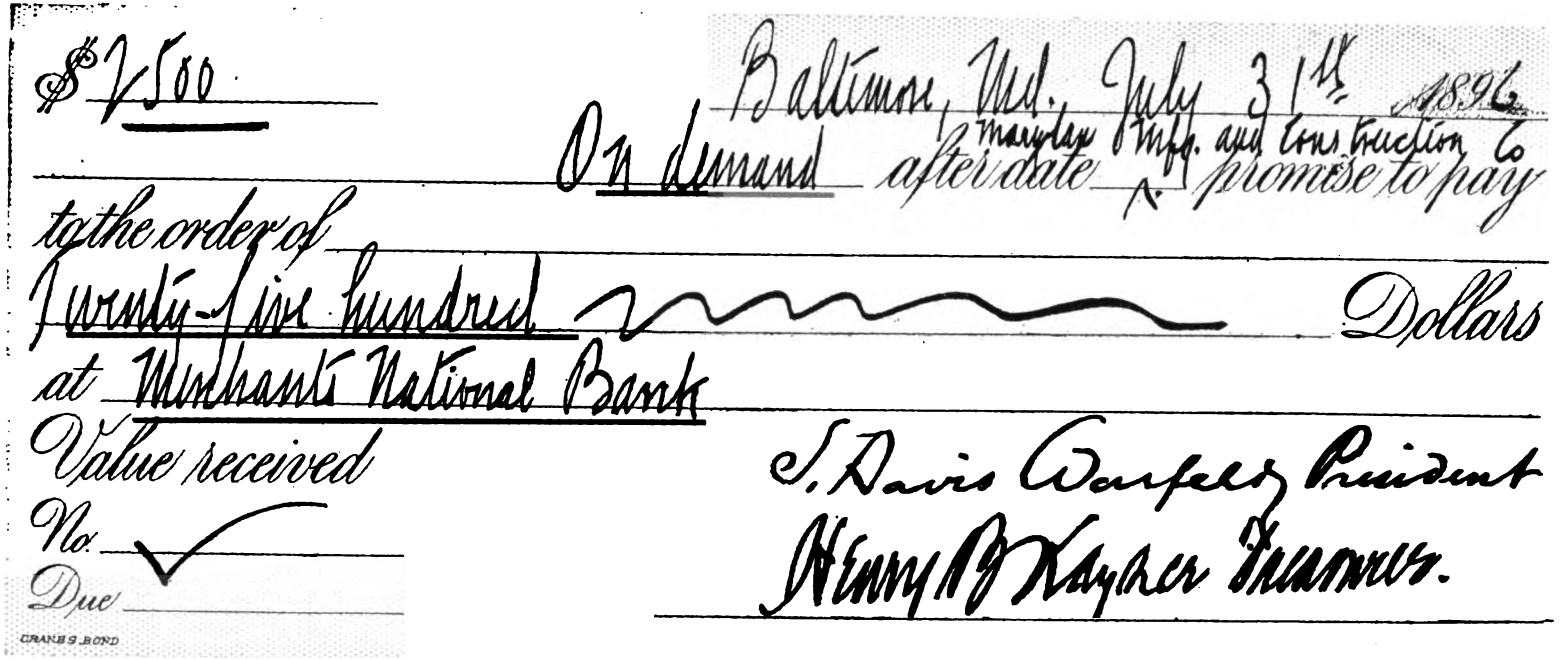

$1,500

Baltimore, Md. July 31st 1896.

On demand after date Maryland Mfg. and Construction Co promise to pay

to the order of

Fifteen Hundred ~~~~~~~~~~ Dollars

at Merchants National Bank

Value received

No. ✓

Due

GRANT'S BOND

S. Davis Warfield President

Henry B Kayser Treasurer.

B. 2. Indorser Held as Maker: Rule of Negotiable Instruments Law: Irregular Indorser: Maker.

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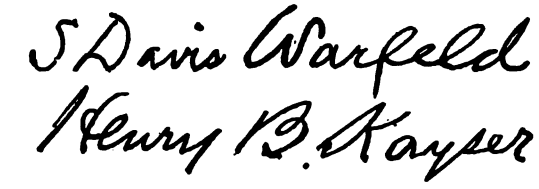

Before the bank to which this note was presented by the makers for discount would take it they requested that the persons who signed it should write their names individually on the back of it. The note was not paid at maturity nor was it protested. In an action against Warfeld and Kayser, individually, it was held on appeal that, under the circumstances, Warfeld and Kayser, the apparent indorsers, were liable as co-makers and as such not entitled to notice of protest. This is in accordance with decisions in many States as to the liability of such irregular indorsers. But since these decisions many of the States in which they were rendered have adopted the Negotiable Instruments Law, and that law provides: "A person placing his signature on an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It also provides: "Where a person not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable *as indorser* in accordance with the following rule": * * * This would seem to mean that hereafter in such States Warfeld and Kayser would be classed as indorsers, and would be released if the paper was not duly protested. This last quotation from the law states the status of a person, not otherwise a party to the instrument, who places his signature in blank *(anywhere?)* thereon before delivery. (It does not say on the back thereof.)

Is it not possible, now, under a harsh construction of this law, that if before delivery of this note John Jones was asked to place his name on the *face* of this note, under the makers, that he would be released if the note was not protested? The section is not confined in its language to *indorsers* who place their name on the (back of) paper,—but to *any person* etc. * * * who places his name thereon—(face or back?)

McMasters Com. Cases, Vol. 1905, 59 At. 189.

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placed their signatures *on the back* of the instrument, but their intention would not be guessed at by a court in construing this statute.

The headnotes to these paragraphs in some of the printed copies of this law indicate that the editors of such copies evidently thought that this paragraph or this section referred only to those who placed their names on the back of an instrument, but these headnotes differ in the copies of the law of the various States, and they are not parts of the law itself.

The court said in part:

"There have been a number of cases decided by this court involving what are usually spoken of as 'irregular indorsements.' The liability of such indorser is not determined by the fixed rules of the law merchant, but it depends upon the relation he bears to the instrument, and the intention of the parties thereto. 4 Am. & Eng. Ency. of Law (2d Ed.) 488; 7 Cyc. 669. Courts have differed as to the presumption of such indorsements. Some have held the signers to be liable as indorsers; others as makers, sureties, or guarantors; although the result of each case is largely dependent upon its own particular facts. An early case in this state was that of Sullivan v. Violett, 6 Gill, 181, in which one who had written his name on the back of a note payable to the plaintiffs or order was held to be liable as maker, but no opinion was filed. In Ives v. Bosley, 35 Md. 262, 6 Am. Rep. 411, the note sued on was payable to the order of Bosley, signed Elisha J. Guyton, and indorsed in blank by Charles T. Guyton and William M. Ives, the appellant. The plaintiff proved that the signatures were all upon the note when it was delivered to him by E. J. Guyton for the payment of the money which he then loaned to him. The defendant, Ives, offered to prove that at the time he placed his name upon the back of the note he signed it as indorser. Upon objection the court ruled the testimony inadmissible, and that ruling was affirmed. This court said, 'The obligation of Ives, as established by the proof of the plaintiff, is clearly that of an original promisor.' and, after stating the facts which are, in substance, above mentioned, added: 'These facts established by conclusion of law the responsibility of Ives as a joint maker or original promisor. . . . It is true, as was urged in the argument, that the contract entered into by a blank indorsement will generally receive such a construction as will give effect to the intention of the parties, and that parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction . . . If, however, the contract set up is different from that which attaches by presumption of law, it must be established by proof, showing that both parties, promisor and promisee, so intended and agreed.' After quoting from Rey v. Simpson, 22 How. 341, 16 L. Ed. 260, the court added: 'Applying these principles to the present case, it is clear that the defendant cannot avoid the liability of a joint promisor, which the law has attached to his blank indorsement, unless he proves a different understanding of all the parties.' That case was followed in Walz v. Alback, 37 Md. 404; Owings v. Baker, 54 Md. 82, 39 Am. Rep. 353; Schroeder v. Turner, 68 Md. 506, 13 Atl. 331; Gisriel v. Burrows, 72 Md. 366, 20 Atl. 240; Thompson v. Young, 90 Md. 75, 44 Atl. 1037; and other cases. In those cases the names of the payees were in the notes, all of the signatures were on them before they were delivered to the payees, and the parties were held liable as joint

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makers, excepting in Owings v. Baker and Gisriel v. Burrows, where the testimony showed that it was the understanding and agreement of all the parties to the notes that those writing their names on the backs should only be held to the liability of indorsers. In Sittig v. Birkestack, 38 Md. 158, the form of the note sued on differed from those in the above-mentioned cases in that the name of the payee was left blank. It was signed by H. Austermuhle, and on the back were the names of Catherine Austermuhle, Henry Sittig, and Henry Birkestack. The latter was the holder, and had loaned H. Austermuhle the money represented by the note. The case had been previously tried, and the judgment then obtained by the plaintiff was reversed by this court, and a new trial awarded, as is shown by the report of the case in 35 Md. 273. At the first trial the attorney for Birkestack, the holder, inserted his name as payee. In speaking of that in 38 Md. the court said: 'The question whether the appellant signed his name on the note as maker was submitted to the jury by the instructions granted and conceded; and, if that was the nature of the contract between the parties, the appellee, as holder of the note, acting in good faith, had authority to insert his name as payee.' In Dunham v. Clogg, 30 Md. 284, the note was payable to blank order, and given by the maker to one G. D. Vaughn. The blank was filled by making it payable to the order of Stetson Vaughn, who, before maturity, indorsed it, and the plaintiff in that case became the owner. In the course of the opinion it was said: 'In the absence of fraud, the appellee having signed the note, leaving a blank for the name of the payee, the holder could fill the blank with his own name, and indorse it in blank, as it was payable to order, which would give it currency, by simple delivery, and the possession of it in such case would be prima facie evidence of title, enabling the holder to sue in his own name. The same effect is given to the note, under such circumstances, as if it had been made payable to bearer.' In Boyd v. McCann, 10 Md. 118, it was said that the holder of a note payable to blank order could fill it up with his own name as payee; and other cases might be cited to show how such a note is regarded in this State. So far as the prayers are concerned (which we are now considering), we do not think the fact that the name of the payee in these notes was left blank distinguishes this case from those of Ives v. Bosley and others above cited. While the blank was the holder of the notes it undoubtedly had the right to insert its own name as payee, if there was no understanding to the contrary, and we do not see why the principles announced in Ives v. Bosley are not as applicable to notes held by the bank in which it had the right to insert its name as if it had been actually so inserted."

(See Decision No. 806.)

Agent: Right of Agent to Buy on Credit and Thus Bind His Principal.

The following quotation relates to the right of an agent who, sent out to buy goods, pledged the credit of his principal for such purchases:

"A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account he cannot bind the latter by a purchase on credit, unless, perhaps, such

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is the well-known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. This is substantially the principle which is involved in this case, and it is sanctioned by the best authorities. See 1 Am. & Eng. Encyc. of Law (2d Ed.), pp. 1020, 1021, where the cases on the subject are collated. This court has said that when the authority to buy or sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. Ruffin v. Mebane, 41 N. C. 507. It may be taken, then, as a settled principle in the law of agency, that, if express authority to buy on a credit is not given to an agent but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. Sprague v. Gillett, 50 Mass. (9 Metc.) 91. The case of Komorowski v. Krumdick, 56 Wis. 23, 13 N. W. 881, is much like ours. The court there held that an agent to purchase property must, in order to bind his principal, who furnishes in advance the funds to make the purchase, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of such express authority or of such a custom the agent cannot bind his principal by a purchase, upon a credit, of a person who is ignorant of his real authority as between himself and his principal, unless the property so bought is delivered to the latter, and he receives it knowing that his agent actually bought on credit, or that he had no funds in his hands at the time with which to buy the same. See, also, Jaques v. Todd, 3 Wend. 83; Willard v. Buckingham, 36 Conn. 395; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; Paine v. Tillinghast, 52 Conn. 532; Mechem on Agency, § 364."

(See Decision No. 808.)

Fixtures: Right of Removal: Landlord and Tenant: Lease.

* * * * * * * *

"An owner executed a lease, with privilege of renewal. The lease gave the lessee the right to remove improvements erected by him, on payment of the rent, which condition he did not comply with. The renewal lease stipulated that the lessee might remove the improvements erected during the renewal term. Held, that as the acceptance of the renewal lease was, in effect, a surrender of the possession to the owner, and a re-entry under the renewal lease, the improvements erected during the original term belonged to the owner, and the lessee was entitled only to remove the improvements erected during the renewal term.

"A lease for a definite term gave the lessee the right to remove improvements on conditions which were not complied with, and also the right to a renewal lease. The renewal lease gave the lessee the right to remove improvements erected during the renewal term. The renewal lease was executed pending proceedings by the city in which the premises were situate for the award of damages for a change in the grade of streets. Damages were awarded for expenses in changes in the buildings

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erected during the original term, rendered necessary by the change of grade. Held, that the lessor was entitled to the sum so awarded, as against a tenant holding over after the expiration of the renewal term under a parol lease.

* * * * * * * *

"The testimony offered at the hearing tended to establish that appellant is owner of the lot at corner of Twenty-first and Papin streets, improved with a building used as a foundry, for damages to which property the award was made. By lease of date January 1, 1882, Porter demised these premises to the McMurray-Judge Architectural Iron Company at rental of $80 per annum, payable in quarterly instalments, and the payment of all taxes, general and special, of every character whatever, as the instrument of lease specifically stipulated thus:

"'(1) All improvements erected on said premises by said lessee, or its representatives, or by any one who may claim under it, are bound for the payment of each quarterly instalment of rent, and for the city, county and State taxes, and all other taxes and demands as aforesaid, and for any arrears of rent or taxes; and in case of the punctual payment of the rent and taxes, as herein specified, the said lessee is hereby authorized to remove all such improvements (and no others), at the expiration of this lease, which it, or any one who may claim under it, may have erected on said premises during said term.

"'(2) And the said lessor, if so requested by said lessee six months before the expiration of the term hereby demised, will grant a further lease of the aforesaid premises to said lessee for the further term of ten years, to commence on the first day of January, 1892,' etc.

"During the term of this lease, the then lessee, in 1882, caused to be constructed a building on the lot, which, without material or substantial change, has continued in use and occupation of respondent, and kept by it in repair. This lease expired on the last day of the year 1891, but the lessee remained in possession, although in default in payment of rental and taxes. In October, 1892, a new lease was entered into between the parties, antedated July 1st of the same year, for a period of nine years and six months. The latter lease contained similar stipulations for payment of all taxes by lessee, and for an increased rate of rental, but made distinct provision for the ownership and rights in the improvements in the language following: 'All improvements erected on said premises by said lessee or its representatives, or by any one who may claim under it, are bound for the payment of each quarterly instalment of rent, and for the city, county and State taxes, and all other taxes and demands as aforesaid, and for any arrears of rent or taxes; and in case of the punctual payment of the rent and taxes herein specified, the said lessee is hereby authorized to remove all such improvements (and no others) at the expiration of this lease, which it or any one who may claim under it may have erected on said premises during said term.

"The buildings on the lot of appellant having been erected by lessee pending the term of the first lease, the lessee enjoyed the right of their removal at its expiration of all such improvements, provided punctual payment had been made of the rent reserved, and all taxes assessed against premises — a condition with which the lessee had not complied; and this conditional right, therefore, was not in force in the years 1891 and 1892, when the change of grade was made, and the statutory proceeding inaugurated. The rights of appellant to the premises in question were then and now determined by the second lease, executed in October,

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1892, pending this proceeding, though bearing date prior to its institution; and by the provisions of this lease then operative, the right of removal of existing improvements on the demised premises was not conferred on, or secured by, the lessee, but the right of removal was expressly confined and restricted to improvements erected during its term, subject to the condition of prompt performance of the stipulations of the lease respecting rental and taxes. The acceptance of the new lease was equivalent to a surrender of the possession to the landlord, and the re-entry under the new in lieu of the old tenancy. A lessee's right of removal of improvements attends the life of the lease creating such right, and does not survive, but expires with it; and under a new contract of lease where such right is not reserved it cannot subsist."

83 S. W. 271.

Surety on Note Held as Maker: Valuable Form.

E. P. Murphy, W. T. Murphy and B. F. Derr signed, apparently as makers, the note described in accompanying illustration.

It seems to have been known to the bank that Derr signed the note in fact as a surety, but in spite of this fact the bank extended the time of payment of the note to the other signers without the consent of Derr.

This it has been frequently held would release Derr, and it seems to be inferred that he would have been released here but that the note when signed contained this provision: "It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof."

Some bankers, and other creditors, have adopted, in promissory notes, provisions and clauses that seem to infer that they do not think that the note is to be paid at maturity and that if it is not that they desire to have it in such form that they can continue to carry it and receive interest on it from the real debtor and yet hold the indorsers or other parties to the note. From the numerous decisions upsetting the supposed iron-bound waivers and agreements adopted by such bankers it is known how difficult it is to continue to hold after maturity, others than the real principals to a promissory note, if the note is held as a continuing security.

It is submitted that the foregoing clause from this note comes nearer covering the ground sought by such bankers than any other form appearing in the books.

If the form read, "It is agreed by any person, firm or corporation who writes his, her or its name or signature on the face or back of this instrument, whether they are makers, indorsers, sureties or guarantors or not, that they or any of them shall be regarded as principals as between them or any of them and any holder hereof" — it is believed that it would cover many contingencies occasioned by mistakes and overt acts of bankers and other creditors.

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It seems to be easy to release an indorser or a surety. It is hard for a principal to release himself except by payment or a release under seal. This form ought to be a good one.

The opinion of the court in this case follows:

MERCHANTS' NAT. BANK OF EAGLE GROVE v. MURPHY et al.

101 N. W. 441.

(Supreme Court of Iowa. Nov. 18, 1904.)

PRINCIPAL AND SURETYY — WAIVER OF SURETYSHIP — EFFECT — EXTENSIONS OF TIME OF PAYMENT — REFORMATION OF INSTRUMENTS — QUANTUM OF PROOF.

1. A surety may waive his rights as such, and make himself a principal, as between himself and the creditor.

2. In order to secure a reformation of a contract by striking out any of its provisions, clear and satisfactory proof must be produced. Mere conjecture or vague inference or a preponderance of evidence is insufficient.

3. Where a surety agreed that, whatever his relation was in fact, he should, as between himself and the creditor, be regarded as a principal, no extension of time of payment, however long, or how many times repeated, would release him from liability.

4. A written agreement by a surety to be treated as a principal was not limited by another clause of the agreement reciting a consent by the surety to an extension of the time of payment in such a manner as to restrict the right of the creditor to extend the time of payment, as against the surety, to one extension.

Appeal from District Court, Wright county; W. D. Evans, Judge.

The opinion states the case. Affirmed.

Wambach & Mattice and Ladd & Rogers, for appellants. J. W. McGrath and C. M. Nagle, for appellee.

WEAVER, J. On July 29, 1898, the defendants, E. P. Murphy, W. T. Murphy, and B. F. Derr, made and delivered to the plaintiff bank a promisory note for $1,000, payable February 1, 1899. So far as the form of the note and the manner of its execution are concerned, there is nothing to indicate that all were not principal debtors. The note contained a clause reading as follows: "It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof." This action was begun at law for a recovery upon said note March 3, 1902. Since the making of the note Derr had been adjudged of unsound mind, and appears and defends by guardian. It was first pleaded that Derr was a surety only, as the bank well knew; that the clause above quoted was by mutual mistake left unerased in the printed form on which the note was written; and a reformation of the instrument was prayed. Further pleading, it was alleged that, without the consent of the surety, the bank had from time to time, for a sufficient consideration, extended the time of payment; that at the time of making the note the Murphys were solvent, but there-

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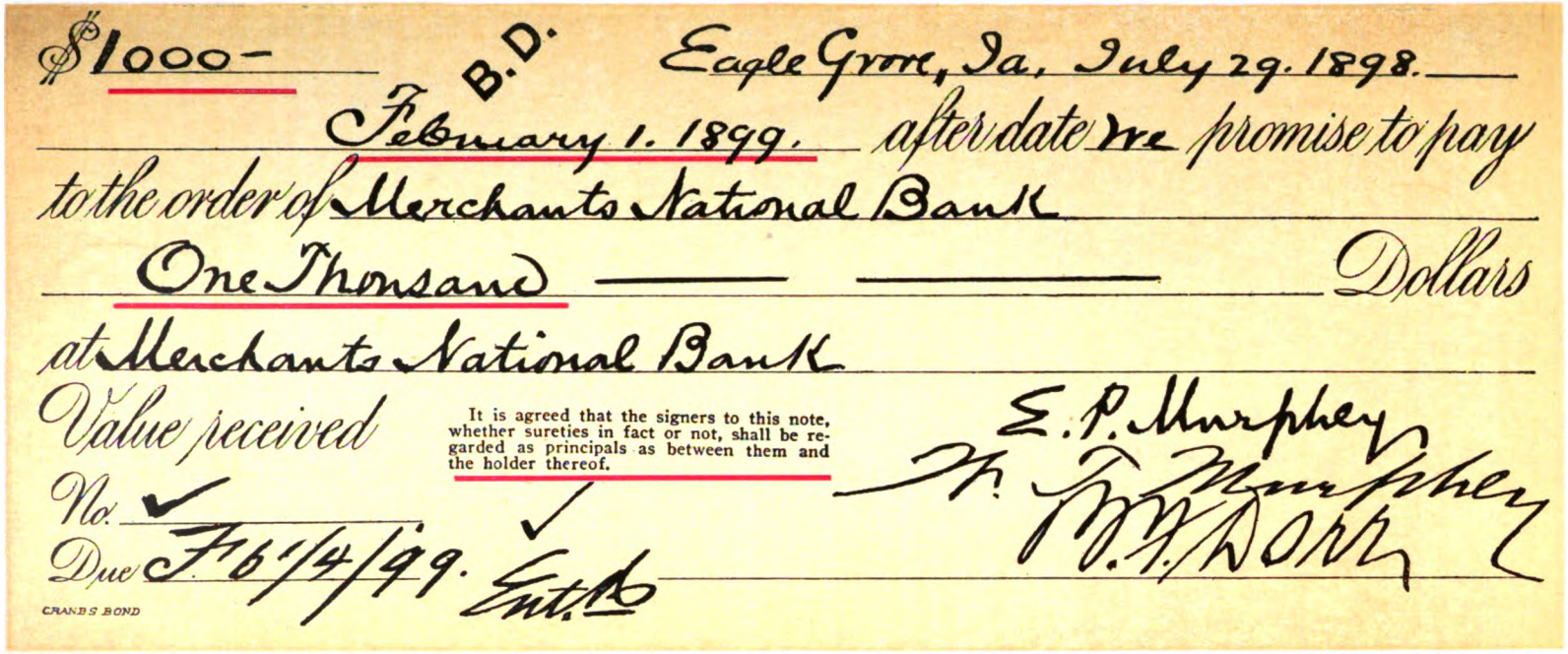
B. 3. Surety Bound as Principal: Valuable Form: Laches: Extension of Time: Protest.



$1000- B.D. Eagle Grove, Ia. July 29. 1898.

February 1. 1899. after date We promise to pay

to the order of Merchants National Bank

One Thousand ——— ——— Dollars

at Merchants National Bank

Value received

It is agreed that the signers to this note, whether sureties in fact or not, shall be regarded as principals as between them and the holder thereof.

E. P. Murphey

T. T. Murphey

No. ✓

Due F 6 1/4/99. ✓ Ent'd

CRANE'S BOND

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Derr, who signed this note in the form of a maker, was, as between himself and the other signers, a surety,—a fact that was known by the bank that discounted it. After the maturity of the note, the bank, without the knowledge or consent of Derr, extended the time of payment of the note to the other signers. This would have released Derr as surety but for the provision on the face of the note that the signers should be regarded as principals. It is submitted that this provision is nearer an iron-clad one than any of the numerous ones in use designed to hold indorsers and sureties on notes in spite of the laches of the holders—failure to protest; extensions of time, etc., etc. The following form is an enlargement on the one on the face of the note.

> It is agreed by any person, firm or corporation who writes his, her or its name on the face or back of this instrument, whether they are makers, indorsers, sureties or guarantors, or not, that they or any of them shall be regarded as principals as between them or any of them and the holder hereof.

The court, in this case, said in part: "It was part of his (Derr's) agreement that if he was a surety as between himself and the principal debtors, he should, as to the bank, be subject to all the obligations which the law imposes on principals. It is entirely competent for a surety to waive his rights as such, and make himself a principal between himself and the creditor, 35 U. St. 257; 89 Ind. 94; 22 Mo. 594; 44 N. H. 180.

While Mr. Derr was a surety as between him and the Murphys, he was, as to the bank, a principal, with no other or different or greater rights than he would have possessed had the note been given for his own debt.

McMaster's Com. Cases, Vol. 1905, 101 N. W. 441.

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after became insolvent, and the bank, well knowing of their impending failure, extended time of payment on this note to the injury of the surety. It is also alleged that the Murphys continued to do business with the bank, and thereafter had money deposited therein, which should have been appropriated by the bank to the payment of the note. Finally it is alleged that at the time of making the note Derr was of unsound mind and incompetent to enter into such a contract, but of this there is no evidence whatever, and we will not further consider it.

It is very manifest from this statement that, if the agreement which we have quoted is valid, and the appellant failed to make a case for the reformation of the instrument, then it is immaterial whether Derr was or was not a mere surety. It was a part of his agreement that, even if he was a surety as between himself and the principal debtors, he should, as to the bank, be subject to all the obligations which the law imposes upon principals. It is entirely competent for a surety to waive his rights as such, and make himself a principal as between himself and the creditor. Menaugh v. Chandler, 89 Ind. 94; Sprigg v. Bank, 35 U. S. 257, 9 L. Ed. 416; Gridley v. Conner, 4 La. Ann. 417; Picot v. Signiago, 22 Mo. 594; Heath v. Bank, 44 N. H. 180. The court below found that the alleged mistake was not established with such clearness and certaintiy as to justify a reformation of the note, and sustained a demurrer to the several defenses based on the theory of Derr's suretyship. If the first conclusion was right, then, in our judgment, it follows, as a matter of course, that the ruling upon the demurrer must also be sustained. That Derr was in fact a surety, and that the bank knew it from the first, appears beyond doubt; but, unfortunately for the defense, the fact thus clearly established is not in the least inconsistent with the execution of the contract contained in the note. The agreement was framed and inserted in the printed form for the evident purpose of relieving the bank from the risk of discharging a surety by its manner of dealing with the principal, and Mr. Derr must be presumed to have signed the note, expecting the agreement to have its intended effect, unless we are able to say that the alleged mistake has been satisfactorily proven. It is a recognized rule that more than a mere preponderance of evidence is required to sustain a decree for the reformation of a written contract. The proof must be clear and satisfactory. Chapman v. Dunwell, 115 Iowa, 533, 88 N. W. 1067. In the case before us we think this measure of proof is not furnished. The effect of the evidence shown in the record is no more than, as already suggested, to establish the fact that Mr. Derr was a surety, and the bank was aware of his true relation to the transaction; but there is not the slightest evidence that such surety did not intend to make the agreement embodied in the note. As a general rule every written contract is sustained by a strong presumption that he whose name is subscribed thereto executed it with knowledge of its contents, and with the intent to be bound by all of its provisions; and a court of equity must have something more than mere conjecture or vague and uncertain inference, before it will assume to change or strike out any of its provisions.

Counsel for appellant argue that, even if the note be not reformed, the defense may still rely upon the relation of suretyship, but we think this cannot be. Mr. Derr agreed that the bank might treat him as a principal debtor. With that relation existing, no extension of time of payment, no matter how long or how many times repeated, would release him from liability. It is said this ruling put Derr to great disadvantage, and exposed him to loss. But he could have interposed at any time and paid

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the debt, and enforced his claim, so far as possible, against the principal debtors, if he had been so minded. He knew, or is presumed to have known, that his note was outstanding all these years, and was content that it should run until the Murphys were prepared to take it up, or until he was called upon to pay it.

Counsel advance a theory that the general agreement of Derr to be treated as a principal is limited by another clause in the note, which says that the sureties consent to an extension of time of payment without notice, and that a single extension exhausted the right thus granted; but we think the agreement first mentioned cannot be thus neutralized and rendered mere meaningless surplusage, and the language must be held to mean just what it says. While Mr. Derr was a surety as between him and the Murphys, he was, as to the bank, a principal, with no other different or greater rights than he would have possessed, had the note been given for his own debt.

For the reasons stated, the judgment of the District Court is affirmed.

President of Corporation in Which He Is Stockholder and Director Is Not Entitled to Compensation as President Except by Virtue of an Express Contract.

Merritt C. Ring was president of a bank in which he was stockholder and director, and in an action against him on certain notes held by the bank he sought to set off against them compensation for his services as president. Of this claim the court said, in part:

"A president of a corporation cannot sue upon an implied contract to enforce a claim for services as an officer, when he is a stockholder or director. The adjudications are to the effect that such officer must show an express contract for compensation as a basis for such a claim. Though this question was not before the court for decision on the first appeal, it is apparent from the questions decided that the court entertained this view. Among the authorities in support of this rule are the following: Cook on Corporations, § 657; Commonwealth Ins. Co. v. Crane, 6 Metc. (Mass) 64; Ill. Linen Co. v. Roselle M. Hough, 91 Ill. 63; Farmers' L. & T. Co. et al. v. H. R. R. Co., 152 N. Y. 251, 46 N. E. 504; Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup Ct. 36, 34 L. Ed. 608; Sears v. Kings Co. Elev. Ry. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117. The cases in seeming conflict with this ruling generally present the distinguishing features that the services rendered for which recovery was claimed were either for extraordinary services rendered outside the usual official duties, or cases where a person other than a director or stockholder accepted an election to such a position under some person or body authorized to elect and employ some one not considered with the corporation."

* * * * * * * *

"Numerous errors are assigned and urged upon our attention. One of the grounds assigned as error pertains to defendant's right to recover compensation for services rendered as president of the bank. The issues upon this claim were submitted to the jury for determination by questions Nos. 19 and 20 in the special verdict. Question 19 was as follows: 'Was there a contract, express or implied, between Ring and the bank, that Ring should receive a salary from the bank as president?' This

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question the jury answered in the affirmative. It is contended that the proof bearing on this issue is materially different upon this trial from that upon the former trial, wherein this court held that there was testimony from which a jury might infer an express contract between defendant and the bank, whereby it agreed to pay the defendant a salary for his services as president of the bank. After a painstaking examination of the evidence of both trials, in so far as it is before us, we find that there is a material difference upon this question. On the former trial there was evidence tending to show that the defendant at a meeting of the board of directors demanded that he be compensated for his services as president after his election to that office, and was then informed by the members of the board that the corporation expected to pay him a reasonable compensation for such services, though no formal action was taken fixing the amount. It also appeared that defendant placed reliance on such promises in continuing his services as president. This evidence called for submission of this issue to the jury, though the evidentiary facts thus adduced were not of a strong and conclusive character. Upon this trial no such evidence was adduced. There is evidence that defendant had interviews with individual members of the board at times other than at board meetings; that at one meeting of the board defendant called attention to his claim for compensation, and was met with the objection from a member of the board that the bank ought not to pay for such services, and that no action was taken by the board. We have discovered no other evidence, on this question, nor do counsel point to any in the record. This state of the evidence leaves the case without proof of any express contract that defendant should receive a salary for his services as president. The question in the special verdict upon this issue was to the effect that, if there was an implied contract between the bank and defendant to pay for these services, the bank became liable therefor. The submission of this question was error."

101 N. W. 698.

Application of Payments: Limitation of Actions.

One Johnson, and his wife, bought a house and lot, December 10, 1903, which they claimed as a homestead, and which, therefore, would be exempt from their simple contract debts contracted after that date. On that date they owed Foster & Co., in an open merchandise account, $138.50. Between that time and July, 1894, they paid $142.50 to Foster & Co., and they had purchased more goods during the same time. Later they gave their notes for the general balance which, not being paid, was put into judgment against them. If any portion of the judgment represented debts due prior to December 10, 1903, the judgment would be a lien to that amount on the homestead. When the payments of $142.50 were made no direction was given as to whether they were to be applied on current purchases or on previous purchases — the whole matter was kept as a running account.

The court applied the payments to the oldest items in the account,

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which wiped out all that was due when the homestead was purchased and left it clear of the judgment.

The court said in part:

"There having been no agreement or direction as to the application of payments, the law will make application thereof so as to cancel the items of indebtedness first incurred in point of time. The result of this would be to wipe out completely the indebtedness which in point of fact existed when the property was acquired, and the note upon which the judgment was entered would be held to represent the items of indebtedness last incurred. Pidcock v. Voorhies, 84 Iowa, 705, 42 N. W. 646, 49 N. W. 1038."

101 N. W. 741.

Power of National Bank to Buy Stocks.

A national bank has no power to buy the stock of any other bank or of any other corporation.

Directors and officers making such purchase must be liable to the other stockholders for depreciation in such purchased securities.

The following quotation is from 132 Fed. 658:

"The First National Bank of Pembina, N. D., failed December 21, 1897, and the plaintiff herein is the receiver thereof, duly appointed by the Comptroller of the Currency. In December, 1889, the defendant. the National German-American Bank of St. Paul, purchased from the former owner thereof thirty-seven shares of the capital stock of the Pembina Bank with funds drawn from its own surplus. This stock and the certificate evidencing the same were, by an instrument in writing, duly transferred to the defendant. The purchase was properly entered in its books and records as an investment of its surplus, and so appeared down to the failure of the Pembina Bank, when it was charged off as a loss. The old certificate was promptly surrendered at the time of the purchase, and a new one taken in the name of the defendant. From that time it appeared upon the books and records of the Pembina Bank as the absolute owner of this stock, and received as such shareholder dividends aggregating $2,368. The present action is brought to recover an assessment of 100 per cent. levied upon said stock by the Comptroller of the Currency. To an amended complaint setting forth these facts a general demurrer was interposed, which was sustained by the trial court, and, the plaintiff electing to stand upon his complaint, final judgment went against him. These are the only errors now complained of.

"The record contains no fact which can properly distinguish this case from California National Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198, and First National Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007. Counsel for plaintiff asks us to re-examine the doctrines there announced by the Supreme Court. That, of course, we cannot do. Upon the authority of those decisions the judgment is affirmed."

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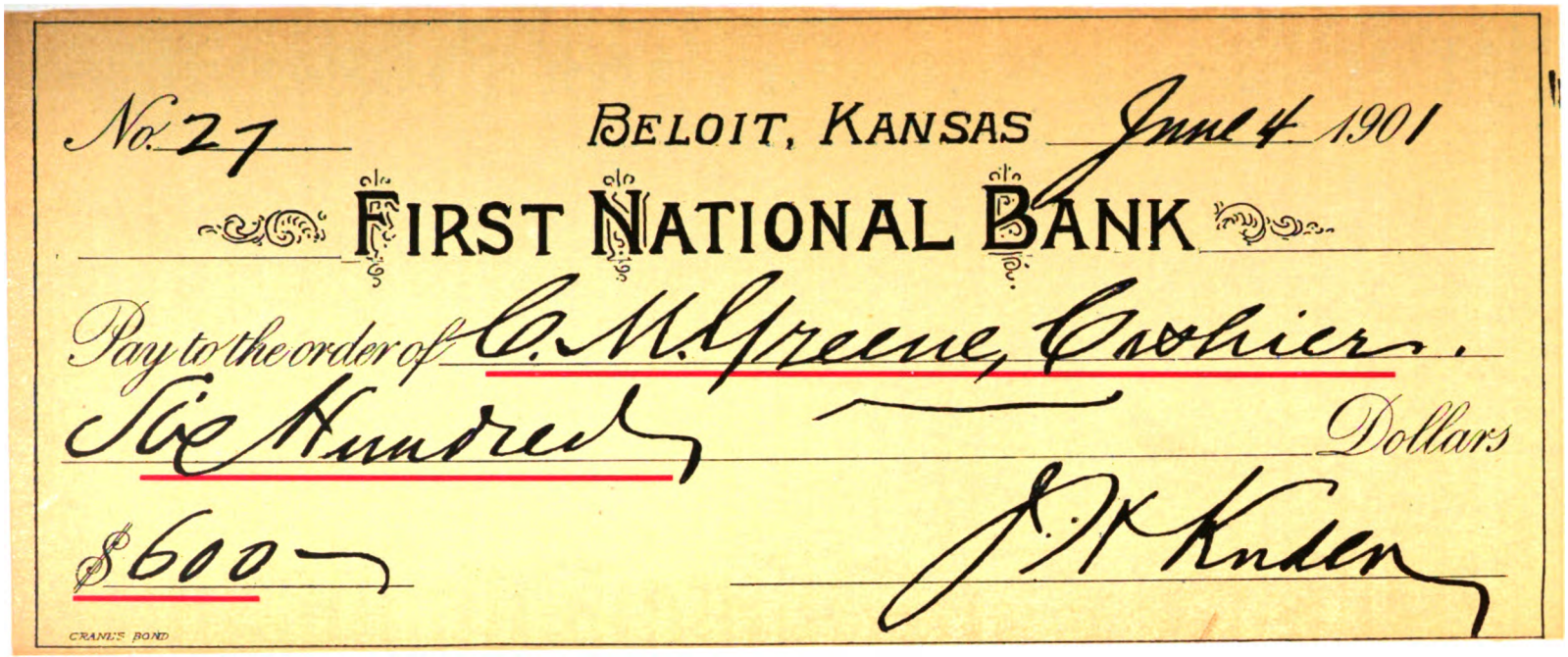
B. 4. Liability of Bank in Paying Check Drawn to Its Order.



No. 27 Beloit, Kansas June 4 1901

FIRST NATIONAL BANK

Pay to the order of C. M. Greene, Cashier.

Six Hundred Dollars

$600

J. K. Kuder

CRANE'S BOND

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C. M. Greene, the payee of this check, was cashier of the Citizens' Bank, of Harrison.

J. H. Kuder, the maker of the check, while in Harrison, drew the check and delivered it to H. E. Cole, and instructed Cole to take it to the Citizens' Bank and ask them to collect it and place the proceeds to his, Kuder's, credit. Cole indorsed the check and delivered it to the cashier, but instructed him to place the proceeds to his, Cole's, credit. This the cashier did, and Cole drew out the money and kept it. Kuder brought an action against the bank for the proceeds of the check, and the Appellate Court said that under this statement of facts he was entitled to it.

To the same effect is the case 41 Conn. 421. It seems that where a bank, or an individual, takes a check payable or indorsed to itself, it is bound to hold the funds or dispose of them only on the order of the maker or indorser,—and if it chooses to take the word of the one who has only naked possession of the instrument—one who is neither payee nor indorsee—it does so at its peril.

McMasters Com. Cases, Vol. 1905, 82 S. W. 836.

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Check Drawn Payable to Bank Cashier and Delivered by Third Person: Liability of Bank as to Its Disposition.

C. M. Greene was cashier of the Citizens' Bank of Harrison. J. H. Kuder, while in Harrison, drew his check, as shown, in effect, by accompanying illustration, to the order of C. M. Greene, cashier, on a bank in Kansas, and delivered it to H. E. Cole with instructions to deposit the same in the Harrison bank for collection for the credit of Kuder. At the same time Kuder gave Cole a check on the same Kansas bank to the order of H. E. Cole.

Cole took both checks to the Harrison bank and had them placed to the credit of his own account; and neither the Harrison bank or Cole accounted to Kuder for his check drawn to the order of the cashier. Kuder sued the Harrison bank for the amount of the check and the appellate court said that he was entitled to judgment although Cole had drawn all of his money from the bank.

To the same effect is the decision 41 Conn. 421; McM. Com. Dec. No. 85.

(See Decision No. 809.)

CALLENDER, McAUSLAN & TROUP CO. v. FLINT.

72 N. E. 345.

(Supreme Judicial Court of Massachusetts. Worcester. Nov. 29, 1904.)

CONTRACTS — CONSTRUCTION — EVIDENCE OF INTENT — GUARANTY — LAW OF FOREIGN JURISDICTION — PRESUMPTION.

1. **A contract of guaranty, not becoming effectual until accepted, will be construed according to the law of the place of acceptance.**

2. **The common law of another State will be presumed to be the same as that of this State.**

3. **Extrinsic evidence of intent is admissible to aid in the interpretation of an ambiguous written contract.**

4. **Plaintiff wrote defendant, stating that a third person wished to buy some goods from plaintiff, and asking defendant to guaranty payment for "any goods he might purchase." Defendant refused, and plaintiff in reply stated that the intending purchaser had told it that defendant would guaranty payment, and to hold the goods until it received the guaranty. Later defendant wrote, stating that he had decided to help the purchaser, and would guaranty the payment of goods he might buy, not exceeding $300. Held not a continuing guaranty.**

* * * * * * * * * *

BRADLEY, J. As the contract of guaranty did not become effectual until accepted by the plaintiff, whose place of business was in another jurisdiction, its argument that the construction of the agreement depends on the law of the place of acceptance may be conceded. Nashua Savings

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Bank v. Sayles, 184 Mass. 520, 522, 69 N. E. 309. But judicial notice cannot be taken of the laws of another State, which must be proved and determined like other facts, and no evidence of their provisions can be received for the first time at the argument of a case in this court. And, as the agreed statement of facts contains no reference to the common law of Rhode Island, the presumption follows that in the case presented it is the same as our own. Hazen v. Mathews, 184 Mass. 388, 391, 68 N. E. 838.

The question to be decided is whether the contract was a continuing guaranty. If there is no ambiguity in the agreement itself, the answer must be found from the terms of the instrument alone; but, as the language used is open to more than one construction, resort may be had to extrinsic evidence to determine the intent of the parties. Bent v. Hartshorn, 1 Metc. 25; Sullivan v. Arcand, 165 Mass. 366, 43 N. E. 198. It appears that Joseph Sherin, the debtor, desiring to buy goods on credit from the plaintiff, and it not being willing to open an account with him, at his suggestion the plaintiff wrote a letter to the defendant, asking him if he would become responsible for the amount of the sale. There is no evidence that before this time the defendant had been requested by Sherin to become a guarantor, and the letter must be considered as the first intimation or request made to him that he should so act. The language of the letter thus becomes important as expressing the nature of the pending transaction with Sherin which the defendant was asked to guaranty. It shows that the purchase intended is limited to goods bought on the day of its date, and, though the phrase, "you would guaranty any purchase he might make from us," is used, it is a part of the sentence which states the proposed sale, and refers to it. And when the defendant had answered, declining to become responsible, the reply of the plaintiff in explanation of its request, and referring to the contract of the debtor, contained this significant language, "He distinctly telling us to hold the goods which he might select until we received the guaranty." If it was the purpose of the plaintiff to give Sherin a general credit for the sale of goods in the future, for the payment of which the defendant should be bound, its letter contained no such statement, though it was written at a time when the proposed course of business between it and the debtor had been considered, and credit had been asked for by him. Obviously, when the guaranty was given, the defendant might well have understood that the debtor had contracted for specific goods on credit, and the plaintiff was unwilling to complete the sale by delivery until security for their payment had been given; and with this understanding he agreed to be liable for this transaction, but did not intend to become bound for succeeding purchases. While it might be said that the plaintiff and Sherin really intended that the defendant should become responsible for a course of continuous dealing, and the language of the defendant's engagement might be found open to such a construction, yet, looking at the conditions under which it was given, it is more consistent with a construction that all the defendant intended was to aid him in a single purchase of goods from the plaintiff, and, as this was followed by payment, the guaranty was fully satisfied. See Boston & Sandwich Glass Co. v. Moore, 119 Mass. 435; Cutler v. Ballou, 136 Mass. 337, 49 Am. Rep. 35; Sherman v. Mulloy, 174 Mass. 41, 43, 54 N. E. 345, 75 Am. St. Rep. 286. This was the finding of the Superior Court, and, as no error of law appears, the judgment must be affirmed.

So ordered.

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Sales: Delivery of Goods to Carrier.

The following quotations are from 82 S. W. 533.

"In the absence of an express or implied agreement, it is the general rule that, as between the parties, if the goods are delivered to a carrier by a seller, it is a delivery to the buyer, and a fortiori to one specially designated by the buyer. The rule is that stated in Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787: 'When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser; or when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected — the goods when delivered to the carrier are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu.' If, however, there be an express agreement that the vendor must actually deliver the goods at the point of destination, and not to be paid for unless so delivered, it would be binding upon the parties, and a delivery to the carrier would not be sufficient. From the testimony of Julius Seligman, a jury might possibly be justified in concluding that such a contract was made.

"Further, if it had been shown that no route had been designated, the delivery of the goods to the carrier was a delivery to appellee, in the absence of an agreement requiring the actual delivery of the goods to appellee in Seguin. Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Mechem, Sales, § 736, and authorities cited."

(See Decision No. 810.)

Landlord and Tenant.

Thomas B. Hedekin leased a house and grounds to Elinore Gillespie, agreeing to keep the same in good repair. A walk leading to an outhouse became defective, of which fact the tenant as well as the landlord was cognizant. The tenant was injured by reason of the defective walk and sued the landlord for damages. The landlord died after the action was commenced but before it was tried, and the case was continued and tried. The court held that if the action was in tort the death of the landlord barred any recovery. It also held that irrespective of that question there could be no recovery. The tenant's duty when she knew of the defective walk was, if she wished to be protected against its condition, to repair it and charge the cost to the landlord.

The court said in part:

"The judgment in this cause has no ground upon which to stand. The complaint does not state a cause of action, whether regarded as

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proceeding on the theory of tort or contract. If in tort the action would not survive against the personal representative of the deceased lessor, and if regarded as an action on contract the measure of damages would be the amount paid for making the repairs. And it was incumbent upon appellee to make the repairs upon the refusal of the landlord to do so, and look to the landlord for the cost of the same. But the complaint seeks to recover damages solely for a personal injury to appellee growing out of the alleged failure of the appellant decedent to repair the premises which appellee and her husband occupies as tenants.

"The decided cases in the courts of appeal cover every feature of this case.

"In Hamilton et al., Ex'rs, v. Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, this court said: 'The appellee admits in her complaint that she knew of the existence of the excavation even before she took possession of the premises, and with such knowledge continued to occupy the property for the period of six months, though the appellant had, upon demand, failed and refused to make the repair which he had covenanted to make. The appellant could not have given the appellee any more information of the defect than she admits she possessed. To avoid this dilemma she undertakes to aver that the hidden portion of the defect consisted in the ruinous conditions of the banks of the excavation, and not in the excavation itself, and she insists that it was the duty of the appellant to have disclosed these to her. She does not aver that the appellant had any peculiar knowledge of these other than she has herself; at least the facts pleaded show that she had ample time and opportunity for investigation, and there is no pretense that the appellant practiced any fraud or deception upon her in connection with the condition of the walls of the excavation. It must be clear, therefore, that if the cause of the injury was a latent and not a patent, danger, it was no more patent to the owner than to the lessee, and it does not appear wherein he violated any duty in failing to apprise her of the same. If we should treat the complaint, therefore, upon the theory of a latent defect, we encounter the insurmountable obstacle that it fails to show the appellant guilty of any negligence; and hence, whether the appellee was guilty of contributory negligence or not, there is no right of action. See Buswell, Pers. Inj. § 84; Taylor, Landlord & Tenant, § 175a. But if we take the other end of the dilemma, and say that the particular duty which the appellant owed the appellee here was not to disclose to her the existence of the latent defect of the banks of the excavation, but to fill up the latter and place the premises in safe condition, we then come back to the other obstacle, already mentioned in reviewing the complaint as upon contract, that the appellee has failed to reduce or moderate the damages, as she could have done by making the repairs herself and charging them to the appellant.'

"After the judgment in the above-cited case was reversed and remanded it was again tried, and an appeal taken to the Supreme Court of this state. See Feary v. Hamilton et al., Ex'rs, 140 Ind. 45, 39 N. E. 516. In the last-cited case the court, by Monks, J., after stating the facts showing that the landlord had died pending the action, said: 'Counsel for appellant earnestly contend that this is an action upon contract; that, the decedent having contracted in his lifetime against the injuries complained of, his contract cannot be avoided by reason of his death. They admit that actions in tort die with the person of either party, but say that actions upon contract do not so die, but may be

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enforced against the legal representatives. Counsel do not cite any authority to sustain this broad proposition, and we have been unable to find any going to that extent. On the contrary, it is settled law that actions arising out of contracts, expressed or implied, will not survive where the damages sustained by such breach are for injuries to the person, as mental anguish, pain of body, or injury to character.'"

(See Decision No. 811.)

Note Made in Indiana — Payable in Pennsylvania: Negotiable Instrument in One State — Not in the Other.

The Midland Steel Company, adopting for that purpose, the name of "R. J. Beatty, President," made its note to the order of the Muncie Land Company. This note, which is shown, in effect, in accompanying illustration, was made in Indiana, but made payable in Pennsylvania. It was indorsed in Indiana and sold to a bank in that State.

An action was brought against the maker of the note and it sought to set up defenses that it could have set up in the payee's hands if it had not transferred the note. This it claimed the right to do under the statutes of Indiana which allow such defenses on notes, not payable at a bank in that State. This claim would have been allowed had the note been payable in Indiana — but outside of a bank. But under the universal rule that the liability of the maker of a note is governed by the law of the State where it is made payable, this defense was not allowed, as by the law of Pennsylvania the note was a negotiable instrument.

The general rule is that the liability of the indorser of a note is governed by the law of the State where the indorsement is made, irrespective of where the note is payable. This seems to be true where the indorsement is made for the purpose of negotiating the instrument in that State, but if the indorsement is made before the inception of the note for the purpose and with the knowledge that the note is to be negotiated where it is payable, then it is held that the indorser's liability is governed by the law of the State where the note is payable.

The court here said in part:

"The amended complaint avers that appellee is a banking corporation at Kokomo, Ind.; that appellant is a manufacturing corporation organized under the laws of Indiana, and with its office and place of business at Muncie, Ind.; that, prior to the execution of the note in suit, appellant adopted the name and style of 'R. J. Beatty, President,' in and by which to execute the commercial obligations, bills of exchange, and promissory notes in the usual course of appellant's business; that, on the date named, appellant, by and in the name of 'R. J. Beatty, President,' executed to the Muncie Land Company the above note, whereby appellant promised to pay the land company the amount named as therein specified; that after the execution of the note, and before it became due, the Muncie Land Company sold, transferred, and indorsed the same, in writing, and

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for a valuable consideration, to appellee; that appellee purchased the note in the usual course of business, without notice of any defense; that at the time the note was executed, and up to the present time, the note was and is negotiable under the rules of the law merchant, as the law was determined and adjudged by the highest judicial tribunals of Pennsylvania, and that the indorser thereof, before maturity, in the usual course of business, and without notice of any defense, took the same free from all defenses, and that, under such laws, appellee so held the note; that, at the maturity of the note, appellee presented the same for payment at the Union National Bank of Pittsburgh, where the same was payable, and payment was refused; and that thereupon appellee caused the note to be duly protested.

* * * * * * * * * *

"It is also argued that the law of Pennsylvania, where the note is payable, is not well pleaded. The note sued on is not governed by the law merchant. It is not payable at a bank in this State, and is subject to defense in the hands of a bona fide holder for value. It is, no doubt, true that the complaint, aside from any averments as to the law of Pennsylvania, states a cause of action upon the note as a non-negotiable instrument. But if the complaint is held good upon that theory only, the demurrers to appellant's answers should not have been sustained. This is the effect of the ruling upon the former appeal. Midland Steel Co. v. Citizens' Nat. Bank, supra. However, the theory of the pleading is that the note is negotiable under the laws of the State of Pennsylvania, and it must be good upon the theory upon which it proceeds, or it will not be good at all.

"In pleading the Pennsylvania law, the complaint avers 'that at the time said note was executed as aforesaid, and at the time it was indorsed and taken by this plaintiff as aforesaid, and for many years prior thereto, and up to the present time, it was and is the common and unwritten law of the State of Pennsylvania, as ruled, established, and adjudicated by the highest judicial courts of that State, that said note was and is negotiable according to and under the rules of the law merchant, as determined and adjudicated by the highest judicial courts of said State, and that the indorsee thereof before maturity in the usual course of business, without notice of any defenses thereto, took the same freed from all defenses thereto, and that under and by the said laws of the State of Pennsylvania the plaintiff took and now holds said paper free from all defenses thereto; that promissory notes payable to order or bearer, containing the words "negotiable and payable without defalcation or discount" at a bank in said State, were and are negotiable by indorsement, and by indorsement before due, for which, in good faith, the holder takes the same freed from all defenses thereto, and set-off and cross-demand.'

"It is quite true there is no common law, strictly speaking, peculiar to the State of Pennsylvania or Indiana. Neither is the general law merchant one thing in Pennsylvania, and another in Indiana. In applying the principles of the general law merchant to a contract, the law of the forum and of the place of the contract is the same. 'The whole current of authorities,' said the court in Piatt v. Eads, 1 Blackf. 81, 'from the commencement of the history of our jurisprudence down to the present day, goes to establish the doctrine that the custom of merchants is and always has been regarded as a part of the common law of England.

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B. 5. Note Made and Indorsed in One State, Payable in Another State: Liability of Parties.

$2000 Midland Steel Co. Muncie, Ind. Apl 26. 1896

Four months after date we promise to pay to the order of Muncie Land Co

Two Thousand Dollars

Negotiable and payable at the Union National Bank, Pittsburg, Pa., without defalcation or discount; value received, with interest at six per cent. per annum from date.

No. Due Augt 26.

J. D. Bentley
President

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In Indiana a note is subject to the same defenses in the hands of a bona-fide holder that it would be in the hands of the payee if he had not transferred it, unless it is payable in a bank in Indiana. This note, made in Indiana, is payable in Pennsylvania. The payee sold it to the Citizens' Nat. Bank. It was not paid, and that bank sued the maker on it, and it was sought by the maker to set up the same defenses against the bank that could have been set up against the Muncy Land Co. if it had retained the note. This right did not prevail, as the note was a negotiable instrument under the laws of Pennsylvania, and the laws of the State where a note is payable governs the liability of the maker. The liability of the Muncy Land Co., the indorser, is governed by the law of Indiana—where it indorsed *and negotiated* the note. If one indorses a note before its inception, for the benefit of the maker, it is held that he is governed by the law of the place of payment of the note,—but such was not the case here, as this indorsement was in the regular course of business and after the inception of the instrument.

19 N. Y. 436, 7 Ala. 120, 15 Ind. 33, 44 At. 516, 33 N. Y. 615, 89 Ill. 221, 15 Iowa 357.

It is also held in a case, like this one, that if this note had been secured by the maker by a mortgage on real estate in Indiana, the validity of the mortgage would have been governed by the laws of Indiana, although the *personal* liability of the maker on the note was governed by the law of Pennsylvania. 83 S. W. 599.

McMasters Com. Cases, Vol. 1905, 72 N. E. 290.

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and that bills of exchange, both foreign and inland, are under its regulation. It is a law of a general nature, and not local to that kingdom, and is there recognized and acknowledged by the courts as a part of their system, from the circumstance of its universal application and use in all mercantile transactions throughout the commercial world; being in those cases a rule of decision to which all nations agreed, and of which all courts take notice.'

"As we have already observed, promissory notes at common law and under the law merchant were not, in this State, negotiable, so as to be free from defenses in the hands of a bona fide holder; and the note in suit, as it is not payable at a bank in this State, is not commercial paper under the law of this State. However, it seems that the law of the foreign State need not necessarily be statute law. Our statute provides that 'the unwritten or common law of any other of the United States . . may be proved as facts by parol evidence.' And in Alford v. Baker, 53 Ind. 279, where the court had under consideration a note made in Kentucky, and payable at a bank in that State, it is said: 'Where the law of another State, claimed to be different from the common law, is involved in a judicial proceeding in this State, it becomes matter of fact in such proceeding, and must be proved, and, indeed, alleged, unless the question arises in such a way as to render the pleading unnecessary. If by any statute of Kentucky, or by the general course of the decisions of the courts of that State, such note is placed upon the footing of bills of exchange, and governed by the law merchant, that fact might have been, but was not, shown. Our statute makes provision for the proof both of the written and unwritten law of another State.'

"As the note was made in Indiana and payable in Pennsylvania, appellant, the maker, is liable according to the law of Pennsylvania. He is presumed to have contracted with reference to the law of that State. Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Alford v. Baker, 53 Ind. 279; Browning v. Merritt, 61 Ind. 425; Lindeman v. Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; Fordyce v. Nelson, 91 Ind. 447; Kopelke v. Kopelke, 112 Ind. 435, 13 N. E. 695; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23.

"We must presume, in the absence of proof to the contrary, that the common law prevails in Pennsylvania. However, a decision of the highest court of that State upon some branch of the common law may not be in harmony with the decisions in this State. But if the highest judicial tribunal of that State has declared that a note like that in suit may be taken by a good-faith purchaser for value freed from all defenses, that is the law of that State. And this would be true whether the decisions of that State were under a statute or not. A foreign court could question the decisions of the courts of this State upon any branch of the common law only upon the ground that it did not agree with the premises or the reasoning of the court. If the foreign court may question such a decision, it might question a decision of the courts of this State in interpreting one of its own statutes, but it is conceded that this the foreign court cannot do. The foreign court is the only tribunal competent to decide upon the common or the statute law of its own State, and we fail to see any reason for permitting such decisions to be questioned in the one case, and not permitting them to be questioned in the other. The contract in question was made with reference to the law of the State where it was to be performed. 'The law is a silent factor in every contract.' Long v. Straus, 107 Ind. 94, 6 N. E. 123, 57 Am. Rep. 87;

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Foulks v. Falls, 91 Ind. 315. We think the complaint sufficiently pleads the law of Pennsylvania, and that, upon the theory that the note in suit is negotiable under the law of the place where it was to be paid, the pleading is good against a demurrer."

72 N. E. 290.

DEMPSTER MFG. CO. v. DOWNS.

101 N. W. 735.

(Supreme Court of Iowa. Dec. 14, 1904.)

CORPORATIONS — STOCK — LIEN — CREATION — ARTICLES — BY-LAWS — NOTICE TO STRANGERS.

1. At common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company, and, secret liens being discouraged, such a lien will not be enforced, unless created by statute, charter, or by-law.

2. The same rule of construction applies to articles of incorporation adopted in pursuance of general laws as to charters granted by special acts of the Legislature.

3. A lien in favor of a corporation on the stock of its members, on account of debts due the corporation from them, may be created by the corporation's articles of incorporation or by its by-laws.

4. While the by-laws of a corporation are not binding on strangers, and liens on stock created in favor of the corporation by its by-laws cannot affect the interests of strangers who have advanced money to stockholders on the security afforded by such stock without notice of the liens, yet third persons are charged with notice of the provisions of articles of incorporation, which are by statute required to be recorded in the office of the recorder of deeds; and liens on stock created by them are binding as against third persons, although they have no actual notice thereof.

* * * * * * * *

LADD, J. The Dempster Manufacturing Company was incorporated September 1, 1897, with a capital stock of $100,000, divided into shares of $100 each. Of these, 10 shares were issued to the defendant, E. S. Downs. The certificates were to the effect that the shares were "fully paid and nonassessable, transferable only on the books of the corporation in person or by attorney on surrender of the certificate," and the eighth article of incorporation reads, "The corporation shall have a lien upon the stock of any holder thereof for the amount of his liability to the corporation, and this lien shall not be discharged by a transfer of the stock except on a written resolution of the board of directors authorizing the transfer." On the 18th day of September, 1900, for full consideration, Downs executed his note to the company for $431.35, payable in one year, at 6 per cent. interest. In April, 1901, he entered into a contract with the company under which he was to handle its goods at New Ulm, Minn., on condition that these remained the company's property until paid for, and that the proceeds belonged to it. Goods on hand were returned to the company in the fall, and he is shown to have been indebted to it for a balance of $249.07 on December 12, 1901. Though questioned, the existence of the indebtedness to the company, not as assignee, as stated, is fully established by the evidence. On the 21st day of January,

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1902, a dividend of $50 was declared on the stock, and this was applied by the company on the account. On the other hand, Downs borrowed $200 of the Citizens' Bank of New Ulm, Minn., on the 29th day of July, 1901, and, to secure the same, indorsed each certificate of five shares of stock: "For value received, I hereby sell, assign and transfer unto M. Mullen the five shares of the capital stock represented by the within certificate and do hereby irrevocably constitute M. Mullen my attorney to transfer the stock on the books of the within named corporation with full power of substitution in the premises. Dated July 29, 1901, E. S. Downs." Another loan of $200 was procured in the same way August 14th following; another, of $300, September 12th; and on October 12, 1901, still another, of $50. These loans were made in reliance upon the stock as security, and without any actual notice of the provisions of article 8 or of the plaintiff's claims. Neither did the company have any knowledge whatever of these lonas, or of the assignment and delivery of the certificates, until so advised by a letter from Mullen dated December 21, 1901.

The only question raised by the record is whether the plaintiff is entitled to enforce a lien for the indebtedness of Downs to it against the stock. At common law a corporation had no lien upon the shares of its stockholders for debts due from them to the company. Secret liens, as they impede the safe and speedy transfer of property, are always discouraged; and courts uniformly refuse to enforce the same, as against stock, unless created by statute, charter, or by-law of the company. The Farmers' & Merchants' Bank v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398. Our statutes are silent on the subject, but the powers which may be exercised by a corporation in effecting its objects are as broad and comprehensive as those of an individual unless expressly prohibited. Thompson v. Lambert, 44 Iowa 239. See sections 1607, 1609, Code. Corporations are formed in this State by the adoption of articles of incorporation in pursuance of the general laws enacted by the Legislature, and such articles, in connction with the statutes, answer the same purpose as a special charter. They contain the terms of agreement between the company and its stockholders, and indicate the business to be transacted, and also the grant from the State of the franchise or right of forming the corporation and attaining the objects contemplated. The same rules of construction apply to articles of incorporation so adopted in pursuance of general laws as to charters granted by the special acts of the Legislature. State v. Central Iowa Ry. Co., 71 Iowa, 410, 32 N. W. 409, 60 Am. Rep. 806; Morawetz on Private Corp. § 318. Provisions in special charters granted by the Legislature, declaring any indebtedness owing by the stockholder to the corporation a lien on his stock, are not unusual, and are enforced by the courts. Union Bank of Georgetown v. Laird, 2 Wheat. 390, 4 L. Ed. 269. A similar provision, when embodied in articles of incorporation, is neither inconsistent with the statutes, nor opposed to public policy. By accepting the stock in the corporation every stockholder assents to the terms and conditions found in the articles. Such lien is not prohibited, and may be created by the articles of incorporation. Bradford Banking Co. v. Briggs & Co., 31 Ch. Div. 19; Sabin v. Bank of Woodstock, 21 Vt. 353; Bohmer v. City Bank of Richmond, 77 Va. 445; Leggett v. Bank of Sing Sing,

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24 N. Y. 283; 1 Cook on Stockholders, § 522; Hillwell on Stockholders, § 166. Whether this may be accomplished by the enactment of a by-law is a controverted question, concerning which the authorities are in sharp conflict, but this court is committed to the doctrine that such power exists. Farmers' & Traders' Bank v. Haney, 87 Iowa, 101, 54 N. W. 61; Des Moines Nat. Bank v. Warren County Bank, 97 Iowa, 204, 66 N. W. 154. The main contention is that, though the lien existed as between the company and the stockholder, this would not affect the interest in the stock acquired by a third person without notice. That such is the rule with respect to liens created by by-laws was recognized in the decisions last cited. The by-laws of a private corporation are not in the nature of legislative enactments, so far as third parties are concerned. They are mere regulations or self-imposed rules for the management and control of the corporate affairs, and are not usually intended for strangers who do not subject themselves to their influence. But it is different with the provisions of the charter. The corporation is created by the adoption of these articles. These form the very basis of its existence. Every one who deals with it or its stock is charged with knowledge of their contents. To the end that the greatest publicity may be attained, as a condition precedent to commencing business, they are required to be recorded in the office of the recorder of deeds in the county where its principal place of business is to be kept, and filed and recorded with the Secretary of State. Counsel concede that where the lien is created by a general statute, or the provision therefor is a part of a special charter granted by the Legislature, it is enforceable against the whole world. This is because all are charged with knowledge of the law as contained in the Public Acts of the Legislature. For the same reason, every one who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording the articles is to give them the same publicity, as nearly as may be, as statutory charters, and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders, and inhere in the certificates of stock, in whosesoever hands they may come. The certificates are undoubtedly continuing assurances of ownership, but the ownership is such as is stipulated in the articles. Says Morawetz in his work on Corporations: "If the lien is provided by the company's charter or articles of association, or by general law, all persons purchasing shares are bound thereby, and must, at their peril, inquire of the company's officers whether the holders of the shares are indebted to it or not." See, also, Jones on Pledges, § 221 et seq. Moreover, section 1626 of the Code provides that "the transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company;" and, in construing this language in The Ottumwa Screen Co. v. Stodgill, 103 Iowa 437, 72 N. W. 669, the court held that such invalidity was not dependent on the absence of notice. In the instant case, however, the entire indebtedness to plaintiff had accrued prior to any

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information of the transfer to Mullen reaching the company. We think the interest so acquired was subject to the lien of the company for the indebtedness owing it, and that this attached to the dividend declared during its existence. Angell & Ames on Corp. § 335; 2 Cook on Corp. § 526.

Affirmed.

Release of Surety.

The American Savings Bank was suing the Shaver Carriage Company for rent, and under two landlords attachments it had seized property of the value of $3,500. At this stage of the proceedings the Carriage Company (by Warren Walker, secretary) and W. T. Shaver as principals, and Warren Walker — as surety — gave the bank a bond for any judgment it might recover, etc., against the company, and Shaver in the action for rent. In connection with the bond Walker and his wife gave to the bank, as further security, his note for $2,800, secured by a mortgage on real estate. After the note and mortgage was given the bank's attorneys released the attachments.

The bank recovered judgment in the action for rent, and the judgment not being paid, an action was brought on the Walker note and mortgage.

The trial court gave judgment against Walker, but on appeal it was held that the release of the attachments released Walker on the bond and on his note and mortgage.

The court said in part:

"It is not questioned that the note in suit was executed by Warren Walker to the American Savings Bank, plaintiff's assignor, 'as additional security to the bank for payment of any judgment that may be obtained' in a pending suit in which the bank was suing the Shaver Carriage Company for rent, and in which two landlord's attachments had already been issued, under which property of the value of $3,500 had been seized. It appears that the note and mortgage were executed in connection with a bond signed by the Shaver Carriage Company (by Warren Walker, secretary) and W. T. Shaver, as principals, and by Warren Walker individually, as security for the payment of any judgment that the bank might recover against the carriage company and W. T. Shaver in the action for rent. In the bond it was agreed that the consideration therefor was 'the waiving of the levy of any further landlord's attachments in the above-entitled cause, but in no case is the landlord's lien waived; but it is agreed that the said landlord's lien is still in force and effect the same as if no bond had been given, the intention being to simply waive the right to levy further landlord's attachments until judgment shall be rendered in the above-entitled cause.' It further appears that after the execution of this bond the attorneys for the bank, in writing, directed the sheriff to release any property held under landlord's attachment issued in the case, and that in consequence of this direction the sheriff released to the carriage company and Shaver

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the property which had already been levied upon under attachment prior to the execution of the bond, and that this property was in part disposed of by the carriage company, and in part was taken possession of by the trustee in the bankruptcy proceedings, and disposed of as assets of the company.

"It is to be noticed that in the bond above described, in connection with which the note and mortgage in suit were executed as a part of the same transaction, there was no stipulation as to the release of property on which levy had already been made, and which was then held by the sheriff under the landlord's attachment. The property thus levied upon and in the possession of the sheriff was the property of the debtors, the carriage company and Shaver. Walker became liable only as surety. We find no authority in the bond, nor consent outside of the bond on the part of the surety, Walker, that the property thus levied on, and subject to be applied to the payment of any judgment rendered in the pending action, should be released. As the bank had, therefore, a lien on the debtors' property, the effect of the release of this lien was to discharge the surety, Walker, to the extent of the value of the property so released; and, as the value of the property released exceeded the amount of the claim finally established as against the principal debtor, no claim can be enforced in this action against the surety, either on the bond, or on the note and the mortgage executed by him as a part of the same transaction in which the bond was given. That the release of the debtors' property constitutes a release pro tanto of the liability of the surety is a proposition so well settled that no citation of authorities is called for The trial court therefore erred in rendering judgment against appellant, Warren Walker, and in directing the foreclosure of the mortgage."

101 N. W. 780.

Negotiable Note: Bona Fide Holder: Texas: Indorser.

Several notes made to the order of Ladd, Penny & Swazey on blanks similar to the one in accompanying illustration, and for large amounts, have been lost to the holders by reason of the decision of the courts that the clause providing for extension of time of payment of the note renders it non-negotiable.

The first appellate court in Texas so held as to this note; but on appeal to the Supreme Court of that State it held otherwise.

This decision seems to be opposed to the desisions in other States on somewhat similar clauses in other notes. It appears, also, here that in Texas a negotiable note, to order, does not lose its negotiable advantages if it is transferred for value, — but without indorsement of the payee. Elsewhere it seems to be universally held that a negotiable note, to order, if transferred without indorsement of the payee, leaves it so that the maker has the same defenses and offsets to it that he would have if it had remained in the hands of the original payee.

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The general rule is: "If such a note so put up as collateral is not indorsed by the original drawee at the time of its delivery to the person or corporation holding the debt against the original drawee, then in such case the drawer of the note and his indorsers have the right to plead and receive the benefit of all the equities and defenses in their favor against the note which existed or arose at any time, and they may plead such defenses and equities against the holder in the same manner and receiving the same benefits under them as if they were contesting the note in the hands of the drawee."

In a recent case, 76 Pac. 393 (1904) Volume, McM. Com. Cases) a bank discounted for the payee a note drawn on a blank exactly like the one here. The maker, not knowing of the transfer of the note, paid it to the payees who did not pay the bank. The bank sued the makers, but it was held on appeal that it could not recover; that the payment by the makers was good.

The Texas court, here, said in part:

"The law of Missouri as to promissory notes transferred without indorsement having been pleaded upon neither side, it is presumed that it is the same as the law of Texas. Under our law, it matters not how a negotiable note has been assigned. Though the transfer be not evidenced by a writing, it is placed upon the same footing as a transfer by indorsement. Word v. Elwood, 90 Tex. 130, 37 S. W. 414. If transferred without notice of any defenses, as against the transferror, it is subject to none.

"The question, therefore, presents itself, Is the note in question a negotiable promissory note? The Court of Civil Appeals held that it was not. In this ruling, however, we do not concur. The ground upon which it is claimed that the note is non-negotiable is that the time of its payment is uncertain. This claim is predicated upon the following provision in the note: 'The makers and indorsers hereof hereby severally waive protest,' demand and notice of protest, and non-payment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder.' If, as is argued, the effect of the stipulation is to give the right to the maker without the consent of the holder, or to the holder without the consent of the maker, to appoint another day of payment and thereby extend the time, it may be that it would render the instrument not negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision, taken as a whole, was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to the extension of time was simply that, in case the holder and the maker

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should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may at any time agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable 'on or before' a certain date is negotiable. The maker of such a note has the right to pay before the day named, but the holder cannot demand payment before that day. So, in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that, if the holder has the absolute right to demand payment at a certain day, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that therefore it was a negotiable note."

(See Decision No. 812.)

"F. O. B.": Seller to Furnish Cars Under "F. O. B." Orders: Title to Goods Passes to Buyer When Placed on Cars — And He Is Liable for Subsequent Damages.

The following quotation relating to shipments f. o. b. is from 100 N. W. 820:

"We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him f. o. b. cars at the point of starting, such other, as a matter of course, is expected to obtain from the railway company the necessary cars upon which to load the subject of the deal. Yet the doctrine of the Boyington case (77 Wis. 55) is not wholly without support. Kunkle v. Mitchell, 56 Pa. 100; Dwight v. Eckert, 117 Pa. 508, 12 Atl. 32; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836. However, this court, in the recent case of John O'Brien L. Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337, expressly repudiated such doctrine, holding that a seller, in the circumstances stated, impliedly agrees to obtain the cars and not hold the buyer to any obligation till the goods are loaded thereon. So far as Boyington v. Sweeney is to the contrary it was, in effect, though not in express terms, there overruled. This language was used by Mr. Justice Dodge, speaking for the court:

"'The general rule is that one who undertakes to accomplish a certain result, by necessary implication agrees to supply all the means necessary to such result. . . . Under this general rule it would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work. Both are alike in the open market, as much at the command of one as another, and the obtaining of each is equally essential to the accomplishment of the result.'

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"'For the reasons stated, we cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on appellants the duty of obtaining the cars upon which they had agreed to load the logs.'

"That is supported by authorities generally holding that a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for the purchase money, by preserving the right of stoppage in transitu. Neimeyer L. Co. v. Burlington R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Congdon v. Kendall, 53 Neb. 282, 73 N. W. 659; Capehart v. Furnam F. I. Co., 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; Sheffield F. Co. v. Hull C. & C. Co., 101 Ala. 446, 14 South, 672; Knapp Electrical Works v. New York I. W. Co., 157 Ill. 456, 42 N. E. 147; Silberman v. Clark, 96 N. Y. 522; Ex parte Rosevear China Clay Co., Ill. Ch. Div. 560; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Benjamin on Sales (6th Ed.) 682; Mechem on Sales, vol. 1, § 741, note; Elliot on Railroads, § 1425. All of such authorities declare that a sale 'f. o. b. cars' so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier that the term is not open to construction."

(See Decision No. 817.)

Sales.

J. P. Rust is engaged in the manufacture of wooden pails at Keene, N. H., and F. K. Higbie is a jobber and dealer in wooden ware in Chicago, Ill. During the summer of 1899 Higbie was at Keene, and there had a conversation with Rust in reference to supplying his (Higbie's) customers with five-pound jelly pails manufactured by Rust. Higbie thus states what there occurred: "Rust said he had about three customers in the western country that he was supplying. If I would keep away from those three customers he would let me handle the rest of the trade out here, which I agreed to do. Told me he would give me all the goods I wanted. I told him I would probably want two car loads for a starter. 'All right,' he said, 'I will send you two car loads for a starter.'" A few days later Rust shipped Higbie a sample pail, and thereafter, on August 5, 1899, Higbie wrote Rust from Chicago, acknowledging receipt of the pail, and inquiring whether Rust would care to ship him "one or two thousand dozen of same for a starter." Rust replied:

"Keene, N. H., August 7, 1899.

"Mr. F. K. Higbie — Dear Sir: Your letter of August 5 at hand and noted. In reply will say I will send you what five-pound jelly pails you may want at forty cents dozen f. o. b. Keene, and will allow five per cent. for cash in ten days, but

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should expect you to keep away from the Glucose Sugar Ref. Co., Chicago, St. Louis Ref. Co., St. Louis, and Farrell & Co., Omaha, Neb.

"Respectfully, J. P. RUST."

Some pails were thereafter shipped by Rust to Higbie and paid for at 40 cents a dozen. Higbie then made another order which Rust refused to fill, except at 50 cents a dozen.

Higbie sought to hold Rust for damages for not filling the order and at the 40 cent price, but it was held that there was no contract between the parties for any goods at any price as, although Rust had agreed to sell, Higbie had not agreed to buy.

The court said in part:

"Higbie contends that the conversation at Keene and the letter received by him from Rust dated August 7, 1899, together with the course of dealing between the parties, shows or tends to show, the existence of a contract between them, whereby Rust was obligated to furnish to Higbie all the five-pound jelly pails which the latter might want for his trade at the price named until notified by Rust that he would no longer furnish pails at that price, and that, as the last 3,500 dozen were originally ordered before the advance in price, Rust was obliged to furnish them at the former price. It will be observed that both by the conversation at Keene and the letter relied upon Rust stated that he would furnish all the pails that Higbie 'wanted.' If it be conceded that the latter accepted this proposition, we think the contract cannot be enforced, for the season that it is lacking in mutuality. By its terms Rust would be obliged to sell, but Higbie would not be obliged to buy. The fact that Higbie was an extensive dealer in pails, supplying many customers, does not alter the situation. He might elect to sell no five-pound jelly pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want such pails as he might sell to his trade, or to take or want any pails whatever. Where there is no consideration for the promise of one party to furnish or sell to much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined whether he will want any of the commodity, or, what quantity he will want, the contract is void for lack of mutuality. Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; Bailey v. Austrian, 19 Minn. 535 (Gil. 465); National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

"Plaintiff in error regards the case last cited as supporting his position. In that case the Keystone Manufacturing Company was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its affairs, and contracted for all the iron, at a fixed price, which it would need in its business during the ensuing year, and the National Furnace Company agreed to furnish the same at that price. In that case there was something by which to measure the needs of the purchaser and fix the amount of the commodity to be delivered under the contract, viz., such quantity as should be needed during the year in the manufacturing business

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which the purchaser was then conducting, and in which it was certain some quantity would be needed. Here there is no method to determine what quantity, if any, the purchaser would want, as his wants would be measured by his sales, and, so far as Rust was concerned, would only exist if he (Higbie) was unable to purchase elsewhere at a better price. We regard Bailey v. Austrian, supra, as in point. 71 N. W. 1010 (Illinois)."

Negotiable Instrument: Payment to Payee: Agency: Mortgage.

J. E. McDonald borrowed $725 of the Bunnell & Eno Investment Company, giving therefor his note secured by a mortgage (deed of trust) on real estate. The material part of the note is shown in accompanying illustration. Soon after receiving the note the holders sold, and transferred it to D. H. Cunningham, who lived in another State. The interest was promptly paid to Cunningham, as it fell due, by the company, who sent the amount to Cunningham, who surrendered the interest coupons to the company, which was in turn reimbursed by McDonald.

In 1901 — before the note was due — Mrs. McDonald, her husband being dead, paid the principal of the note to the Bunnell & Eno Investment Company, but they did not pay it over to Cunningham, who subsequently sought to foreclose the deed of trust. Cunningham was beaten in the lower courts but won on appeal.

At the time Mrs. McDonald paid the money to the company she did not receive her note nor was the deed of trust discharged.

The main question litigated was whether the note was a negotiable instrument or not. If it was a non-negotiable instrument, and the maker paid the amount to the original payee, believing that it was yet the owner thereof, then the payment would be good and the mortgage or deed of trust would be discharged. But if the note was a negotiable instrument, then the maker would pay it at his peril unless it was produced when payment was made. By the terms of the note the holder could demand payment only on the first of December, 1905, unless there was a failure to pay an installment of interest, when the whole amount could be declared due. This it was held, on appeal, did not render the note non-negotiable.

It was also claimed that Cunningham had made the company his agent for the collection of the money. On this point the court said:

"To support the judgment of this case, the defendant in error relies upon (1) the fact that the Bunnell & Eno Investment Company received from McDonald payment of three installments of interest and delivered the coupons therefor, and (2) upon the guaranty which the corporation gave to D. H. Cunningham at the time that it transferred the note. There is no evidence tending to prove that the Bunnell & Eno Investment Company collected the installments

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of interest as the agent of Cunningham. On the contrary, the guaranty that the interest should be paid by the company one day after each installment became due, and the undisputed testimony of David Cunningham that the interest was paid by the Bunnell & Eno Investment Company promptly as it fell due, indicates that the Bunnell & Eno Investment Company paid the coupons as they fell due, took possession of them as it had a right to do, and collected from the makers of the note — not for Cunningham, but for itself. If, however, it were admitted that the corporation, acting as the agent of Cunningham, collected the interest from McDonald, that fact would not tend to prove that it had the authority to collect the principal of the note. How can it be inferred from the agency to collect the interest that the agency to collect the note existed? The one fact does not form a basis for the presumption of the other fact. John Stewart & Co. v. Asher (Colo. App.), 62 Pac. 1051; Walsh v. Paterson (Neb.), 81 N. W. 853.

"The terms of the guaranty relied upon as evidence of authority to collect the principal do not reserve to the Bunnell & Eno Investment Company any control over the note. It provides that after the lapse of a certain time the guarantor shall have the right to take up the note by paying the principal thereof, or, in case the holder of the note should refuse, then the guarantor should be relieved from the guaranty; but this does not in any way tend to prove that the Bunnell & Eno Investment Company retained any interest in or control over the note itself. The indorsement shows that the title to the note passed to the indorsee without limitation.

"The controvery in this case is over the right of the corporation to collect the principal of the note, and does not involve the question of the collection of the interest coupons. At the time the payment was made the note was not due, and neither did the payor have any right at that time to make payment of any part or all of it under the terms of the deed of trust. If, therefore, it be admitted that the Bunnell & Eno Investment Company was the agent of Cunningham and had authority to collect the note when it should become due, the agent had no authority to receive the payment before maturity, and the note was not discharged. There is no testimony to support the finding by the jury that the Bunnell & Eno Investment Company had authority, at the time that Mrs. McDonald paid the principal of the debt, to collect it as the agent of D. H. Cunningham. It was error for the court to submit to the jury the question of authority in the Bunnell & Eno Investment Company to act for Cunningham, for which error the judgment must be reversed and the cause remanded."

(See Decision No. 813.)

Sales: Refusal of Buyer to Take Goods: Seller Without Remedy as Contract Was Without Consideration: Consideration.

The American Agricultural Chemical Company entered into a written agreement to furnish Kennedy and Crawford during a certain season a given amount of fertilizers, and Kennedy and Crawford

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B. 7. Note Secured by Mortgage: Payment: Indorsement: Agency.

$725.- Limestone Tex. Nov. 1. 1898

December 1. 1905 after date We promise to pay to the order of Pennell & Eno Investment Co Seven Hundred & Twenty Five — Dollars at their office in Philadelphia, Pa.

Value received

No. ✓

Due Dec. 1. 1905.

J. E. McDonald

Thula McDonald

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"Pay to the order of David H. Cunningham, without liability except under the accompanying guarantee.

Bunnell & Eno Investment Co.,

W. S. Eno, Prest."

This note, indorsed as above, the original of which had interest coupons attached, was secured by mortgage on real estate. The note and mortgage were sold by the B. & E. I. Co., before maturity, to D. E. Cunningham. The company sent the interest to Cunningham as it fell due, and he sent them the interest coupons, which were delivered to McDonald, the maker, as he paid them. Three years before the note was due the makers paid the whole principal to the company, which neglected to pay to Cunningham, and he sought to foreclose the mortgage,—and the court held that he could. The payment to the company would have discharged the mortgage and note if the note had been a non-negotiable instrument, as the makers had no notice of its transfer by the payee. (Recording of assignment of mortgage is not, except in a few States, sufficient notice—the maker must have actual notice. 61 N. E. 92.) The court held that the uncertainty of ultimate maturity of the note did not destroy its negotiability. (Some courts have held that the note and the mortgage would have been construed together, and the non-negotiable provisions in the mortgage would have made the note non-negotiable. 65 Pac. 1111, 94 N. W. 803, 99 N. W. 680.) The main question litigated here was whether Cunningham had not made the company his agent to receive the money and so was bound by the payment? Even if the company was Cunningham's agent to collect interest this would not protect the makers in paying him the principal—at least before it was due. Implied authority to collect an obligation is not implied authority to receive the money before it is due by the terms of the written obligation. This mortgage was never assigned by the company to Cunningham. But this fact would not have protected the makers, even if they had known it and had then received a discharge of the mortgage from the company and recorded it, as the true owner of a *negotiable* note secured by mortgage is the only one that can legally discharge it. 71 N. W. 52, 47 S. W. 1, 74 N. W. 435. (Contra: the owner of a *non-negotiable* instrument can only protect himself against bona-fide payments to the original payee by notifying the maker of the instrument of the holder's ownership. 61 N. E. 92.)

McMasters Com. Cases, Vol. 1905, 83 S. W. 372

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agreed in writing to take the fertilizers and pay for them. There was a clause in the contract by which the chemical company might terminate the contract at any time. This clause reads:

> "We (the chemical company) reserve the right to cancel this contract at any time we may deem proper, but in the event of such cancellation the provisions of this contract shall govern the closing of all business begun thereunder."

The chemical company manufactured the fertilizers and put them in sacks ready to deliver, but Kennedy and Crawford refused to accept or pay for them, — and the court held that they were not obliged to do either.

There was no other consideration for the execution of this contract except mutual promises — one party agreeing to sell and the other agreeing to buy. This, the court held, was sufficient consideration if the agreements were absolute. But, here, the seller reserved the right to cancel the contract at any time; it never need fulfill any of its provisions. This left the contract void if there was no other consideration entering into it, — and there was not. The contract was not under seal. If it had been under seal it could have been enforced in some States, — regardless of any actual consideration, as the presence of a seal usually imports consideration.

(See Decision No. 814.)

Purchase by Director of Debt of Corporation, Held to Be for Benefit of Corporation: Contra as to Stockholder: Certain Election of Director Held to Be Inoperative.

Thomas F. Hargis was president of the Commonwealth Land and Lumber Co., and George W. Bramblet was a stockholder. Bramblet was elected a director early in the history of the company. His election was for one year "and until his successor was elected and qualified." He was not present at the meeting and never acted as director and no other meeting was ever held.

Judgments were obtained against the company and it was apparently hopelessly involved. The stockholders would not attend meetings and to all appearances abandoned their investment. Bramblet had invested considerable money in the enterprise and acted with Hargis in various attempts to make a deal that would save something for themselves. In pursuance of such attempt they found, as they supposed, a customer for the assets of the company at about $75,000. The judgments then against the property amounted to about $67,000, which the owners were willing to sell

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for $10,000, they being unable to locate the property, on which they were liens, with sufficient definiteness to find a customer for them. Bramblet bought these judgments, individually, for $10,000, agreeing to divide with Hargis any profit that might come out of the transaction. The trade in view fell through, and Bramblet sold the lands under the judgments and bid them in for $67,000. At this stage of the proceedings some minority stockholders asked that Bramblet's purchase of the judgments and his sale thereunder be held to be for the benefit of the company, — and the court so adjudged, — providing the stockholders stepped in and relieved Bramblet in accordance with terms laid down in the decision.

The court held that Bramblet was not a director; that as a stockholder he had a right to purchase the judgments and make the sale thereunder for his own benefit; but that his agreement with Hargis, the president of the company, placed him where the transaction would be looked at in the same light as if Hargis was the sole principal, — and any director acting as Bramblet did would be deemed to be acting for the company.

It was also held, incidentally, that where bonds executed in Kentucky, and secured by mortgage on lands there, were made payable in Minnesota, the validity of the lien of the mortgage — in a suit to foreclose it — would be tested by the laws of Kentucky. The general rule that the law of the place where an instrument is payable governs the personal liability of the maker was not controverted.

The court said in part:

"Early in the history of the Commonwealth Land & Lumber Company, some eight or ten years before Bramblet bought in the judgments from the banks, he had been elected a director of the company. He was not present and his stock was not represented at that meeting. His election was for one year, 'and until his successor was elected and qualified.' Bramblet did not accept the office, and did not attempt to qualify or act as director at any time during the year, nor does he appear to have known of it during that year. No other election was ever held. Many years after Bramblet's election, and, indeed, after he had bought these judgments, he appears to have been present at one meeting, of which the minutes state that he was present as director. That Bramblet understood he was present in that capacity does not clearly appear. On another and later occasion he is said to have represented himself as being a director. He denies this. But be that fact as it may, we are satisfied that it did not constitute him a director. Whether he might have been estopped as against the person to whom he made the representation, who was a stranger to the corporation, is immaterial here. One elected to an office must accept it in some way before he can be said to have become an officer. And he must accept it during the term for which he was elected. Holding over applies only to officers who were elected

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and installed during the term. We conclude that Bramblet was never in fact a director of the company.

"On the other ground there is more difficulty. We have no hesitancy in declaring the law to be that a president of an insolvent and failing corporation cannot traffic in its property to his advantage, or to its disadvantage, or buy in debts against it at heavy discount and then assert them for full value. To the argument that it does not matter to the corporation who owns its debts, so it honestly owes them, and it is immaterial to it whether its president gets them for nothing, as it does not have to pay any more than it actually owes in any event, the answer is, it does matter, for human nature is not so constituted that the same person can fairly represent opposing sides of the same question — cannot be both creditor and debtor. The corporation was entitled to the untrammeled judgment and efforts of its president in administering its affairs in its behalf exclusively. When he assumed an attitude wherein his personal interest came into conflict with his duty to his corporation — where he would be tempted to serve it less diligently in order that he personally might profit by his relaxation of official vigilance — his disloyal act to his company will be turned aside from his pocket, and the profits of his speculation will be turned into the corporation. The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them. Whether the derelict officer acts from a mistaken notion of his rights, or from an actually fraudulent purpose, is immaterial, as affecting the invalidity of the transaction. The principle is too well settled to require elaboration. Thompson on Corporations, § 4040; Widrig v. Newport St. Ry. Co., 82 Ky. 511; Covington & L. R. Co. v. Bowler's Heirs, 9 Bush, 468.

"Although Judge Hargis may have believed that the stockholders had abandoned the property, and that in consequence he would, unless he could save it by the plan which he followed, lose ultimately all he had invested in the corporation, and although he may not in fact have had bad motive against the stockholders' interests, yet his duty as president of the corporation is not to be measured by his fears of his personal loss. He was bound, in law, to serve the interests of all alike in that crisis of the corporation's affairs. Taking advantage for his own sake of the necessitous condition of his corporation is deemed, in law, constructive fraud. The effect of it, in so far as it allows the corporation to go behind his action, is the same as if he had been guilty of actual fraud. That there was actual fraud on his part is not found to be a fact.

"But what is the effect of Hargis' connection with Bramlet in the matter? It may be conceded that Bramlet alone had the right to buy in the judgments at whatever price he could get them, and then to enforce them for their full amount against the company, although he was a stockholder in the company. A mere stockholder, unlike a director, is under no duty to serve his corporation. He may deal with it or with its debts or property as any stranger.

"The president's illegal connection with the transaction taints it throughout. Neither he, nor any one claiming through him, can be allowed to profit by it. If his partner were allowed to hold his

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part of the profits, giving the president's part to the corporation, then the law would be favoring at least partial faithlessness upon the part of corporate officials. Just how much of appellant's share of the profits depended upon the president's abdicating his oversight of his company's interests, and what part of it was dependent upon the illegal bargain by which the president or his wife was to share in the profits, it is impossible to determine. The chancellor will not hazard a guess in an effort to apportion them, but will resolve the doubt by giving the profits to the cestui que trusts whose interests have been sacrificed by their trustee. Mitchum's Heirs v. Mitchum's Adm'rs, 3 Dana 261; Hoffman, etc., Co. v. Cumberland C. & I. Co., 16 Md. 456, 77 Am. Dec. 311; Chaffin v. Hull (C. C.) 49 Fed. 524. Which brings us to consider upon what terms the complaining stockholders, on behalf of their corporation, will be granted equitable relief.

* * * * * * * *

"The bonds were not negotiable instruments, under the statute then in force in this State. Schnable v. German-American Title Co., 53 S. W. 1031, 21 Ky. Law Rep. 1063; Louisville Ins. Co. v. Hoffman, 50 S. W. 979, 20 Ky. Law Rep. 2016.

"Or if they be deemed obligations payable in Minnesota, and be judged by the laws of the State, yet the fact that interest coupons were so long overdue and unpaid, and attached, as well as the absurdly low price at which they were sold, was enough to give notice of infirmity to the purchasers, and to have put them upon inquiry which would have led to a discovery of the truth. Daniel on Neg. Instruments, 777a; Parsons v. Jackson, 99 U. S. 434, 25 L. Ed. 457; First Nat. Bank v. Commissioners of Scott County, 14 Minn. 77 (Gil. 59), 100 Am. Dec. 194. But although the bonds were issued and by their terms made payable in Minnesota, their security, the mortgage, by which alone they constituted a lien upon the land now sought to be subjected to their payment, was executed and recorded in this State, upon property situated here. The validity of that lien is a matter to be tested by the laws of this State alone."

83 S. W. 599.

Certificate of Deposit Payable to Either of Two Persons: Payment After Death of One

The following decision, requiring, in effect, the bank to pay the second time the certificate which is described in accompanying illustration, is from a late decision of the Supreme Court of Minnesota:

"START, C. J. Action by the administrator of the estate of Henry B. McHenry, deceased, to recover from the defendant $2,100 and interest; being the amount collected by her on a certificate of deposit for that amount issued by the Old Bank of St. James, Minn. This certificate was dated October 30, 1901, and, so far as here material, was in these words: 'Henry B. McHenry has deposited in this bank two thousand one hundred dollars payable to the order of himself or wife upon the return of this certificate properly endorsed.'

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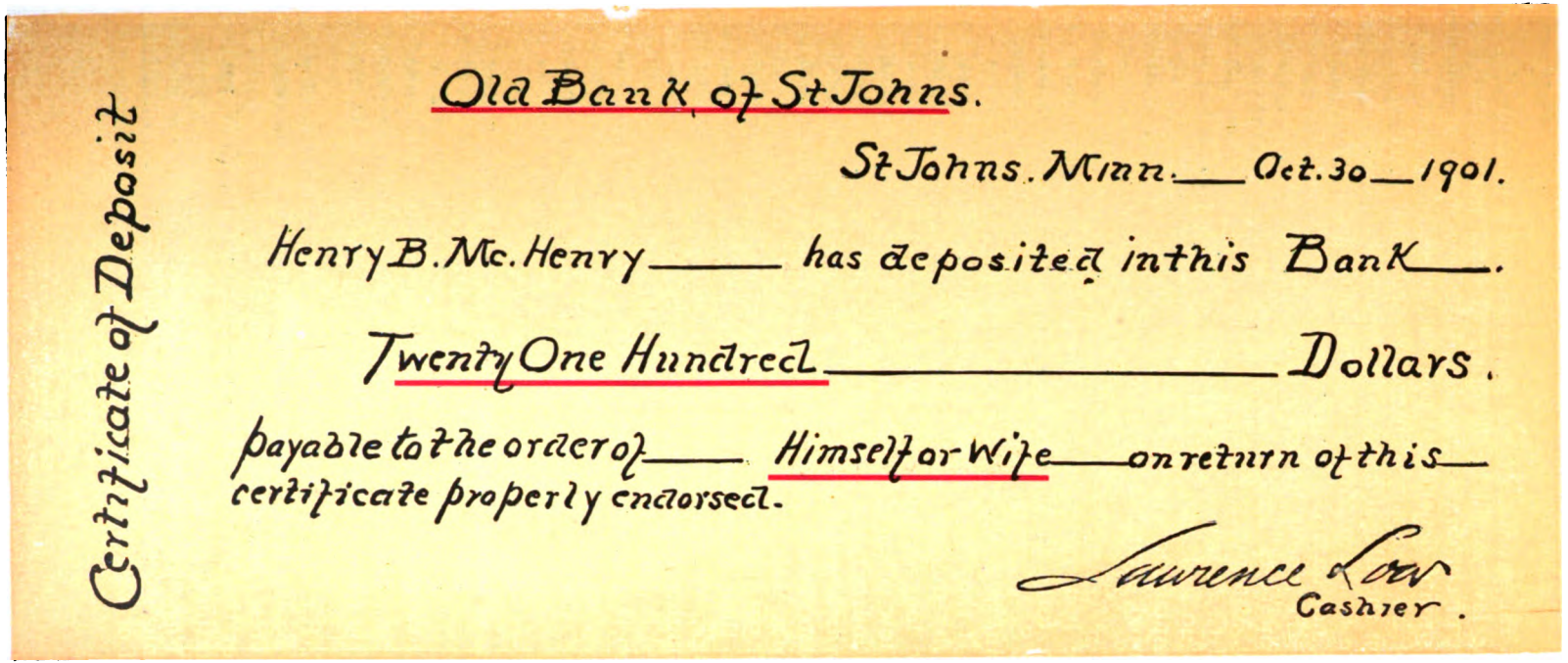
B. 8. Deposit: Two Payees: Payment After Death of One Payee: Power of Attorney.



Certificate of Deposit

Old Bank of St Johns.

St Johns. Minn. Oct. 30 1901.

Henry B. Mc. Henry has deposited in this Bank.

Twenty One Hundred Dollars.

payable to the order of Himself or Wife on return of this certificate properly endorsed.

Lawrence Low
Cashier.

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Oct. 30, 1901, H. B. McHenry and his wife went to the bank that issued this certificate of deposit, and McHenry introduced his wife to the cashier, and stated that he wanted this money deposited, so that if he should die she could collect it. In pursuance thereof this certificate was issued, which McHenry put in his pocket and carried home and there put it in a trunk, to which his wife and he each had a key, where it remained until he died—March 11, 1902. Soon thereafter the wife took the certificate to the bank, endorsed it, and the bank paid her the money. The administrator of McHenry's estate sued the bank for the money and it had to pay it over again. If the wife had so presented and indorsed the certificate in her husband's life-time the payment would have been good. His instruction to the bank, which was embodied in the certificate, was, in effect, a power of attorney allowing his wife to draw the money. Death of the principal revokes a power of attorney instanter, and payments or acts thereunder—after that instant—are void, and ignorance of the death will not afford any protection, even to those who may have acted in entirely good faith.

The survivor of "joint owners" and "partners" can draw and properly receipt for all of the common fund, and if this certificate had read—"H. B. McHenry and Sarah McHenry, joint owners, have deposited, etc.—payable to either or the survivor," etc.—then, it is said, the bank would have been protected in its payment. But the rule is that no one, *except by a duly executed will*, can have whole or partial control of his property during life, and also direct its disposition after his death.

This rule applies rigidly to gifts. The thing given must at the time be parted from the giver; he must not "have a string on it," or where he can "take it back." Here, McHenry had the certificate where he could properly draw the money on it for his own use. He never delivered it to his wife, nor to any one for her.

No evidence, therefore, as to his intention, written or oral, could, under these circumstances, make this a gift.

McMasters Com. Cases, Vol. 1905, 101 N. W. 799, 63 Md. 81.

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The complaint alleged, in effect, that Henry B. McHenry died intestate March 11, 1902, and at the time of his death was the owner and in possession of this certificate; that thereafter the defendant (his wife) obtained possession thereof, and collected it from the bank, receiving therefrom $2,117 as principal and interest; and further that the plaintiff was duly appointed administrator of the estate of the deceased, and demanded from the defendant (the wife) the money so collected by her, which she refused pay to the plaintiff. The answer denied that the plaintiff's intestate was the owner of the certificate at the time of his death, and alleged that the defendant was the wife of the intestate, and the person referred to in the certificate as his wife, and that she was the owner of the certificate, and entitled to the money represented by it. The case was tried by the court without a jury, and findings of fact made to the effect that the defendant (the wife) was never the owner of the certificate of deposit, but that the plaintiff's intestate was at the time of his death the owner and in possession of the certificate; and, as a conclusion of law, judgment was directed for the plaintiff. The defendant appealed from an order denying her motion for a new trial.

"Practically the only question presented by the record is whether the findings of the trial court are sustained by the evidence. If the undisputed evidence establishes a gift causa mortis of the certificate to the defendant (the wife), the findings are not sustained by the evidence; otherwise they are. There is little, if any, conflict in the evidence, which is ample to establish these facts: The intestate (the husband) was the owner of $2,100, and on October 30, 1901, he went, with the defendant (his wife), to the bank, having the money with him. He there introduced to the cashier of the bank the defendant as his wife, and stated that he desired to have the money deposited in the name of himself and wife, so that, if he should die, she could collect it. He then deposited the money, and the certificate of deposit in question was made and delivered to him by the cashier. The intestate's (the husband's) health was then impaired, and so continued until March 11th following, when he died. Upon receiving the certificate from the cashier, the intestate put it in his pocket, and when he reached home he put it in his trunk, to which there were two keys, one of which the defendant (his wife) had. It remained until after his death in his trunk, when the defendant took it therefrom, indorsed it, and received the amount thereof from the bank.

"These facts do not, as a matter of law, establish a gift causa mortis or inter vivos of the money represented by the certificate to the defendant. On the contrary, they fully sustain the findings of the trial court. To constitute a gift causa mortis, three things are essential: It must be made in expectation of the donor's death, he must die of the disorder or peril existing or impending at the time the gift is made, and there must be a delivery of the thing given. Allen v. Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442; Davis v. Kuck (Minn.) 101 N. W. 165. Now, waiving all other questions, it is clear from the evidence that there was no delivery of the certificate or the money it represented to the defendant (the wife). The money was not deposited in her name or for her. Un-

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which was the basis of the contract was for a steel piston rod of specified dimensions. The plaintiffs were engaged in the manufacture and sale of steam engines at Nashua, and the defendants in the making of forgings at the same place. It is not suggested that the defendants were manufacturers of steel, or that the plaintiffs understood them to be. Read in the light of the surrounding circumstances, the order means that the defendants should secure by purchase the necessary steel, and forge the same into the specified shape with the required finish, to be used by the plaintiffs for a piston rod in some steam engine to be sold by them. The contract was not for a piston rod for the plaintiff's engine. It is distinguishable from the contract in Randall v. Newson, 2 Q. B. Div. 102, which was for a pole for the plaintiff's carriage, and from that in Brown v. Edgington, 2 M. & G. 279, which was for a rope for the plaintiff's crane. The plaintiffs did not rely upon the defendants to furnish a suitable piston rod for any particular engine, or for a steam engine generally. They prescribed the material and dimensions of the forgings desired; and the fact that, when finished by the plaintiffs and made a part of an engine, the rod proved unsuitable, does not establish the defendants' liability. For any defect due to the kind of material or dimensions prescribed, the plaintiffs, and not defendants, would be responsible. Nashau Iron & Steel Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456. In these respects the plaintiffs relied upon their own judgment, and not upon the defendant's. Jones v. Just, L. R. 3 Q. B. 197, 202, 203."

(See Decision No. 815.)

Negotiable Note: Payment: Agency Bona Fide Holder: Mortgage.

George Mindeman made to Henry Herman his note for $6,500, secured by mortgage, — the material parts of the instrument being illustrated in accompanying illustration. Without the knowledge of Mindeman, Herman sold the note and mortgage to Josephine Thorpe. It was shown that Herman never accounted to Mindeman for the proceeds of the note and mortgage, and when the assignee of them sought to foreclose the mortgage this fact was set up as a defense. This defense would have been good if the note had been a non-negotiable one, or if the writing on the back transferring it was held not to be a commercial indorsement. As stated in the opinion of the court, the note was held to be a negotiable instrument, and the indorsement a commercial one. There are decisions in some other States that would seem to indicate that the note was non-negotiable by reason of various provisions in the mortgage, — 46 Pac. 720, 52 Pac. 59.

It was also argued that the indorsement was not such a one as would transfer the note so as to cut off the defenses of the maker, — defenses could have been successfully set up if the note had remained in Herman's hands.

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B. 9. Payment: Transfer: Indorsement: Agency: Mortgage: Recording Assignment of Mortgage: Notice.

$ 6500. Milwaukee Wis. Dec 11 1900

Three years after date we promise to pay to the order of Henry Herman Sixty Five Hundred —— Dollars at his office

The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall at the option of the mortgagee, or his representatives and assignees (notice of such option being hereby expressly waived), become payable without any notice whatever.

Value received

George Mindeman

Mary Mindeman

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"For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive (previous coupons having been paid and surrendered) to Josephine Thorpe, without recourse.

The makers of this note gave it to Herman, who agreed to advance them the money on it. Instead of doing so he transferred it as above, with the mortgage securing it, to an innocent purchaser and kept the proceeds. The debt not being paid, foreclosure of the mortgage was commenced. If the note was a non-negotiable instrument the makers could have the same defense against an innocent holder that they would have had against Herman if he had not transferred it. It was claimed that the note was non-negotiable by reason of the default clause on its face by which its time of payment might be uncertain, and by reason of clauses in the mortgage to which it in terms referred. These clauses provided that if taxes and insurance on the property were not paid they might be paid by the holder of the note and be added to it, and be a lien on the property, and also if there was a default in the payment of interest the whole debt could be declared due and payable.

The Court held that these clauses did not affect negotiability, although they had practically held in 73 Wis. 332 and 80 Wis. 133 that the clause in the note as to declaring the debt due and payable by reason of non-payment of interest, etc., would render it non-negotiable. They now said that they did not follow these decisions by reasons of the provisions of the Negotiable Instruments Law now in force in that State (Wisconsin).

It was also argued that the above transfer by Herman was not equivalent to a commercial indorsement, but the Court held that it was—and so it did not open the note to the defenses of the makers as it would have done if the transfer had been made otherwise than by indorsement.

On this point it may be noted that the U. S. Supreme Court held 101 U. S. 68, that the following transfer of a negotiable note by the payee was not a commercial indorsement, and left the note open to the same defenses by the maker that he would have had if the note had remained in the original payee's hands:

"For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same."

McMasters Com. Cases, Vol. 1905, 101 N. W. 417.

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The indorsement here was — "For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive (previous coupons having been paid and surrendered) to Josephine Thorpe, without recourse."

The U. S. Supreme Court held that the following writing on the back of a negotiable note was not a commercial indorsement and did not operate to cut off the defenses of the matter although the note was in the hands of an innocent holder for value and before maturity: "For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting same." (McM. Com'l Digest, 13a; McM. I. & R. Com'l Paper, No. 47, 101 V. S. 68.

There had been some decisions of the Wisconsin courts that might indicate that the note in question was non-negotiable by reason of the uncertainty of its time of payment as mentioned in the mortgage. The court said that the Negotiable Instruments Law removed, now, any doubt on that point.

(See Decision No. 816.)

Sales: Order Countermanded: Remedy of Seller: Form for Such Cases.

K. P. Hill executed a written order to the National Cash Register Company for a cash register, the order providing that title to the machine should remain in the seller until the purchase was paid.

The machine was manufactured and shipped to the buyer, but it got no further than the depot in his place of business, as he refused to take it from the carrier or to accept it.

The buyer claimed that before the machine was finished and shipped he had countermanded the order, but the court found that the order had not been countermanded before completion of the machine and shipment, — saying that had it been so countermanded then the seller's remedy might have been confined to damages, and that an action for the whole contract price might have failed.

The sellers, tendering the machine, sued the buyer for the whole contract price.

The court, conceding that the general rule in most cases is that where a buyer countermands an order and refuses to accept goods ordered, the seller's remedy is confined to damages — which usually are measured by the profit the seller would have made if the sale had been completed, — held in this case, that seller was entitled to recover the full purchase price of the machine.

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Dealers, in some instances, have in their order blanks a stipulation by which the buyer agrees not to countermand the order. Courts cannot enforce this stipulation; they are limited in such cases to giving the seller damages. The making of the proof of the amount of such damages usually makes this remedy without much value. The following form, which fixes in advance the amount of such damages, will, it is believed, give practical relief to the seller where the order is countermanded.

The form can be added to so as to give the buyer the same relief against the seller:

> In consideration of the acceptance of this order by the seller, it is hereby agreed between buyer and seller that in the event of the cancellation of this order, or any portion thereof, by the buyer, or of his refusal to accept any of the goods, wares, merchandise, things or articles ordered, the buyer shall pay, on demand to the seller, (30?) per cent. (based on the prices named in the order) of the amount of the order cancelled or refused to be received, as liquidated damages or such cancellation or refusal, and the seller hereby agrees to receive such amount in full for such damages.

The court in this case said, in part:

"The defendants, however, insist that the contract was executory; that, as found by the jury, they contracted and agreed to buy the machine; that they did not buy a machine; that at the time the order was given the plaintiff had no such machine to sell. They also insist that the order was countermanded before the machine was made; that, this being so, the plaintiff should not have completed it, but sued for damages for breach of contract, relying upon the decision of this court in Heiser v. Mears, 120 N. C. 443, 27 S. E. 117. We do not deem it necessary to discuss the question, because the defendants have not, either by their answer or by the issues tendered, presented it. The answer is based upon the contention that the order was conditional, and that the condition had never been performed. This is very different from the contention that, although a binding order was given, it was, without legal excuse, countermanded; thus admitting a right of action in the plaintiff, but denying its right to recover the contract price. The issues tendered by the defendants show clearly that such was not their contention. It is not improper to say that there is no evidence to sustain the suggestion of a countermand of the order. The letter of October 10th falls far short of a countermand. It was at most a request to hold the order until they heard further from them. The plaintiff's answer that it would "hold for a period" put the defendants upon notice that it was not construed as a countermand. The defendants, however, insist that, conceding they are wrong in this position, the contract being executory, the plaintiff cannot sue for the price; that it is entitled to recover damages for the breach of

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the contract, such damages being the difference between the contract price and the market value of the machine; that this is especially the measure of the plaintiff's recovery in this action, because the title to the machine was not to pass by delivery, but to remain in the plaintiff until paid for. The defendants insist that they were entitled to have the third issue tendered by them submitted, so that they could introduce testimony to reduce the plaintiff's recovery by showing the market value of the machine, which should be deducted from the contract price; that after the refusal to submit that issue they were cut off from introducing such testimony. The decision of the question thus raised depends upon whether the plaintiff's exclusive remedy is an action for damages, or whether it may elect to sue for the contract price, or retain the machine and sue for the difference between the contract price and its market value, or adopt another alternative by selling the machine and suing for the difference between the price thus obtained and the contract price. It must be conceded that the authorities are conflicting. In the Am. and Eng. Enc. vol. 24, 1118, 1119, both views are stated, and tne decided cases sustaining them given. An examination of many of the cases sustains the author in saying that: "When title has not passed, and the contract is still executory, it is usually held that the remedy by an action for damages is exclusive, and that an action for the agreed price cannot be maintained. There is authority, however, for the view that the vendor may elect either to sue for damages or to treat the goods as the property of the vendee, notwithstanding a distinct refusal to accept them, and sue upon a contract for the whole contract price. * * * But this rule is frequently confined to cases where the contract calls for goods to be manufactured especially for the vendee.' He says that there is much confusion upon the subject, even among cases from the same jurisdiction. He cites no case, nor do we find any in our reports, directly deciding the question. We are therefore driven to the necessity of adopting that rule which seems most consonant with 'the reason of the thing' and the upholding of contractual duties and rights. When one has without valid excuse broken his contract, the courts will not incline to permit him to prescribe the rights of the innocent party. In either view the law looks to making the plaintiff whole, and securing to him his rights under the contract. The difference is rather in the method of working it out. Shall the manufacturer of the machine, who, as the jury have found, has performed its part of the contract, be compelled to either send an agent to Louisburg, and sell the machine manufactured for the special use and to meet the wants of the defendants, or to reship it to the place of manufacture, before he can sue? Is it not more reasonable and just to require the party who is in default to make good his obligation, and protect himself by selling the machine if he does not want it. If the vendor is required to sell or otherwise show the market value, he is put to trouble and expense and subjected to the sometimes uncertain verdict of the jury as to whether he has made the best sale or secured the best price possible, or exercised good judgment in handling the property. The case which we find nearest analogous to ours is White v. Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537. The defendant gave an order for a manikin to be delivered, and for which he was to pay a part cash and

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the balance in installments. Title was retained by the vendor until the whole amount was paid. The terms of the contract were strikingly like the one made by the defendants. Mr. Justice Holmes says: 'The main question is whether the judge who tried the case ought to have ruled that the plaintiffs were not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract. A majority of the court are of the opinion that this ruling was properly refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office; but that assumption does not dispose of the case. In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and, if the buyer refuses to accept the goods even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damage for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that, although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly solvendum in futuro) of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words 'in consideration of the delivery' are not accidental or insignificant. The contract is carefully drawn so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so and thereby binding himself to pay the whole sum. . . . When, as here, all the conditions have been complied with, the performance of which, by the terms of the contract, entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised."

It will be noted that in the order given in this case following the direction to ship the machine are the words, "in consideration of the above;" that is, the shipment. We can see nothing to distinguish our case from the principles announced by this very able court. We have quoted the opinion at length, because it meets and disposes of the question before us. The defendants do not, in their answer, raise any issue the finding of which would diminish the recovery. The jury having found that they gave an unconditional order, and the plaintiff having complied with it, we can see no good reason why it may not recover the contract price.

The judgment must be affirmed. Affirmed.

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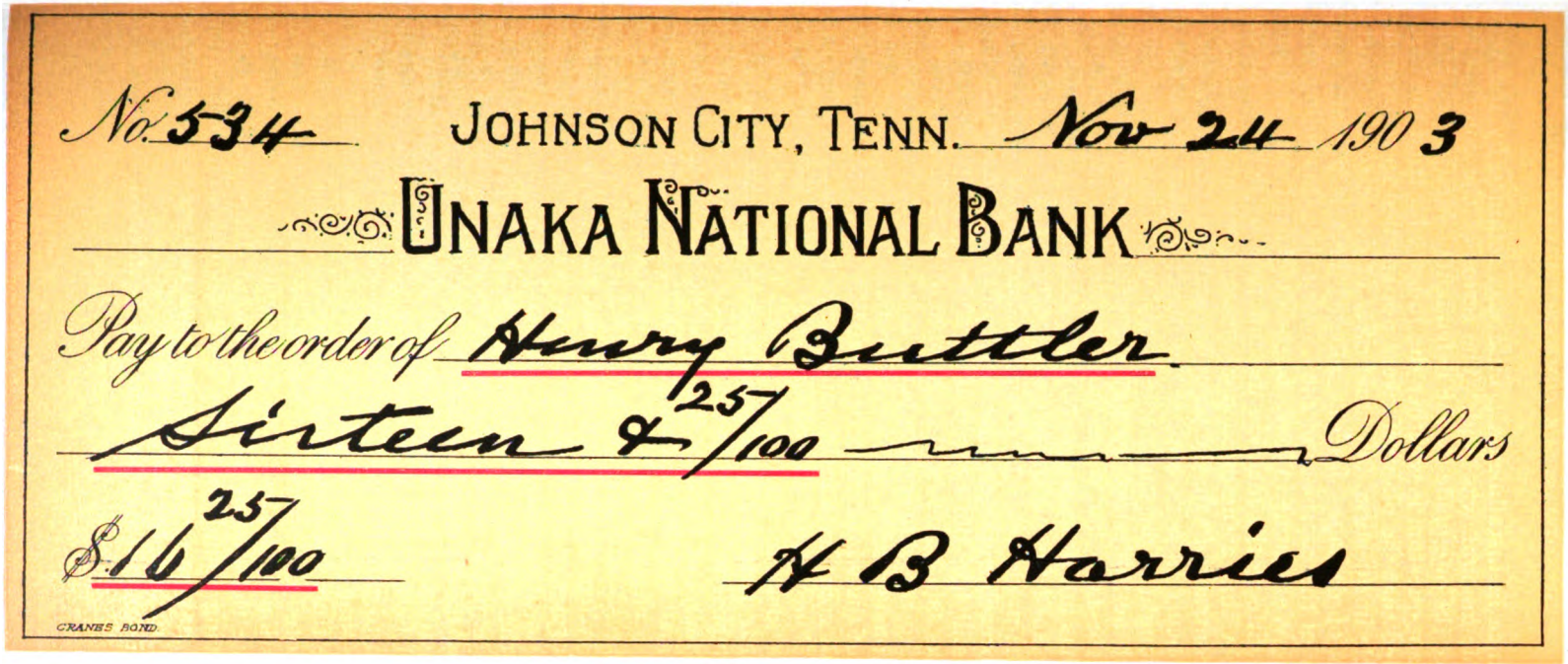

No. 534 JOHNSON CITY, TENN. Nov 24 1903

UNAKA NATIONAL BANK

Pay to the order of Henry Buttler

Sixteen & 25/100 Dollars

$16 25/100

H B Harries

CRANES BOND

B. 10. Lost Check: Payment Stopped: Payment to Bona Fide Holder: Title.

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On the day this check was issued Butler indorsed it in blank and delivered for value to Thomas Davis, who lost it on the highway.

The next day the maker of the check and Davis notified the bank of these facts and instructed it not to pay the check. Soon after this the check was presented by another party to Ward & Fryberg, and they in good faith gave him the money it called for,—and the bank then paid the amount to Ward & Fryberg. An action was brought against the bank, for the amount, for the benefit of Davis. The bank was beaten in the trial court, but won on appeal.

The check was a negotiable instrument indorsed in blank, and Ward & Fryberg, as innocent purchasers, got good title to it, and when they got title Davis' title was extinguished.

The bank need not have paid the check, and, if it had refused, Ward & Fryberg could not have maintained an action against it, as such is the rule, except in a few States (a *holder* of a check in States where the negotiable instruments law is in force has no right of action against a bank for refusal to pay a check—the maker alone has such right). A bank pays at its peril a check on which the maker has stopped payment; but if the person presenting such check is a bona fide holder—has indefeasible title to it, the bank would doubtless take his title to it in taking it and could enforce it against the maker—and one way of doing this would be to charge it to his account. But the maker of this check did not appear in this litigation, and this latter point was not raised or decided.

If the holder of a negotiable instrument takes it for value and in good faith, from a thief, he can enforce it or he can pass his indefeasible title to one who knew of the theft, and the latter can enforce it.

McMasters Com. Cases, Vol. 1905 83 S. W. 655.

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Checks: Payment Stopped: Payment to Bona Fide Purchaser.

W. B. Harris, of Johnson City, issued his check against his account n the Unaka National Bank, as shown, in effect, in accompanying illustration, to Henry Butler, who indorsed it in blank and delivered it for value to Thomas Davis, who next day lost it.

On the second day Harris, the maker of the check, and Davis gave notice to the bank of the loss, and directed it not to pay the check if presented.

The check was found by another party who took it to Ward & Fryberg, merchants of the same place, who took it and paid money for it in good faith, and they presented it at the bank and it was paid to them.

An action was then brought, for the benefit of Davis, against the bank for the amount of the check. The bank was beaten in the lower court, but won on appeal, it being held that Ward & Fryberg were bona fide purchasers of the check and entitled to its proceeds as against Davis.

Harris, the maker of the check, had instructed the bank not to pay it. He was not a party to the law suit, but even if he had sued the bank for the amount charged against his account, after he had stopped payment on the check, he probably would have been beaten. For while a customer is entitled to stop payment on his check and the bank pays it thereafter at its peril, it would doubtless be protected if it paid it to a bona fide holder who could have enforced it against the maker, — and it was decided here that Ward & Fryberg were in such position, and if they had good title they could transmit such title to the bank, even if the bank knew that the check had been previously stolen from its owner. If the bank had good title to the check they could doubtless offset its amount against any funds in their hands belonging to the maker although, technically, he could stop its payment. A customer has a right to stop payment of his check, and the bank pays it thereafter at its peril; but it seems that the bank would be protected in paying the amount of the check or purchasing such check and charging it to the customer's account, if it takes it from one who could have enforced it against the maker.

(See Decision No. 818.)

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FLAHERTY v. NIEMAN.

101 N. W. 280.

(Supreme Court of Iowa. Nov. 16, 1904.)

LANDLORD AND TENANT — DANGEROUS PREMISES — LANDLORD'S LIABILITY — LICENSES — INJURY TO LICENSEE — LIABILITY OF LICENSOR.

1. Plaintiff's husband rented rooms on condition that the landlord would cut a door to open on a porch to be erected at the rear of the rooms, and to adjoin a previously constructed porch in the rear of the next adjoining rooms; but there was no agreement that plaintiff's husband was to occupy any of the porch other than that back of his own rooms, nor did it appear that the landlord had reserved the porch back of the adjoining rooms for common use. Held, that plaintiff, in making use of that portion of the porch back of the adjoining rooms, was a mere licensee, and could not recover for injuries owing to the defective condition of that portion of the porch.

2. The license was not one coupled with an interest.

3. A licensee cannot recover for injuries caused by existing defects in the premises.

4. In the absence of concealed defects in leased premises, the tenant takes the risk of safe occupancy.

LADD, J. The defendant was the owner of a two-story building facing the west. The ground floor was occupied as a blacksmith shop. The husband of the plaintiff rented the suite of rooms on the north side of the second story, on condition that defendant should cut a door in back end so as to open upon a porch to be erected along the rear end over to a platform back of the middle apartment, which was occupied by one Wragg as a billiard hall and confectionery. The room to the south was used as a storeroom by defendant. The improvements promised were made, and plaintiff with her family moved into the north rooms. She had been there several years when on the 24th day of September, 1902, she stepped on the old portion of the porch back of the middle apartment to get some rain water from a tub she kept immediately north of the doors to such apartment. The part of the platform where the tub was sitting, immediately north of that back of the plaintiff's rooms, fell, precipitating her to the ground, and caused the injuries of which she complains. Appellant insists that the platform and stairway were reserved by the landlord for use of the tenants in common, and that for this reason he was bound to keep them in repair. The evidence, however, fails to show such a state of facts. The platform back of plaintiff's rooms was constructed in pursuance of the oral lease for Flaherty's use, and there is not a particle of evidence in the record indicating that it was ever reserved, or that any one save Flaherty had any right to its occupancy. The stairway leading to the back yard was attached to this part of the platform, so in going up and down stairs there was no occasion for passing over that portion in the rear of the middle apartment. Whether the tenant thereof had the right also to use the stairway is immaterial, for that did not fall. Nor is there any evidence indicating that under the oral lease Flaherty was to occupy any of the porch other than that back of his rooms, or that the owner had reserved that back of the middle apartment for himself or for use in common. The most that can be said is that the stairway may have been used in common by both

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tenants, but defects in it in no way contributed to the accident. If, then, the plaintiff occupied the platform back of the middle apartment with her tubs or other articles, she did so as a mere licensee, and not by virtue of the lease. But a licensee enters at his own risk, and cannot recover for injuries caused by existing defects in the premises. Stevens v. Nichols, 155 Mass, 472, 29 N. E. 1150, 15 L. R. A. 459; Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; McGill v. Compton, 66 Ill. 327; 18 Am. & Eng. Encyc. of Law (2d Ed.), 1136. "Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right. It is an excuse or license, so that a party cannot be treated as a trespasser." Martin, B., in Bolch v. Smith, 7 Hurl. & N. 745. In Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514, the court observed, in considering this subject, that the "distinction which exists between the obligation which is due by owners of premises to a mere licensee who enters thereon without any enticement or inducement, and to one who enters upon lawful business by invitation, either express or implied, is well settled. The former enters at his own risk. The latter has a right to believe that by taking reasonable care of himself all reasonable care has been used by the owner in order that no injury may occur." The suggestion that the license was coupled with an interest is not borne out by the record. The premises were leased in the condition they were in, save the improvements mentioned. There is no claim that defects, if any existed, in the platform back of plaintiff's rooms, were concealed. In these circumstances the rule caveat emptor applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired. In the absence of concealed defects, he takes the risk of safe occupancy. Harpel v. Fall, 63 Minn. 520, 65 N. W. 913; Booth v. Merriam, 155 Mass. 521, 30 N. E. 85; Moynihan v. Allyn, 162 Mass. 270, 38 N. E. 497; Boyer v. Commercial, etc., Co., 110 Iowa, 491, 81 N. W. 720.

The ruling of the court was correct, and the judgment is affirmed.

ROSS MEEHAN FOUNDRY CO. v. ROYER WHEEL CO. et al.

83 S. W. 167.

(Supreme Court of Tennessee. Nov. 29, 1904.)

CONTRACTS TO MANUFACTURE AND SELL — RIGHT TO TERMINATE — FAILURE TO MAKE PAYMENTS.

1. **A contract by which complainant agrees to make and deliver to defendant for a period of three years all castings required by it, each delivery to be paid for within sixty days thereof, is an enirety, which complainant may terminate on defendant's failure to make a payment as provided thereby.**

Appeal from Chancery Court, Hamilton county; T. M. McConnell, Chancellor.

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Suit by the Ross Meehan Foundry Company against the Royer Wheel Company and others. A decree for complainant was affirmed by the Court of Chancery Appeals, and defendants appeal. Affirmed.

Pritchard & Sizer, for appellant Wheel Co. Williams & Lancaster, for appellee Foundry Co.

BEARD, C. J. The controversy in this case grows out of a contract entered into on the 28th March, 1899, between the complainant company and the Royer Wheel Company, by which the first party agreed to make for the second party, from metal patterns to be furnished by the second party, all malleable or other castings required, as set out in the contract, and the second party agreed to order from the first party all such castings as were required by it between the 1st day of September, 1899, and the 1st of September, 1903, and to pay for such castings as were delivered under the contract in sixty days from the date of each delivery, or in cash within ten days thereof with a discount of 2 per cent.

Soon after the making of the contract, disagreements between the parties thereto arose. The Royer Wheel Company complained of delays in the delivery of castings, as well as of defects in some of those delivered, and the foundry company complained of the defendant company for its failure to make payment for deliveries made. Finally, upon the continued delay on the part of the Royer Wheel Company for a term of about nine months to make payment for castings received by it, the Ross Meehan Company notified the Royer Wheel Company that it regarded this non-payment as such a breach of the contract as relieved it from the obligation to make any future delivery. The present bill was soon thereafter filed upon an open account to recover the value of these castings delivered. The Royer Wheel Company filed an answer, in which it set up the contract, and insisted that the complainant had failed to make deliveries as were required by its terms; that many of the castings furnished were defective; and that by its renunciation of the contract the complainant company had inflicted serious losses upon the defendant in view of the advanced price of such castings which it would have now to obtain in the open market. These alleged damages the defendant set up by way of recoupment. The case went to trial, and the chancellor, treating the continued failure on the part of the defendant company to pay as a breach going to the whole contract, released the complainant company from all obligation to make future deliveries, and gave it a decree for the full value of the castings covered by its account, with interest, less a small sum allowed the defendant company by way of recoupment. Upon reference of the cause to the Court of Chancery Appeals, this decree was affirmed.

That court finds as facts that the complainant company substantially complied with the obligations imposed upon it by the contract, and that only a short time before the complainant company notified it of a purpose to rescind because of the long failure to pay for castings delivered the defendant company expressed to the complainant entire satisfaction with the manner in which it had performed its part of the contract. Under this finding the only question really open is, did complainant have a right to rescind, or, rather, to decline to go on with the contract, upon the mere failure of the defendant to make payment for castings delivered as provided therein?

The contract in question, it will be observed, covers a period of three

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years, to be executed, however, in instalments; that is, the castings were to be made and delivered by the complainant in lots as ordered or required by the defendant, and the defendant was to pay for each delivery in the mode set out in the opening paragraph of this opinion.

The rights of the respective parties under such a contract had been made a subject of much discussion, which resulted in discordant opinions in England. By some of the courts of that country the contract was regarded as severable or divisible, so that a failure to pay one or more instalments due on delivery would not authorize the other party to rescind the contract, as for such failure he could obtain adequated compensation. The English cases are grouped and analyzed by Mr. Benjamin in his work on Sales, and it would seem that some of the earlier of these cases were decided in view of this principle. Others, however, treated such a failure as evidentiary in character, leaving the question open for the court or jury whether by such failure the party guilty intended to abandon the contract and set the other party at large. This rule, after more or less fluctuation, seems to have been at last established so as to be beyond further controversy in the leading case of Mersey Steel & Iron Co. v. Nailor (1884) 9 App. Cas. 434.

In America it will be found that the courts are by no means in accord. However, in the now leading case in this country of Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, the Supreme Court of the United States has announced the rule that, where a seller has provided in a contract with a buyer for a succession of deliveries, a failure upon the part of the seller to make one or more of the earlier deliveries, went to the whole contract, and relieved the buyer of all obligation to accept. In that case the facts were that Norrington sold to Wright & Son 5,000 tons of iron rails to be shipped from a European port or ports, at the rate of about 1,000 tons per month beginning with February, 1880, but the whole contract to be shipped before August 1, 1880. Norrington shipped 400 tons by one vessel in February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified the Wrights of each shipment. The Wrights received and paid for the February shipment upon its arrival in March, and in April gave directions as to what wharves the March shipment should be discharged, but on May 14th, having been for the first time informed of the amounts shipped in February, March and April, gave the agent of Norrington written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract. Thereafter tender of delivery of other cargoes shipped by Norrington to fill this contract was made by his agent to the Wrights, which they declined to accept upon the ground that the earlier shipments had not been made in accordance with the contract, and they thereupon announced their purpose to rescind the same. Suit was brought by the Norringtons, and they sought to recover for a breach of this contract, placing the right of recovery upon two grounds: "(1) That under the contract Norrington had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up later, provided that the defendant would not be required to take more than 1,000 tons in any one month. (2) That, if this was not so, the contract was a divisible contract, and the remedy of the defendant for the default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in

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shipment on the part of the plaintiff." To these contentions, ruled against them in the trial court, and renewed in the Supreme Court of the United States, this latter court responded in an elaborate opinion, reviewing, among others, English cases for the purpose of reconciling these latter with the conclusion reached by that court. As to the first of these contentions the court said: "In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with the view of providing funds to pay for the goods or fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense of which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cas. 451; Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885."

To the contention that the contract was severable the court said: "The contract sued is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities or iron. . . . The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select out of a greater quantity; and when the goods are to be shipped in certain proportions monthly the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delieverd at once." Concluding this branch of the case, the court said: "The plaintiff denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action." It is true that this case does not present the exact question which is now being considered, but it furnishes a strong analogy, and we think announces the principle, which, if sound, should be controlling in the case at bar. It does determine that a contract like the one in controversy is an entirety, and that a breach of one of its conditions, even if that breach should occur in the earlier steps of its execution, may be availed of, without more, as a ground of a renunciation of the contract by the other party. The force of the analogy, as well as the closeness of the application of the authority to the present case, would be more apparent if we had here as the party complaining the Royer Wheel Company insisting upon a recovery for the breach of a contract to deliver, when it was conceded that this latter company had failed to comply with its part of the contract in making payment for deliveries already made. Upon such a record there is no doubt, upon the authority of the Norrington Case, that such a bill would be dismissed. So closely allied are the questions as to the duty and default of buyer and seller in contracts providing for delivery of payment in instalments, where the breach on the one part or the other arises, that Mr. Mechem in his admirable work on Sales treats them together. In section 1140 he says: "The failure

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of the seller may be in not delivering an instalment either in the time or the amount or the quantity agreed upon. The failure of the buyer may be in not paying an instalment in the time or the amount or the manner agreed upon. The question of the duty and default of the buyer may belong more appropriately to a subsequent chapter, but, inasmuch as the principle seems substantially the same in either case, and the default of one leads often to the alleged default of the other in such a way as to commingle both questions almost inextricably, both will be considered together." That author, after putting the question, "Does the default of one party in delivering or paying one instalment justify the other in treating the contract as at an end, or must the latter continue performance on his own part, relying on his action for damages to compensate him for the breach by the former?" proceeds then to discuss both English and American authorities. In summing up as to the English cases, he finds that the rule prevailing there is the one announced in the Mersey Steel Case, before referred to. As to the American cases, in section 1148 he says, though not in harmony, "that the view that the failure of either party to perform an essential term of the contract gives to the other the right to rescind that contract is sustained by the clear weight of American authority." As enforcing his view the author refers to Norrington v. Wright, supra; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. Pope v. Porter was a case in which there was a contract for the delivery of iron in two instalments, and the seller made default in the delivery of the first, but offered to deliver the second, which the buyer refused to accept. The court held that the first failure of the seller justified the refusal of the buyer. "Here," said the court, "there is a breach of the contract at the beginning, a failure to perform at the outset, and that breach justifies a rescission by the vendee. But a rescission of what? Obviously of the entire contract. It must be that or nothing, since there are not two independent and separate contracts, one of which may be broken without peril to the other, but there is a single contract, which may be rescinded at the moment of the breach, so long as it remains wholly unperformed." The case of McGrath v. Gegner, supra, was where the same rule was applied in favor of the seller upon a default in payment by the buyer. The contract there repudiated was for the sale of a lot of shells to be delivered in weekly instalments, each of which was to be paid for within a week following its delivery. The buyer made default, and the seller repudiated the contract. In disposing of the case the court said: "It is clear that the weekly payments were meant and understood by the parties to be an essential part of the contract, and, the plaintiff having failed time and again to make these payments according to the terms of the contract, the defendant had a right to put an end to the contract, and to refuse a delivery of any more shells under it to the plaintiff."

This view is also supported by Kokomo Strawboard Co. v. Inman, 134 N. Y. 92, 31 N. E. 248; Winchell v. Scott, 114 N. Y. 640, 21 N. E. 1065; G. H. Hess Co. v. Dawson, 149 Ill. 138, 36 N. E. 557; Providence Coal Co. v. Coxe, 19 R. I. 380, 35 Atl. 210; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; Branch v. Palmer, 65 Ga. 210; City of Baltimore v. Schaub, 96 Md. 534, 54 Atl. 106.

On the other hand, New Jersey, in Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27; 54 Am. Rep. 159, and other cases; Michigan, in West v Bechtel, 84 N. W. 69, 51 L. R. A. 791; and the United States Circuit

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Court of Appeals for the Sixth Circuit, in Cherry Valley Iron Works v. Iron River Company, 64 Fed. 569, 12 C. C. A. 306, and in Monarch Cycle Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523 — adopt the rule announced in Mersey Steel & Iron Co. v. Nailor, supra; while the Supreme Court of Iowa, in Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692, held that such a contract was divisible, and that rescission would not be allowed unless the breach went to the whole consideration.

While these authorities are entitled to the highest respect, yet we cannot but think the better reason is with those cases which take the view supported, as is said by Mr. Mechem, by the weight of American authority. It seems to us, as is well remarked by the learned editors of the 4th American Edition of Benjamin on Sales in their discussion of this question, that it is manifestly unjust "to compel a seller to continue delivering to one who owes for previous deliveries, or to compel a buyer to continue paying to one who has previously defaulted in delivering goods paid for in advance."

We think a rule enforcing a compliance of seller or buyer under these several conditions in order to maintain his right as against the contracting, but defaulting, party, is unreasonable, and a violation of the intention of the parties as manifested in the contract. It is apparent that it was not the purpose of these present parties that complainant should make indefinite deliveries without payment, and it is equally clear that it was not the purpose of the defendant company to make payment except for goods already received. Both parties evidently contemplated that following each delivery the defendant company should execute its paper at sixty days, or else within ten days from such delivery take advantage of the discount and pay cash. Where the defendant company has received deliveries, and for months has persistently neglected to pay the sums due on those deliveries, it would be a manifest hardship to impose on the complainant the necessity of continued deliveries.

We think the decree of the Court of Chancery Appeals is in all things right, and it is therefore affirmed.

Non-negotiable Instrument: Absence of Name of Payee: Bona Fide Holder.

John Willing gave to his son a note, in effect, as shown in accompanying illustration. The note was given by the father as testified to by father and son, to enable the son to buy out his, the son's, partner in a business carried on in Bloomington, Illinois. It was understood that the note was to be discounted by the People's Bank in Bloomington, and father and son supposed that the note was drawn payable to the order of that bank, but in fact no payee was named.

Instead of borrowing money on the note and using it in buying out the partner it was used as collateral to a note given to a creditor of the firm, Edward E. Smith. This creditor brought an action against the partner, John Willing, the maker of the note, and when eventually he defended payment on the note before the Wisconsin courts, his defense was that the note was a non-negotiable instrument in that it was not payable to bearer, and that it did not name a payee or leave a blank space

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$2500. La Crosse Wisconsin, Sep 2 '97.

Four months after date I promise to pay to Edward E. Smith the order of Twenty Five Hundred ——— Dollars

at the office of People's Bank, Bloomington, Illinois, with interest at 7 per cent. per annum until paid. And to secure the payment of said amount I hereby authorize irrevocably any attorney of any Court of Record to appear for me in such Court in term time or vacation, at any time thereafter, and confess a judgment without process in favor of the holder of this Note, for such amount as may be due thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in such proceedings or in execution thereon, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof.

Value received

John Nieding.

E. 11. Note: No Payee Named: Liability of Maker Authority to Fill Blank Spaces: Non-Negotiable Instrument.

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The maker of this note delivered it to his son, who was to use the proceeds to buy out his, the son's, partner. Instead of so using it the son pledged it as collateral to a note made by his firm. A portion of the firm note was not paid, and the holder of this note sued the father on this note. The father defended on the ground that the note had been diverted from the purposes for which it was issued: that it was purely an accommodation note; that while he was willing to become responsible by reason of it, if it went toward helping his son buy his partner out, he would not have issued it to secure a debt of that firm—a position that he was entirely at liberty to take in issuing it. The defense was good if the note was a non-negotiable instrument, but not if the note was negotiable. The father and son were each under the supposition that when the note was executed the People's Bank was named as payee, but inadvertently no payee was named—and no blank was left in which to write one in,—and the note was not payable to bearer. This, a divided Court held, made the note non-negotiable, 42 Minn. 498, 13 Mass. 158 (or possibly a void one), and left it in an innocent purchaser's hands subject to the same defenses that it would be if the son yet held it against the father—and no recovery could be had. The name "Edward E. Smith," the holder of the note, was interlined as payee by his attorney. This would have been legal and would have cured the defects in the note and to his title if there had been left by the maker a blank line for the name of a payee, under the rule "that the delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come." 92 U. S. 330, 57 N. Y. 573.

The Supreme Court of Michigan held May 12, 1903, in Gordon vs. L. S. S. Bank, that where in an ordinarily printed check there had been drawn, with a pen, a line above the blank payee line (where the payee's name would be written) that the check was *not* payable to bearer, and was non-negotiable,—and the bank that paid it as a check to bearer had to account to the drawer for the amount.

The same court held that a check with such blank space vacant is negotiable as a check payable to bearer, as is also an instrument payable to the order of "Bills Payable," or "Cash," or "No. 90," or to a fictitious payee. In the latter case the owner can indorse the name of the fictitious payee. McM. C. Cases 1903, p. 274*a*.

McMasters Com. Cases, Vol. 1905, 101. N. W. 692.

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which an owner of the note had implied authority to fill in, and that the note had been diverted from the uses for which he issued it. It was conceded that the name "Edward E. Smith," was interlined as payee, after he received the note, by his attorney.

It was held by a divided court that the note was non-negotiable and that the maker had a good defense to it, as it had been used for purposes other than those for which he consented to issue it.

The court said in part:

"We cannot avoid the conclusion that the paper on its face shows that a payee was intended to be named, but by mistake was not named. That this was the intent is confirmed by the evidence, which shows clearly that both parties to the making of the instrument intended to make it payable to the order of the People's Bank of Bloomington, and supposed they had done so. A promise to pay, other than to bearer, which is not certain as to the payee, is not negotiable, with certain well-defined conventional exceptions not at all applicable here. McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983; Alexander v. Thompson, 42 Minn. 498, 44 N. W. 534; Brown v. Gilman, 13 Mass. 158.

"The next contention rests upon a perfectly well-established rule, that the delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come. Snyder v. Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Johnson v. Weed & Gumaer Mfg. Co., 103 Wis. 291, 295, 79 N. W. 236; Angle v. N. W. I. Co., 92 U. S. 330, L. Ed. 556; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534. This rule is based on implied agreement with any one who may become the owner, and is not to be confused in principle or application with those cases, some of which are cited above, where an incomplete instrument is delivered to one, not as payee, but as agent, with authority to make it complete, and where the agent exceeds his authority; for the insertion of plaintiff's name in this paper was not made by defendant's agent, but by plaintiff himself, under his claimed rights as owner. This implied authority depends, however, on the very existence of a blank. There is no right in the holder of a contract, negotiable or otherwise, to rewrite it or insert omitted provisions, except where the signer, by leaving a blank obviously delivers it with such intention. In the instrument before us there was no blank; the writing joined to the printed porition without physical break or separation. True, there was an hiatus in sense, but that does not carry with it any authority to supply the missing term.

"We must, therefore, reach the conclusion that this instrument is not negotiable. Whether it is absolutely void as a contract, either originally, because containing no promise to pay to any one, or subsequently, because of illegal alteration by plaintiff, for both which contentions there is authority, we need not decide. Being non-negotiable, the plaintiff could gain none of those techincal protections or advantages which run with that class of contracts. He can, at most, rely on equitable doctrines of estoppel, if he was misled to his hurt by defendant's act. Defendant, of course, had a perfect right to make his own contract. He had the right to say he would be liable to the Bloomington bank for money to be loaned to his son, personally, and to refuse to become liable

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for pre-existing debts of the corporation of which his son was president. He did agree to the former, and not to the latter, to which, however, the judgment subjects him, obviously to his injury, for the corporation is bankrupt and out of existence, and he can have no hope of reimbursement from it. His defense, therefore, to the liability asserted is not technical, but meritorious and equitable. It is that he never agreed to assume it.

(See Decision No. 81)

Sales: Delivery: Trade Term.

"Under a contract by which plaintiff merely agreed to sell and deliver to defendant ties, to be of a certain quality, payment to be cash on delivery, defendant has the right on their arrival to examine them before accepting and paying for them; and a shipment with a sight draft accompanying the bill of lading, without an offer of inspection before acceptance, deprives defendant of such right, and therefore is not a sufficient tender of performance."

The contract, for the breach of which this suit is brought, is evidenced by the following writings:

"Detroit, Mich., March 14, 1900.

"J. A. Thick — Dear Sir: We will take seventeen thousand (17,000) cedar ties, to be delivered on the M. C. R. R. at Center Line, North Detroit, or Belt Line, as we may hereafter direct. Price for No. 1 standard cedar ties forty-one cents (41). We will take some No. 2 ties at twenty-five cents. Terms cash on delivery.

"Yours truly, Detroit, Utica & Romeo Ry.,

"GEO. B. DAVIS, Pres."

"I accept the above order. J. A. THICK."

Thick owned no ties but he relied on his ability to buy and furnish them to the railway company.

He notified the company that he loaded two cars with the ties and would send them down with the bill of lading attached to a sight draft for the purchase price. The company said that they would not receive them that way; that such a delivery or offer to deliver in that way was not a good offer to deliver goods that were paid for "cash on delivery."

The Supreme Court of Michigan, reversing the trial court, said in part:

"The circuit judge instructed the jury that a sight draft accompanying the bill of lading was equivalent to the payment of cash on delivery. This was error. The contract is unambiguous. All prior conversations were merged in it, and were inadmissible in evidence. It was the duty of the plaintiff to deliver ties of the character specified. It was the right of defendant to examine them before accepting and paying for them. Plaintiff had no ties at the time to deliver. Plaintiff might manufacture them, or might purchase them from others. The law applicable to this case is stated by the Supreme Court of the United States in Pope v. Allis, 115 U. S. 363, 372, 6 Sup. Ct. 69, 73, 29 L. Ed. 393: 'When a vendor sells goods of a specified quality, but not in existence or ascer-

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tained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract.' Where goods are sold and shipped to the vendee, and the vendor draws a sight draft with bill of lading attached, the vendee is not entitled to examine the goods in the hands of the carrier until he pays the draft and procures the bill of lading. In such case the vendee's only remedy is, having paid for the goods, to rescind the sale and sue for the purchase price, or to retain the goods and bring suit for damages. 2 Dan. on Neg. Inst. § 1734c; Whitney v. McLean et al. (Sup.), 38 N. Y. Supp. 793. The parties may agree that the vendee and drawee may inspect before acceptance and payment, but, unless they do, no such right exists; or, if the vendor accompanies his draft with an offer of inspection before acceptance, that is sufficient tender of performance."

101 N. W. 64.

CHASE v. WATERBURY SAV. BANK.

59 Atl. 37.

(Supreme Court of Errors of Connecticut. Nov. 11, 1904.)

SAVINGS BANK — RULES OF BANK — ASSENT BY DEPOSITOR — REPAYMENT OF DEPOSITS — PAYMENT TO WRONG PERSON — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF DEPOSITOR — APPEAL — ASSIGNMENT OF ERRORS — SUFFICIENCY.

1. **Under Gen. St. 1902, § 802, providing that the court on appeal shall not be bound to consider errors unless they are specifically stated in the reasons of appeal, an assignment that the court erred in charging the jury as certified to in the printed record, without pointing out the particular errors in a charge covering twelve pages of the printed record, raises no questions which the court is bound to review.**

2. **A depositor in a savings bank, who accepted from the bank and used a deposit book containing printed regulations relating to the liability of the bank for the payment of the deposit to others than the depositor, assented to the regulations, which became binding on both the bank and the depositor.**

3. **A savings bank agreeing that deposits and dividends withdrawn shall be paid only to the depositor, or his order or legal representatives, and then only on the depositor's book being presented, is, in the absence of any modifying agreement, liable for a payment made on a forged order of one who had fraudulently obtained possession of the deposit book, though the payment was made in good faith, and in the exercise of ordinary care, and in accordance with the general practice among savings banks.**

4. **A savings bank agreed with its depositors that deposits withdrawn should be paid only to the depositor or to his order, and then only on the depositor's books being presented, but that it would not be responsible to any depositor for any fraud**

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practiced on it or by presenting a depositor's book and drawing money without the knowledge or consent of the owner. Held, that the bank was not relieved of its duty of exercising ordinary care in preventing payment of a deposit to a wrong person, though he presented a depositor's book, but the agreement furnished a complete defense for payments made in the exercise of ordinary care to a wrong person.

5. A savings bank negligently paying a deposit on forged orders to one who had fraudulently obtained the deposit book from the owner is not relieved from liability by showing that the owner was negligent.

6. On the issue as to whether a savings bank was negligent in paying a deposit to a wrong person, evidence held to warrant the jury in finding negligence on the part of the bank, making it liable to the depositor for the money paid.

Appeal from Superion Court, Litchfield County; Alberto T. Roraback, Judge.

Action by Mary A. Chase against the Waterbury Savings Bank to recover savings deposits paid by the bank on forged orders. From a judgment for plaintiff, defendant appeals. Affirmed.

Nathaniel R. Bronson, for appellant. Frank W. Etheridge, for appellee.

HALL, J. From April 1, 1887, to September 26, 1900, the plaintiff made in person 25 deposits in the defendant's savings bank, which, with dividends added at the rate declared by the bank, amounted at the time of the trial, in March, 1904, to $3,230. The plaintiff has neither herself withdrawn any part of said sum, nor has she given any order for any payment to others. Upon four occasions between December 31, 1901, and March 3, 1902, the plaintiff's daughter, Mrs. Keith, who, with her husband, lived with the plaintiff, obtained money from the bank, amounting in all to $500, by presenting the plaintiff's bankbook, of which she had fraudulently obtained the possession, and by presenting with the bankbook forged orders purporting to have been signed by the plaintiff directing payment to be made to Mrs. Keith of the sums named in the orders. Early in April, 1902, Mrs. Keith confessed to her mother that she had drawn money upon the bankbook, but claimed that she could obtain no more without an order from the plaintiff, and offered to write to the bank and secure a reply which would satisfy the plaintiff, and a few days later read to her mother what purported to be a letter from the bank to the effect that no further money could be drawn on the plaintiff's account without an order from the plaintiff, and that it would be all right. Thereafter the plaintiff kept her bankbook locked up in a more secure place, but did not then notify the bank that her daughter had thus wrongfully obtained possession of the bankbook and drawn the money. On the 16th of April, 1902, Mrs. Keith presented at the bank to Mr. Merriman, the defendant's bookkeeper, a forged letter of that date, purporting to have been signed by the plaintiff, addressed to the treasurer of the bank, representing that the plaintiff had accidentally destroyed her bankbook, and requesting that a new one be issued in its place, and further stating that the plaintiff was an invalid, and had sent her daughter Mrs. Keith to get the new book, and had inclosed an order for money. Mr. Merriman informed Mrs. Keith that a new book could not be issued until a bond had been

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given to the bank, and prepared and gave to Mrs. Keith a form of a bond, with instructions to have it executed by the plaintiff and some responsible person as surety. On the following day Mrs. Keith presented the bond to Mr. Merriman at the bank, with the plaintiff's name as principal, and the name of another person as surety signed thereto. Both signatures were forgeries. In the absence of the treasurer of the bank, and without inquiring as to the responsibility or existence of the person whose name appeared as surety on the bond, and without submitting the matter to the "board of direction," or to "a committee appointed for that purpose," Mr. Merriman issued and delivered to Mrs. Keith a new book, in the name of the plaintiff, with the balance due upon the first book transferred thereto, and at the same time paid to Mrs. Keith $300 upon the forged order presented by her, dated April 16, 1902, purporting to have been signed by the plaintiff, and directing said sum to be paid to Mrs. Keith upon the amount due upon the first book. Six payments, amounting to $1,700, were made by the bank to Mrs. Keith upon presentation of said second book with forged orders of the plaintiff; the last payment having been made on the 27th of October, 1902. The plaintiff had no knowledge of the existence of said second book, nor of the payment of any of the money drawn by her daughter thereon, until informed of these facts by the bank on the 1st of November, 1902, when she immediately obtained from her daughter the second book, and $20 of the money which she had fraudulently drawn. Said second book was issued, and all the payments upon both bank books were made, by the bank in good faith, and upon the belief that the letter and orders purporting to have been signed by the plaintiff were genuine; and the plaintiff gave no notice to the defendant that Mrs. Keith had fraudulently obtained possession of the first book, and that said letter and orders were forgeries, until November 1, 1902.

The following statement was printed in the plaintiff's bankbook:

"Take Care of This Book. If you lose it or mislay it give immediate notice to the Bank, as if it gets into improper hands you may be defrauded."

Among the by-laws printed in plaintiff's book were these:

"Art 13. Dividends and money withdrawn shall be paid only to the depositor, or to the depositor's order, or legal representative: but neither the principal nor interest of any deposit shall be paid to any person, unless the depositor's book of entries made by an officer of the corporation or of the direction shall be presented that such payments may be entered therein, or unless the depositor shall prove to the satisfaction of the board of direction, or a committee appointed for that purpose, that such book has been lost or destroyed, in which case the depositor or his legal representative shall lodge with the treasurer a written discharge."

"Art. 15. This bank will not be responsible to any depositor, or to his heirs or assigns, for any fraud that may be practiced upon any of the officers of this institution by forged signatures, or by presenting a depositor's book, and drawing money without the knowledge or consent of the owner. And all entries of money paid, made in the depositor's book by an officer of the Institution, shall be deemed good and valid evidence of money paid, and shall exonorate this bank from any liability on account of any fraud practiced in drawing the money of any depositor."

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The above facts appear to have been proved at the trial beyond controversy.

Whether the officers of the bank exercised reasonable care in issuing the second book, and in making the payments to Mrs. Keith upon the first and second book upon the forged orders, and whether the plaintiff was negligent in failing to keep her first bankbook in a safe place, and in not notifying the bank that her daughter had fraudulently drawn money on the first book when she learned of it, in April, 1902, were among the disputed questions of fact at the trial.

The only proper assigned reasons of appeal are the denial of the defendant's motion for a new trial upon the ground that the verdict was against the evidence, and the failure of the trial judge to charge the jury in accordance with the specific requests set forth in the appeal. The last reason of appeal, that "the court erred in charging the jury as certified to in the printed record," is not a proper assignment of error. It fails to point out the particular errors complained of in a charge covering 12 pages of the printed record, and therefore raises no question which this court is bound to review. Section 802, Gen. St. 1902; Hayden v. Fair Haven & W. R. Co., 76 Conn. 355-365, 56 Atl. 613; Simmonds v. Holmes, 61 Conn. 1-9, 23 Atl. 702, 15 L. R. A. 253.

The substance of the several requests contained in the appeal may be fairly stated as these four requests to charge: First, that article 15 of the by-laws was sufficient authority to the bank for the payments made to Mrs. Keith; second, that her failure to notify the bank that Mrs. Keith had fraudulently drawn money on her deposit book when she first learned of that fact prevented the plaintiff from recovering the sums paid by the bank to Mrs. Keith; third, that, if Mrs. Keith obtained possession of the deposit book through the carelessness of the plaintiff in her manner of keeping it, the plaintiff could not recover the money paid by the bank to Mrs. Keith by reason of her possession of the book; fourth, that the jury would not be justified in finding negligence on the part of the bank from the mere fact that signatures of depositors were not kept for the purpose of comparison, and that the fact that Mrs. Keith was a daughter of the plaintiff might be considered as partially excusing the officers of the bank for not having exercised greater caution.

By accepting from the bank and using, as she did, the deposit book, in which articles 13 and 15 of the by-laws were printed, the plaintiff assented to these regulations, and they became a part of the contract of deposit for the protection of the bank and the depositor, and binding alike upon both. Eaves v. People's Savings Bank, 27 Conn. 229-231, 71 Am. Dec. 59; Doulan v. Provident Institution, 127 Mass. 183, 34 Am. Rep. 358; Appleby v. Erie Co. Savings Bank, 62 N. Y. 12. By the language of article 13, in the absence of any modifying agreement the bank was authorized to pay deposits and dividends only to the depositor or his attorney, or in case of his death to his legal representative; and the bank could not avoid liability for a payment made upon a forged order to one who had fraudulently obtained possesion of the deposit book, even by showing that such payment was made in good faith, and in the exercise of ordinary care, and in accordance with the general practice among savings banks

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Eaves v. People's Savings Bank, supra. It was evidently for the purpose of relieving the bank from so great a liability that the provisions of article 13 were modified by those of article 15. It was undoubtedly learned from experience that the depositors of a savings bank were so numerous that they could not all be personally known to its officers, that many of them were unaccustomed to writing, that they frequently kept their bankbooks where they were accessible to others, and that therefore in some instances competent officers, in the exercise of proper care and caution, would fail to detect forgeries and prevent imposition by persons presenting deposit books. It was clearly to protect itself against losses from such impositions, and not from losses which it was its duty to prevent, and which by the exercise of ordinary care it could prevent, that article 15 was adopted. By its provisions the bank was not relieved from its duty to exercise ordinary care to prevent payment to the wrong person, even though such person presented a deposit book, and in accepting this regulation the depositor agreed to bear the loss of a payment to the wrong person presenting the deposit book only to the extent that the bank acted reasonably. Ferguson v. Harlem Savings Bank (Sup.) 86 N. Y. Supp. 825; Kummell v. Germania Savings Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786; Sullivan v. Lewiston Savings Inst., 56 Me. 507, 96 Am. Dec. 500; Ladd v. Augusta Savings Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288; Gifford v. Rutland Savings Bank, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794, 25 Am. St. Rep. 744; Brown v. Merrimac River Savings Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700; Wegner v. Bank, 76 Wis. 242, 44 N. W. 1096. The by-law in question was therefore not a sufficient authority to the bank for payments negligently made to Mrs. Keith, and the court did not err in not charging the jury in accordance with the first request.

Nor did the trial court err in not charging in accordance with the second and third requests. Article 15 furnished a complete defense against liability for payments to Mrs. Keith made by the bank in the exercise of reasonable care. The second and third requests must therefore rest upon the claim that, under the doctrine of contributory negligence or of estoppel, the defendant would not be liable even for payments negligently made, if it also appeared that the plaintiff was negligent in not notifying the bank of the fraudulent acts of Mrs. Keith, or in not taking proper care of her bankbook. If the question whether the plaintiff was negligent in these matters were a material one in this case, it may well be doubted whether the jury would have been justified in finding, upon the facts, that the exercise of reasonable care by the plaintiff to prevent the bank from being imposed upon required her to give notice in April, 1902, of her daughter's fraudulent acts, or to keep her bankbook more securely than she did before she learned that her daughter had wrongfully obtained possession of it and drawn money upon it. The plaintiff knew that, by the by-laws of the bank, "neither the principal nor interest of any deposit" would be paid to any person "unless the depositor's book" should be presented. Upon learning of her daughter's acts she at once put the book where her daughter could not get possession of it. Can it be said that ordinary care required the plaintiff to anticipate that her daughter, without having possession of the deposit book,

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might continue to draw her money, by procuring, as she did, by fraud and forgery, a new book to be issued? As to the plaintiff's alleged carelessness in leaving her bankbook where Mrs. Keith could obtain possession of it, it appears that she kept it locked with other valuable papers in a bookcase drawer in the hallway on the second floor of her dwelling, with the key in her own sleeping room. Can depositors in savings banks be reasonably required, under ordinary circumstances, to take greater precautions in keeping their bankbooks? And especially could the plaintiff be reasonably expected to take greater precautions to prevent her own daughter from obtaining possession of the book before she learned that she had wrongfully drawn money upon it?

But without deciding whether there was sufficient evidence to go to the jury upon the question of the plaintiff's negligence, had that been a material inquiry in this case, we hold that the bank would not have been exonerated from liability for payments negligently made by its officers to Mrs. Keith, even if the jury could have properly found from the evidence that the plaintiff was guilty of the claimed negligence. This is not an action based upon the negligence of the defendant, in which the plaintiff was required to prove that she exercised due care. It is an action to recover money deposited by the plaintiff with the defendant, and which the defendant contracted, as declared in the deposit book, to repay to the plaintiff, or to her order, or to her legal representative, upon presentation of the book. Eaves v. People's Savings Bank, supra. From its absolute undertaking to pay to the depositor or his order, article 15 relieves the bank in cases of payments made in good faith and in the exercise of ordinary care to persons presenting the book, even though such payments are made upon forged orders. As we have already shown, no greater protection than this was intended to be afforded the bank by the provisions of article 15. Even if the plaintiff was negligent, as claimed, that did not excuse the bank officers from exercising ordinary care to prevent one who they knew was not a depositor from obtaining money upon a forged order, nor relieve the bank from liability for payments negligently made to the wrong person. The question of contributory negligence is not involved in the case. If the bank officers failed to exercise ordinary care in making the payments to Mrs. Keith upon forged orders, the bank was liable to the plaintiff for the sums so paid. If the officers exercised such care, the bank was relieved from liability by the provisions of article 15 of its by-laws. Geitelsohn v. Citizens' Savings Bank (Sup.) 40 N. Y. Supp. 662; Brown v. Merrimac River Savings Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700; Ladd v. Augusta Savings Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288; Ladd v. Androscoggin County Savings Bank, 96 Me. 520, 52 Atl. 1016; People's Savings Bank v. Cupps, 91 Pa. 315.

If the alleged negligence of the plaintiff had been proved, it would not have estopped her from claiming that the orders were forged, if the defendant was also negligent in not ascertaining that fact. If the bank officers were thus negligent, the facts would fail to show any such equity in the defendant as would enable it to invoke the principle of equitable estoppel against the plaintiff. Morgan v. Farrel, 58 Conn. 413-427, 20 Atl. 614, 18 Am. St. Rep. 282.

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The trial court rightly declined to instruct the jury as to the effect upon the question of defendant's negligence of the particular facts referred to in the fourth request. The question was one of reasonable care under all the circumstances, and these facts, with others, were properly left to the consideration of the jury in determining whether the defendant had exercised that degree of care.

The plaintiff claimed that it appeared from the evidence that the defendant was guilty of negligence in failing to make proper examinations and comparisons of the handwriting and signatures of the orders and the letter for the purpose of ascertaining whether they were genuine, in not having the signature of the plaintiff for reference and comparison, and in issuing a new bankbook to Mrs. Keith without requiring proper proof of the destruction of the first one, or attempting to ascertain whether the signatures to the bond presented by Mrs. Keith were genuine. The question whether the bank officers were guilty of negligence in making these payments in the manner they did was one of fact, and was fairly submitted to the jury and decided against the defendant.

An examination of the evidence fails to convine us that the trial court erred in denying the defendant's motion for a new trial upon the ground that the verdict was against the evidence. There is no error.

Officer With Authority to Indorse and Discount Paper Could Not Bind Company by Indorsement Where He Discounted the Paper Individually.

Sidney M. Smith was president and general manager of the Pacific Vinegar and Pickle Works and as such officer had authority to indorse and discount its paper taken from customers.

He so indorsed and discounted at a bank $20,000 of paper of the California Packing Company. Having idle means of his own he indorsed similar paper, to the amount of over $7,000, in the name of his company, as shown, in effect, in accompanying illustration, and discounted it individually, turning over the proceeds to his company.

The notes were not paid and he brought an action against his company on the indorsement. He won in the lower courts but was beaten on appeal.

The court said in part:

"It will be observed that no question is involved in this action of the right of a director, who has advanced or loaned money to a corporation, to recover it back on a quantum meruit, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself individually, as indorsee, and is now seeking to enforce such contract of indorsement against his corporation. His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law. In this regard the general prinicple is clearly stated in Bensiek v. Thomas, 66 Fed. 104, 13 C. C. A.

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457: 'It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property or loan his own funds, without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer.' Wardell v. R. R. Co., 103 U. S. 651, 26 L. Ed. 509; Mallory v. Mallory-Wheeler Co. (Conn.), 23 Atl. 708; Bigelow on Fraud, 217; Perry on Trusts, § 207. And in Morawetz Priv. Corp. § 517, it is said: 'The directors of a corporation have no authority to bind the company to any contract made with themselves personally. . . . Thus a president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself, or certify a check for his own benefit.' This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself. In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors, or with other agents thereof. He was dealing with himself, contracting as president with himself, as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to, or contract of indorsement thereof, with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 411, may pertinently be applied: 'A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself. is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession to ratify the act of his agent.' In Clark & Marshall's Private Cor., vol. 3, § 759, the rule is concisely summed up in this language: 'A person cannot, as director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation on one side, and for himself on the other, can make no difference.'

* * * * * * * * * *

"It may be well to say, also, that it is quite likely that the respondent Smith did not intend to do any unlawful act, and that what he did probably inured to the benefit, rather than the injury, of the pickle company; but well-established and just general principles of law can occasionally be invoked so as to work hardship in particular cases."

(See Decision No. 820.)

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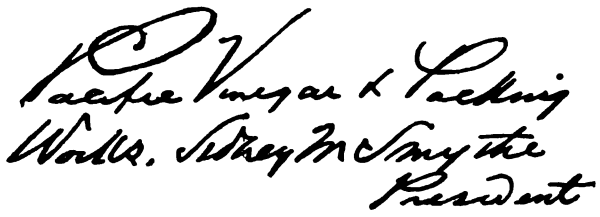
B. 12. President of Corporation Indorsed. for Full Consideration, Its Bills Receivable to Himself: Liability of Corporation.

$1500 San Francisco Cal. Jan 1 1900.
Three Months after date We promise to pay to
the order of Pacific Vinegar & Pickling Works
Fifteen Hundred Dollars
at First National Bank
Value received. California Pickling Co.
E. R. Clark Treas.
No. Due.
CRANES BOND



Sidney M. Smythe, who indorsed this note for the corporation, was its president, and had full authority to indorse and discount its paper. He had indorsed and sold to a bank several notes made by the same parties who made this one. Having idle funds of his own, he indorsed this one and gave his company the money for it. The note was not paid, and he sued his company as indorser on the note. He won in the lower court, but was beaten on appeal. There was no question as to the fairness of the transaction, but Smythe was beaten by having invoked against him the cast-iron rule that no agent can bind his principal in a transaction where the agent is the other party to the trade.

The court said in part: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally... Thus a president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself."

"Courts will not permit any investigation into the fairness or unfairness of the transaction."

"It may sometimes happen that the terms * * * have been as good as could be obtained from any other person: they may even at the time have been better; but still so inflexible is the rule, that no inquiry on that subject is permitted."

"It may be well to say, also, that it is quite likely that the respondent Smythe did not intend to do any unlawful act, and that what he did probably inured to the benefit rather than the injury of the (his) company; but well established and just general principles of law can occasionally be invoked so as to work hardship in particular cases."

McMasters Com. Cases, Vol. 1905, 78 Pac. 550.

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Sales: Conditional Sale: Waiver.

It is provided by the statutes of Tennessee that when any property is sold upon condition that the title remain in the seller until the payment of the purchase money, and the buyer defaults in his payments and the seller retakes the property, that he shall advertise and sell the same in accordance with the statute. Section 4 of the Statute provides that if sale is made in any other manner, the purchaser may recover from the seller any part of the consideration that he has paid. It is also provided that "said original seller and purchaser may at any time, by agreement waive the sale, provided in this act."

The Massillon Engine & Thresher Company sold one of its engines to C. R. Wilkes and took his four notes therefor, aggregating $1,265

After Wilkes had paid $388 on the purchase price of the engine he defaulted and the sellers took possession of the property and advertised it for sale and sold it. In posting notices of the sale the seller failed to post a notice as required by statute in the county where the buyer resided, although the buyer knew of the sale and attended it.

As the statute provided that "said original seller and purchaser may at any time, by agreement, waive the sale provided by this act," the sellers had this clause inserted in the notes made by Wilkes:

'The sale provided by an act of legislature of the State of Tennessee, passed March 15th, 1889, and approved March 30th, 1889, entitled 'An Act to provide a remedy for purchaser and seller in conditional sales of personal property is hereby waived,' and the said Massillon Engine & Thresher Company, upon repossessing said goods in accordance with this agreement, is not required to make any sale of the same, under provisions of the above, or any other act of the legislature of Tennessee."

This would have been a good waiver of the sale if it had been executed after there had been a default in payment, but it was held to be beyond the power of the seller to make, in advance of default, any waiver of the sale that would bind him.

The buyer sued the sellers for the $388 that he had paid on the purchase money and recovered judgment.

The court said in part:

"The notices of sale were posted on the door of the courthouse of Marshall county, in which county the local agents of the Massillon Company resided, and two other notices were posted in said county at public places, but no notice whatever was posted in Giles county, where the purchaser resided.

"It is insisted, however, on behalf of the Massillon Company, that Wilkes could not take advantage of this defective advertisement, for two reasons, viz:

"(1) That he voluntarily surrendered the possession of the engine to the agent of the Massillon Company, and, being present at the sale, made no protest or complaint.

"(2) That, in each of the notes executed by him for the purchase of the engine, he had waived the sale required by the act of 1889."

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"The next question presented is whether the purchaser waived the validity and regularity of this sale by voluntarily surrendering the possession of the engine, attending the sale, and making no complaint. We think this question is virtually settled by the case of Lieberman v. Puckett (94 Tenn. 274), wherein it was said as follows:

"'The act clearly contemplates two cases — one where the vendor retakes possession by consent of the purchaser, and the other where it is necessary to regain the possession by process of law in the absence of consent. This can be done by an action of replevin, and, if the complainant's right, under his replevin, to hold the property is not controverted, as well as when possession is gained by consent, it is the duty of the vendor to at once proceed under the statute to make the sale required.'

"So we think the purchaser has not, by his conduct in surrendering possession of the property and attending the sale, waived the necessity and duty of the seller to proceed in accordance with the requirements of the statute."

* * * * * * * * * *

"The next question that arises is in respect of the waiver of advertisement and sale of the property embodied in the purchase-money notes. The circuit judge instructed the jury that the waiver contained in these notes was invalid. He based his opinion on a ruling made by this court in the case of Lethe Miner v. J. I. Jackson and R. Dorman & Co., decided by this court in 1895 (not published), in which it was held as follows:

"'The waiver of advertisement and sale contained in the contract produced in this case was not binding upon the purchaser. The waiver or agreement contemplated by the act of 1889 cannot be made before default and reclamation.'

"We adhere to that ruling, and there was no error in the instruction of the circuit judge on this subject.

"It is true, the first section of the act of 1889 provides that the seller and purchaser may at any time, by agreement, waive the sale provided in this act, but we think the act contemplated there might be a waiver at any time after default and reclamation. Until such contingency happened, there could be no occasion for a waiver.

"It results from this holding that, the advertisement not having been legally made, and the property sold in conformity with the provisions of the statute, the purchaser is entitled to recover back all the purchase money paid by him."

82 S. W. 316.

Bank Directed to Make Good Check of Corporation Made by Its Treasurer to Pay His Individual Note at Bank: Return of Vouchers as Notice.

The Manhattan Webb Company had an account with the Aquidneck National Bank. The treasurer of the company, E Read Goodridge, drew its check, which is shown, in effect, in accompanying illustration, to his own order for $7,750, and indorsing it "Pay Aquidneck National Bank or order. E. Read Goodridge," sent it by mail to the cashier of the bank and instructed him to pay notes aggregating $5,150, held by the bank, made by E. Read Goodridge, individually. This the bank did, charging the

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check to the account of the company, and soon after it balanced the pass book of the company, showing the charge for the check, and returned the check, with other vouchers, to the company. No objection was made to this charge for nearly four years, when the company sued the bank, asking that the charge be canceled and the amount made good. This the court held should be done as to the amount of these notes.

This decision is in accordance with the well-settled rule that one takes at his peril the check of a corporation drawn by an officer to the officer's individual order, or drawn by such officer to the order of the creditor, in payment of the officer's individual debt. In two comparatively recent cases the creditor has escaped from the effect of this ruling by showing that such officer had drawn checks, in such manner, with such frequency as to have established a course of business which the directors of the corporation were cognizant of, or at least, should have been cognizant of, and thus had, in law, ratified. In 130 Fed. 699, the cashier of the Middlesex County Bank had drawn its check for a large amount to his creditor in payment of his individual debt. The receiver of the bank sought to recover the amount of the check, but he was beaten on the ground that the directors were, in law, cognizant of this course of business on the part of the cashier and had thus ratified it. This same receiver had previously recovered $7,500 from a creditor of the cashier by reason of a similar check — this creditor not having raised — at least failing to establish — ratification by the directors by reason of their silence or negligence. 51 At. 597. In 57 N. E. 477, the president of a warehouse company, who was authorized to issue its receipts for cotton, issued a number of them to himself individually and pledged them with banks as collateral for his individual loans. The receipts were fraudulent as he had no cotton in the warehouse — or anywhere else — to represent them, and, in suit by several banks against the warehouse company it was held that the company was not liable by reason of the receipts as the banks took them at their peril — being, on their face, issued by an officer of the company to himself.

Subsequently a bank, which was in exactly the same situation as the other banks, brought its action and alleged ratification by the directors, through their negligence or by reason of their silence after knowledge of the irregular practice of the president.

The court said in part:

"The plaintiff contends that it is well settled as a matter of law that, where an agent draws a corporation note or check payable to himself, and uses it to pay his individual debts or debts of third parties, the payee takes with notice of the fraud, and the burden is cast upon him to establish by proof that the act was authorized or ratified by the corporation; citing the following cases: Rochester & Charlotte Turnpike Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Campbell v. Manufacturer's National Bank, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; Gale v. Chase National Bank, 104 Fed. 214, 43 C. C. A.

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496; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; Randall v. R. I. L. Co., 20 R. I. 625, 40 Atl. 763; New York I. Mine v. First National Bank, 39 Mich. 644; Reynolds El. Co. v. Merchants' National Bank, 55 App. Div. 1, 67 N. Y. Supp. 397; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. While there is a question whether this rule is not too broadly stated, since perhaps it would not be an unusual business transaction for a treasurer to draw corporate funds for his own salary, and to deposit them in his own account subject to check for his private bills, yet the cases cited are at least sufficient to justify the proposition that, where a treasurer of a corporation draws and uses its funds for private purposes, in the absence of circumstances giving rise to a reasonable inference of authority to do so, the bank is put upon inquiry; and that a presumption of a treasurer's authority to apply corporate funds to his private purposes does not arise from the mere fact that he does so apply them.

"The defendant relies upon the fact that after paying the check of February 20, 1900, for $7,750, the bank, on April 2, 1900, made up the passbook of the plaintiff, showing the withdrawal, and sent it, with the check vouchers to the plaintiff, and that it was retained without objection until 1904, when suit was brought. It is contended that the plaintiff failed in its duty of reasonable diligence to examine its account and to give notice of irregularities within a reasonable time; citing Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. The applicability of this doctrine to the present case is very doubtful. The bank knew at the outset that money was to be used to pay Goodridge's individual debts. Without inquiry it at once surrendered its rights against indorsers of the old notes and its collateral security as well. Knowing the facts, it could not complain because it was not informed of them by the plaintiff. The bank did what was prima facie unlawful — surrendered its security — and then communicated the fact through the passbook and vouchers. There is a clear distinction between a case where a bank unwittingly has taken a forged check and the depositor has failed to give the bank timely information of the forgery, thus acting negligently, and preventing the bank from taking steps for its protection, and the present case. In Leather Manfrs. Bank v. Morgan, 117 U. S. 96, 112, 6 Sup. Ct. 657, 633, 29 L. Ed. 811, it was said:

"'Of course, if the defendant's officers, before paying the altered checks, could, by proper care and skill, have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of the account.'

"This is applicable to the present case. The bank knew the facts, and knowingly gave up its securities. This either cut it off from all recourse against the original parties to the old notes, or it could at will seek to cancel the transaction. If it chose to wait, in the hope that the plaintiff would not object, its delay in proceeding against the original indorsers and original collateral is voluntary, and not caused by neglect of any duty of the plaintiff."

* * * * * * * * * * *

"As to the individual notes of Goodridge, there apparently was no fact, additional to the assumption of authority by the treasurer, to give rise to any fair inference of special authority to use the funds of the corporation to pay his individual notes."

(See Decision No. 821.)

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No. 113 NEWPORT R.I. Feb 15th 1900

AQUIDNECK NATIONAL BANK

Pay to the order of E. Read Goodridge

Seventy seven Hundred and fifty ——— Dollars

$7750.

The Manhattan Weber Company
By E. Read Goodridge
Treas.

GRANT'S BOND

B. 13. Coporate Check: Payment: Notice.

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Godridge indorsed this check and sent it by mail to the Aquidneck Nat. Bank and directed it to apply $5,500 of the amount in payment of his individual notes held by it. The bank did this, charging the check to the account of the company and returning it shortly thereafter with other canceled vouchers. The company made no objection thereto until four years thereafter, when it sued the bank for the amount and recovered judgment under the rule that the bank was bound to inquire as to the authority of Godridge to draw the checks of the corporation in payment of his own debts. 164 N. Y. 281, 39 Mich. 644. His authority to draw checks, generally, for the corporation was not sufficient. It requires special authority for an officer to draw the checks of his corporation in payment of his own debts,—although such authority may be shown by acquiescence of the directors in silently allowing such practice after it has been called to their attention. To this effect is 130 Fed. 699, the syllabus of which is:

"A bank cannot recover the amount collected on a cashier's draft issued by its cashier and made payable to his individual creditor, where it is shown that the cashier had on numerous previous occasions drawn similar drafts in payment of his own debts, and such acts had continued for a period sufficiently long to establish a settled course of business in the conduct of the bank which had been sanctioned by its officers, and was known, or should have been known, to its directors."

It was also claimed that the bank failed in its duty in not examining its vouchers and reporting the irregular check until four years had passed. The court said as to this, that there was a clear distinction between this case and one where the bank had paid a forged check and returned it with the other vouchers to the drawer and he had not objected for a long time. The bank, legally, (the court says) knew the facts (it had the check before them) and it surrendered the collateral to the Godridge notes. "If it chose to wait in the hope that the plaintiff (corporation) would not object, its delay in proceeding against the original indorsers and original collateral is voluntary, and not caused by any neglect of any duty of the plaintiff."

McMasters Com. Cases, Vol. 1905, 133 Fed. 76.

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SHERMAN NURSERY CO v. AUGHENBAUGH.

100 N. W. 1101.

(Supreme Court of Minnesota. Oct. 21, 1904.)

SALE — REFUSAL TO ACCEPT — ACTION FOR PRICE.

1. Except where the purchase price of goods is payable irrespective of their delivery, if the buyer repudiates the sale while it is executory, and prevents the seller from performing on his part by making delivery of the goods, the seller cannot maintain an action on the contract for the purchase price. His only remedy in such a case is an action for damages for a breach of the contract.

* * * * * * * *

"START, C. J. The complaint herein alleged that the plaintiff is a corporation organized under the laws of Iowa, and that on May 17, 1902, it sold to the defendant, at the agree price of $300, payable when the goods were delivered, certain nursery stock, consisting of trees and shrubs, all to be delivered to him at the city of Waseca, this State, in the spring of 1903, pursuant to a written order therefor signed by the defendant and plaintiff's agent; and, further, that it delivered such stock to the defendant at Waseca on May 4, 1903. The answer alleges, with other matters, that on May 28, 1902, and before the plaintiff had done anything in execution of the contract on its part, the defendant countermanded the order, and notified the plaintiff that he would not accept of any of the stock."

* * * * * * * *

"We have, then, a case where the purchase price of goods is to be paid on the delivery thereof, but the buyer has repudiated the sale, and prevented the seller from making delivery. This brings the case within the well-settled rule that, except where the purchase price of goods is payable irrespective of their delivery, if the buyer repudiates the sale while it is executory, and prevents the seller from performing on his part by making delivery of the goods, the seller cannot maintain an action on the contract for the purchase price. His only remedy in such a case is an action for damages for a breach of the contract. Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; McCormick Harvesting Machine Co. v. Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; Benjamin Pr. of Sales, 195; 24 Encyc. of Law, 1113."

JONES et al. v. CHISM.

83 S. W. 315.

(Supreme Court of Arkansas. Nov. 5, 1904.)

JOINT TRESPASSERS — SATISFACTION BY ONE — EFFECT ON SUIT AGAINT THE OTHERS.

1. A person injured by joint trespassers, who receives satisfaction from one of the wrongdoers, cannot maintain an action against the others.

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HILL, C. J. Chism sued Tom Jones, Bill Jones, and E. J. Hickock, in Boone Circuit Court, for forcibly entering his land and cutting and carrying away timber therefrom. The defendants answered, denying indebtedness for the amount sued for, or any other sum above $20, and pleaded an accord and satisfaction between Chism and Tom Jones, whereby Chism received $20 in full of all claims and demands as damages against him for cutting timber, and agreeing to dismiss as to him in this suit which was then pending against the three of them. Defendants averred that, having received one satisfaction for the damages sued for, he was not entitled to recover another satisfaction. A demurrer was sustained to their answer; and, the defendants standing on it, the damages were assessed, and judgment entered therefor, and the defendants appealed therefrom.

Is the satisfaction by one of several joint trespassers a release of the others? The accepted rule on the subject of the liability to joint or several suits of joint wrongdoers is the one announced by Chancellor Kent when Chief Justice of the Supreme Court of New York—that joint or several suits could be prosecuted against joint trespassers, with judgments against each, but only one satisfaction. Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Cooley on Torts, p. 138. Judge Cooley says: "It is to be observed, in respect to the point above considered, when the bar accrues in favor of some of the wrondoers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that the proceedings assume, but from the fact that the injured party has actually received satisfaction, or what, in law, is deemed equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all." Cooley on Torts, pp. 160, 161. Prof. Jaggard says: "Wherever the person injured by the wrong of several joint tort feasors has settled his claim for damages, and received satisfaction from one of them, the cause of action is discharged as to all." 1 Jaggard on Torts, § 117. To same effect is 24 A. & E. Encyc. Law (2d Ed.), p. 306. Numerous authorities are cited by these writers, sustaining these propositions, which seem to be firmly established.

The answer presented a good defense, if proved, and therefore the court erred in sustaining a demurrer to it. Reversed and remanded.

LOWE v. REDDAN.

100 N. W. 1038.

(Supreme Court of Wisconsin. Oct. 18, 1904.)

BANKS — DEBTS OF DEPOSITORS — NOTES — DEPOSITS — APPLICATION — SURETIES — RIGHTS.

1. Where a bank was indebted on a deposit account to the maker of a note payable to it, a surety on such note was not discharged by reason of the bank's failure to apply such deposit in payment of the note, but was only relieved to the extent that such deposit would have paid the note if applied thereon.

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2. Where a bank depositor was indebted to a bank on two notes, the bank was entitled, as against a surety on one of the notes, to apply the maker's deposits one-half to the payment of each note.

Appeal from Circuit Court, Clark county; James O'Neill, Judge.

Action by Jesse Lowe against Anthony Reddan. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Action to recover on a promissory note for $1,000. Defendant Anthony Reddan answered that, if liable at all, it was only as an accommodation maker; that the note was given to the Clark County Bank with another of the same character, the payee knowing his status as accommodation maker; that the due date of the note was extended by the bank for a valuable consideration, without his consent, the bank releasing to the principal debtor, J. H. Reddan, securities for the payment thereof sufficient to discharge same; and that the plaintiff became the owner of the note after its maturity. A formal special verdict was taken, the court, however, directing the answers to all of the questions. One, after the coming in of the verdict, was changed to accord with what the court viewed to be the uncontroverted evidence. The verdict as so corrected was to this effect. Plaintiff is the owner and holder of the note in the suit. He purchased the same after it became due. Defendant, Anthony Reddan, signed the note as surety only for J. R. Reddan. The Clark County Bank, the payee of the note, did not extend the time of payment. while it owned the note and another of the same character and amount, both being due, it released the sum of $259.68, which it should have applied to the payment of such note. In the order changing the verdict to the form indicated, it was recited that J. H. Reddan had on deposit in the bank when the two notes became due as aforesaid $519.36, which it should have applied to the payment thereof. Upon the fact so found and recited the court held that the defendant, Anthony Reddan, was entitled to the credit indicated. Judgment was entered upon the verdict so corrected, from which this appeal was taken.

R. J. MacBride and James Wickham, for appellant. L. M. Sturdevant (Richard E. Smith, of counsel), for respondent.

MARSHALL, J. (after stating the facts). Many questions are presented for consideration on this appeal, the solution of which does not appear to be material to the final conclusion, and will, therefore, not be discussed.

Assuming for the purposes of this case, but by no means even suggesting that such is the law, that a bank having the opportunity to protect a surety upon a note held by it, by asserting its right to offset against the same its indebtedness to the principal maker thereof upon his open deposit account; it owes to the surety the duty to exercise such opportunity, and that a failure to do so can be taken advantage of by such surety as regards his liability to the bank, such duty is based upon mere principles of equity and cannot therefore be extended further than to fully satisfy the reason of the rule. That is fully accomplished by considering the note paid, as to the surety to the extent of the amount of the maker's credit with the bank.

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which it has a legal right, at least, by asserting its right of offset, to apply thereon. To carry the rule further and hold that a mere partial release of the deposit account to the prejudice of the surety's equitable rights will operate as a full discharge of the latter's obligation, as in the case of the variation of a contract to his prejudice, the performance of which he is surety for, could only occur by confusing the legal relations between the obligee and the surety in the latter case with the pure equitable relations existing in the former case. In the latter case no contract exists between the bank and the surety upon the note, as regards the mere deposit account. None at all. Its right to protection in the circumstances stated grows out of equitable principles, as in Plankinton, Assignee, v. Gorman, 93 Wis. 560, 67 N. W. 1128. It will be observed in reading that case that, while the surety was held to have been fully released by a release of the security, the proof was that such security was sufficient, had it been enforced to fully discharge the debt. It would seem that on principle the law must be as stated. Ample authority is cited by counsel for appellant to demonstrate that it is. Hoyt v. French, 24 N. H. 198; Hurd v. Spencer, 40 Vt. 581; Montgomery v. Martin, 94 Ga. 219, 21 S. E. 513; Holland v. Johnson, 51 Ind. 346; Freaner v. Yingling, 37 Md. 491; Dawson v. Real Estate Bank, 5 Ark. 283; Baker v. Briggs, 8 Pick. 122, 19 Am. Dec. 311; and Brandt on Suretyship, § 426. The cases to the same effect, which might be added, are numerous. The following are but a few of them: Morgan v. Board of Commissioners of Rush County, 82 Ind. 257-262; Sample v. Cochran, 84 Ind. 594; Weik et al. v. Pugh et al., 92 Ind. 382-386; Allen v. Hollingshead, 155 Ind. 178-185, 57 N. E. 917; Wright v. Bartlett, 43 N. H. 548; Calvert v. London Dock Co., 2 Keen, 638; Phares v. Barbour, 49 Ill. 370; Taylor v. Jeter, 23 Mo. 244; Pfirshing v. Peterson, 98 Ill. App. 70; Teaff v. Ross, 1 Ohio St. 469-475; Steele v. Mealing, 24 Ala. 285-290; Henderson v. Huey, 45 Ala. 275; Miller v. Berkey, 27 Pa. 317. The following from the opinion of Black, C., in Weik et al. v. Pugh et al., supra, fairly indicates the character of such authorities:

"It is a settled principle, that a surety is entitled to the benefit of all securities for the debts that are held by the creditor, and it follows from this right of subrogation that the creditor cannot, without the surety's assent, surrender, release, waste or render unavailable to the surety any of such securities, without affecting the creditor's remedy against the surety; but the surety is discharged on such ground only to the extent to which the creditor has parted with such securities."

Such cases as Paine v. Jones, 76 N. Y. 274; Gardner v. Van Norstrand, 13 Wis. 543, 544; Sage v. Strong, 40 Wis. 575; Stephens v. Elver, 101 Wis. 392, 77 N. W. 737; Cowdery v. Hahn et al., 105 Wis. 455, 81 N. W. 882, 76 Am. St. Rep. 923, and similar authorities that might be cited, upon which counsel rely, and which seemingly, it is supposed by them, are in conflict with those we have cited, apply only, as the learned counsel for the respondent contends, to cases where the contract itself, in respect to which the surety is bound, is changed to his prejudice, without his consent. That is not this case. An entirely different rule applies to one situation than to the other. There was a claim made here that the contract between the principal maker

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of the note and the bank was changed to the prejudice of the surety, without his consent, by the extension of the due date of the note. On that point, however, the appellant prevailed.

Counsel for the appellant insist that, conceding the law to be as we state it, the court erred in deciding that only $259.68, of the deposit account was applicable to the note, instead of the full amount of such account, $519.36. Such contention does not seem to merit much attention. There were two notes, exactly alike, one being the note in suit. The right, as regards the deposit account, was manifestly the same in respect to one note as to the other. If, as to the surety, it should have been applied in payment of the notes, so far as it would go for that purpose, certainly the court applied it rightly, one-half to each note.

Judgment is affirmed.

Check: Alteration: Payment.

H. J. Morris, who had an account in the First National Bank of Beaumont, delivered to H. M. Turner, his check for $200, which is described, in effect, in accompanying illustration. Before the check was presented for payment Morris stopped payment on it and changed his account to the Beaumont National Bank. He then drew two checks on the latter account, which were paid — using the blank checks of the First National Bank — erasing the word "First" and inserting in place thereof the word "Beaumont."

Turner subsequently made a similar alteration in his check and the Beaumont National Bank paid it and charged it to the account of Morris. To this Morris objected, and the bank refusing to make his account good he sued them for the amount. The bank won in the trial court but Morris won on appeal.

The court said in part:

"The defendant, the Beaumont National Bank, resisted the suit on the ground that they were innocent holders of the checks without notice of the forgery, and pleaded further that it was the local custom for banks to pay checks where the printed name of the payor was erased and another inserted in writing; that they had paid other checks of plaintiffs written the same way, which were genuine; wherefore it claims it is not liable. The trial court, after hearing the evidence, instructed a verdict for defendant, and judgment was rendered upon the verdict. Plaintiffs have appealed.

"It is true that the defendant paid two other checks of the firm written upon the printed blanks of the First National Bank, the word 'First' being erased by Morris in the same way, and the word 'Beaumont' substituted in ink. These checks were genuine. Plaintiffs contend in their briefs that, as the checks were forgeries, the innocence of defendants is no defense. The defendants have filed no briefs. We understand the law to be in line with the contention of plaintiffs. As between the depositor and defendant, the latter is held to a knowledge of the signature and handwriting of its cus-

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tomer, and, in the absence of some fault on the part of the customer affecting the question of liability, a forged check, whether the forgery was accomplished by material alteration or the forgery of the signature, is honored by the depositee at its peril.

"There can be no question as to the materiality of the alteration. The plaintiffs are not shown to have been guilty of any negligence in respect to these checks, and it certainly cannot be contended with any show of reason that it was their duty to foresee Turner's fraudulent act and notify defendant as against checks which had not been drawn against it. No local custom can give vitality to a forged check."

(See Decision No. 822.)

CITIZENS' NATIONAL BANK OF KANSAS CITY, MISSOURI,

Plff. in Err., v. M. S. C. DONNELL.

25 Sup. Court, 49..

USURY BY NATIONAL BANKS.

1. By compounding interest oftener than is permitted by Mo. Rev. Stat., § 3711, a national bank charges interest at a higher rate than that allowed by the laws of the State, within the meaning of U. S. Rev. Stat., § 5197; U. S. Comp. Stat. 1901, p. 3493, fixing the rate which national banks may charge, although the compounded interest is less than the State laws permit to be charged directly, without compounding.

2. A national bank which has made a 12 per cent. charge on overdrafts, where 8 per cent. is the highest rate of interest permitted by the State laws, cannot escape the forfeiture prescribed by U. S. Rev. Stat., § 5198, U. S. Comp. Stat. 1901, p. 3493, where a greater rate of interest is charged than the State laws allow, because of the trifling amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due.

3. A national bank whose action on a promissory note is met by the plea of usury may not avoid the forfeiture of the entire interest, imposed by U. S. Rev. Stat., § 5198, U. S. Comp. Stat. 1901, p. 3493, in absolute terms, by then declaring an election to remit the excessive interest.

Mr. Justice HOLMES delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri on the ground that the plaintiff in error is denied the rights with regard to charging interest conferred upon it by the national banking act. Rev. Stat. §§ 5197, 5198, U. S. Comp. Stat. 1901, p. 3493. The suit was brought by the plaintiff in error upon a promissory note for $20,000, with interest at 8 per cent, made on April 29, 1892. The facts, shortly stated are as follows: On October 29, 1892, the plaintiff bought the defendant's note for $15,000, with interest at 7 per cent. On July 12, 1895, the defendant being behindhand with his payments of interest and also having overdrawn a bank account which he kept in the plaintiff's bank, he gave the plaintiff a new note for $17,500, and interest at 7 per cent., in satisfaction of both liabilities. The amount of this note included three semiannual interest charges of $225 each, with a few days' further

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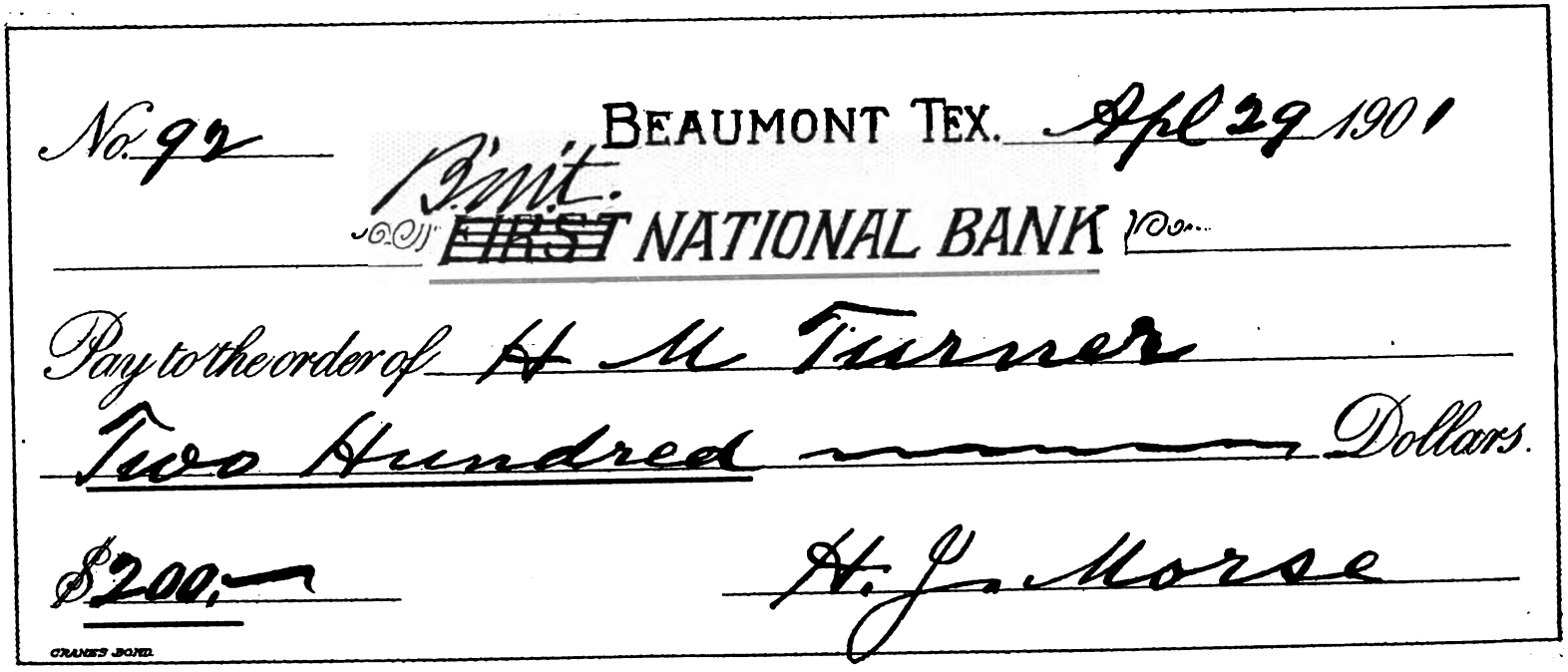

No. 92 BEAUMONT TEX. Apl 29 1901

Pmt.

FIRST NATIONAL BANK

Pay to the order of H M Turner

Two Hundred Dollars.

$200.00

H. J. Morse

CRANE'S BOND.

B. 14. Check: Payment Stopped: Alteration: Local Custom.

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This check was drawn on the First National Bank. Before it was presented there the maker stopped its payment there on the ground that it was obtained by fraud, and withdrew his balance and opened an account with the Beaumont National Bank. He drew checks on the latter account and used therefor blanks of the First National Bank—erasing the word "First" and inserting the word "Beaumont." The holder of this check, observing this, altered it correspondingly, and the Beaumont Nat. Bank—not inquiring about the apparent alteration, and not having heard of any other irregularity—paid it in good faith and charged it to the maker's account. The appellate court, reversing the lower court, held that the bank was liable to the maker of the check for the amount so charged to his account. The bank claimed that there was a local custom which made regular the payment of checks altered as was this one, and that the maker of the check was negligent in not notifying them that this check was outstanding. The court said as to this: "There can be no question as to the materiality of the alteration. The plaintiffs are not shown to have been guilty of any negligence in respect to these checks, and it certainly cannot be contended with any show of reason that it was their duty to foresee Turner's fraudulent act and notify defendant as against checks which had not been drawn against it. No local custom can give vitality to a forged check."

Where banks pay, or where others pay checks, drafts or notes where the payee's name, or the place of payment has been changed by inserting another name either by type or pen, they run the risk of knowing whether the drawer made or ordered this particular change. As shown here, the fact that the maker has made similar changes in other instruments is no protection if this particular alteration was unauthorized. Lawyers and business men that would faint at the sight of an altered word in a deed, glide thoughtlessly over erasures of printed words, in notes, relating to place of payment, rate of interest, time of maturity, etc., etc.—and never feel the jolt until they are brought up in court and have applied to them the rule that an alteration which could not and did not injure the debtor can be fatal to the creditor.

McMasters Com. Cases, Vol. 1905, 83 S. W. 36.

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interest, on the former note, with interest on this interest from the time it was due, and charges of 1 per cent. or more a month on the amount overdrawn each month. It left the defendant with a credit on his bank account of $230.50. On April 29, 1896, the note in suit and another note for $2,000 were given in satisfaction of the last note for $17,500, and of another note for $2,500, of October 1, 1895, with interest accrued on both, and of an overdraft of $919.90, and a balance of $2.42. The overdraft item included, as before, charges of about 1 per cent. a month on the amounts actually overdrawn.

The Supreme Court of Missouri held that the plaintiff must forfeit all interest from the beginning of the above transactions, and could recover only the original $15,000, the actual overdraft on July 12, 1895, $474.24, the bank credit of $230, given the same day, the note of October 1, 1895, for $2,500, the overdraft on April 29, 1896, of $878.81, and the bank credit of $2.42 — in all, $19,081.97, less $5,500 collected on account since the action was begun. 172 Mo. 384, 72 S. W. 925.

By the U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, a bank may charge "interest at the rate allowed by the laws of the State, . . . where the bank is located, and no more." By § 5198 (U. S. Comp. Stat. 1901, p. 3493), taking, receiving, or charging "a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." The Revised Statutes of Missouri fix 6 per cent. as the rate of interest in the absence of agreement (§ 3705), but allow parties to agree in writing for not over 8 per cent. (§ 3706). They also allow parties to contract in writing for the payment of interest upon interest, "but the interest shall not be compounded oftener than once in a year" (§ 3711). It will be seen that the charge on the overdrafts went beyond § 3706, and the compounding of the semiannual interest or the notes encountered § 3711.

The plaintiff in error denies that the prohibition of compounding oftener than once a year affects the "rate of interest" within the meaning of those words in U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, and contends that so long as the total sums received would not amount to more than 8 per cent. on the debt, it has a right to charge them under U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, coupled with Mo. Rev. Stat. § 3706. It disposes of the 12 per cent. charge on overdrafts by the suggestion that the amount is trifling, and de minimmis non curat lex, and that this charge was a penalty because of a failure to pay a debt when due, and therefore not usurious. We are of a different opinion. The rate of interest which a man receives is greater when he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point, and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the State Court. Union Nat. Bank v. Louisville N. A. & C. R. Co. 163 U. S. 325, 331, 41 L. ed. 177, 179, 16 Sup. Ct. Rep. 1039. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year, it was a rate greater than was allowed by U. S. Rev. Stat. § 5197, U. S. Comp. Stat.

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1901, p. 3493, and it was forfeited. The suggestions as to the 12 per cent. charge on overdrafts do not seem to us to need answer.

There is no doubt, of course, that the court could go behind the face of the present note, and analyze the sum which it represents into its original elements. Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; Haseltine v. Central Nat. Bank, 183 U. S. 132, 135, 136, 46 L. ed. 118-120, 22 Sup. Ct. Rep. 50. These cases sufficiently show, also, if more is wanted than the words of Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, that the court below did not err in forfeiting all the interest from the beginning.

We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, in absolute terms, by then declaring an election to remit the excessive interest.

Judgment affirmed.

Negotiable Instrument: Payment: Agency: Bona Fide Holder.

John Fremder and his wife borrowed of Henry Herman $4,000 on a note secured by mortgage, the material parts of which are shown in accompanying illustration. Herman sold the note and mortgage to one Sanderson, who at all times kept them in her possession.

As the interest coupons became due Sanderson sent them to Herman, who delivered them, on payment, to Fremder.

Without the knowledge of Sanderson, Herman collected and retained from the makers $3,100 of the principal, before by the terms of its extension, it became due. Herman did not have the securities in his possession when he collected this principal. The makers did not know that Herman had sold the securities. If, under these circumstances, the note was a negotiable instrument the makers were not protected in making these payments. If the note was a non-negotiable one the makers' payments were good as against the true owner of the securities.

The question of the negotiability of this form of note was discussed in the case of Thorpe v. Mindeman, 101 N. W. 417, page 217 and it was there decided that the note was a negotiable instrument.

The purchaser of these securities assumed some risk in buying and retaining them without first ascertaining from the makers whether they had any defenses to them, or, if they had no doubt on that point in not notifying the makers that she had purchased them; for if the note had been held non-negotiable (and the question was a close one) the makers having made their payments to Herman, believing that he yet owned the securities, the payments would have been good. Recording of the assignment of a mortgage is not, except in a few States, notice to the mortgagor of the change of ownership of the securities, unless he is informed of it. Actual notice conveyed to the mortgagor is the only safe course.

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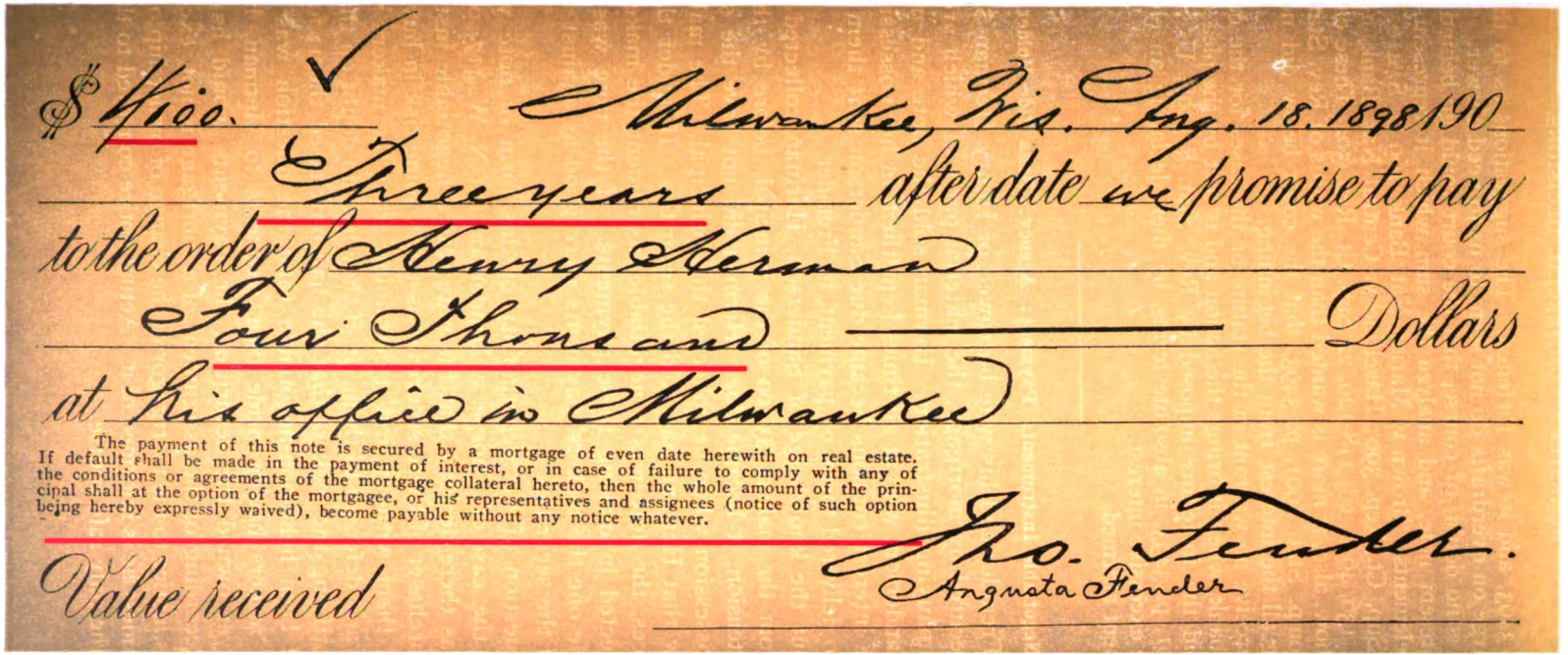
B. 15. Payment: Agency: Note Secured by Mortgage.



$ 4100. ✓ Milwaukee, Wis. Aug. 18. 1898 190

Three years after date we promise to pay

to the order of Henry Herman

Four Thousand Dollars

at his office in Milwaukee

The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall at the option of the mortgagee, or his representatives and assignees (notice of such option being hereby expressly waived), become payable without any notice whatever.

Value received

Jno. Fender.
Angusta Fender

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Soon after this note was given, it, and the mortgage securing it, were sold by the payee, Herman, to one Sanderson, who at all times kept possession of them. As the interest coupons became due they were forwarded to Herman who remitted for them, and he was reimbursed by the makers.

Before the time of the ultimate maturity of the note, the makers paid $3,100 of the principal to Herman, who never accounted for it to the holder of the note. The makers had no actual knowledge that Herman was not the owner of the securities when they made their payments, and, if they believed that he was, they would have been protected in their payments if the note was a non-negotiable instrument; but the court held that it was negotiable, and the rule is that one who makes payments on negotiable instruments is bound at his peril to know that the payments are made to the true owner, and that they show on the instrument. The makers then sought to show that the owner, by his actions in collecting interest, had given the makers reason to believe that Herman was his agent in the matter of receiving payments on the debt. The court held that this was not so. Even if it had been so, an implied agency to collect interest, or even principal, on a debt, is not an implied agency to collect it before it is due,—and the payments here, of principal, were made before they were ultimately due.

It was careless in the makers to make these payments to the payee without the production of the unindorsed note. It was nearly as careless in the owner not to communicate with the makers before purchasing the securities and then notifying them of the purchase; for, if the note had been held non-negotiable,—and the question was a close one—then the owner would have been bound by bona fide payments of the makers to the payee. Recording of the assignment of the mortgage, except in a few States, is not of itself notice of that fact to the mortgagor: actual notice should be given.

McMasters Com. Cases, Vol. 1905, 101 N. W. 423.

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The court said in part:

"Discussion of the negotiability of the note in suit may be dispensed with in this opinion, for that is considered and settled in Thorpe v. Mindeman (decided herewith), 101 N. W. 417. Such negotiability being established, there results the rule that the debtor's duty is to pay to the person who owns the note at the time of payment, or to an agent of such owner actually authorized to receive payment; that no payment to any other person can be of any effect unless made in reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment as to estop the owner from denying such authority. Possession of a negotiable instrument is generally the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so. Miller Brewing Co. v. Manasse, 99 Wis. 99, 74 N. W. 535, 67 Am. St. Rep. 854; Winkelmann v. Brickert, 102 Wis. 50, 78 N. W. 164; Bartel v. Brown, 104 Wis. 493, 80 N. W. 801; Kohl v. Beach, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. Rep. 849; Spence v. Pieper, 107 Wis. 453, 83 N. W. 660; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904; Joy v. Vance, 104 Mich. 97, 62 N. W. 140; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659. Of course, there may be subsequent ratification, of which, however, nothing is claimed in this case. Platt v. Schmitt, 117 Wis. 489, 94 N. W. 345. This rule has been held sufficient to deny efficacy to such acts as permitting collection of interest, or even prior installments of principal, which, in relation to other business not involving collection of negotiable paper, might well suffice to establish apparent agency. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder, and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and profitable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next. Of the probability of such change the negotiability of the instrument is a continual warning.

"One is not required to anticipate negligence nor ignorance of the law in others in so governing his conduct as not to mislead them to their hurt. Long prior to 1901 the law was well settled that one indebted on negotiable paper had no right to pay to any one not in possession of the instrument. Why, then, should the plaintiff anticipate that the debtor would forego the care? Certainly not. She exercised the very precaution against any collection of principal which the law required, by retaining possession of the principal note while she put Herman in position to bind her in receiving interest by delivering into his custody the coupons as they matured. Further, the conduct of the defendant strongly negatives reliance by her on any mere silence of plaintiff, for when she came to make final payment she demanded presentation of the note, and in its

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absence, refused payment. Had she exercised that same care on other occasions which she herself deemed proper on the last, she would have been safe.

"We can find nothing to remove this case from the carefully considered rule of the above authorities, nor to avoid the conclusion that between these two innocent persons the negligence of defendant in paying to one not having possession is so responsible for the loss that it cannot be imposed on the plaintiff, who at all times guarded against such result by keeping the note in her own possession. It is the former, and not the latter, who trusted Herman so as to enable him to do the wrong."

(Decision No. 823.)

HIBBARD, SPENCER, BARTLET & CO v. STEIN.

78 Pac. 665.

(Supreme Court of Oregon. Nov. 28, 1904.)

PRINCIPAL AND AGENT — TRAVEVLING SALESMEN — AUTHORITY — SALE OF SAMPLES — TITLE.

1. A traveling salesman has no implied authority from the nature of his employment to sell the samples with which he is intrusted by his principal.

2. A contract employing a traveling salesman provided that the salesman should return all the samples to his employer or sell them under the instructions of the house, and account for the same in cash or an itemized statement, naming the firm they are to be charged to, and required the salesman to pay cash for all samples unaccounted for at the end of the year or at the termination of the contract. The contract also had attached a schedule, which provided that samples were charged as cash, and must be paid for by salesmen, unless returned, or their sale properly accounted for. Held, that such contract did not authorize the salesman to sell his samples except in pursuance of express instructions from his employer, and that a sale made without such instructions conferred no title on the purchaser.

WOLVERTON, J. But a single question is presented for our determination, which is whether Diener was authorized by the plaintiff, under his contract of employment, to sell the samples, and this depends for its solution upon a proper interpretation of the contract. The trial court was of the opinion that the contract did not confer the requisite authority. It permitted evidence to go to the jury, pro and con, touching the alleged existence of a general custom among dealers and their salesmen, whereby the right of salesmen to dispose of their samples at will is recognized, and upon which an implied authority was predicated, and instructed them as to that, but charged them, upon a construction of the contract, that Diener was not by its terms and conditions authorized or empowered to make the sale. If the court was right in this latter particular, the judgment should be sustained; otherwise not.

A traveling salesman, known in modern business parlance as a "drummer," derives no implied authority from the nature of his employment to sell the samples with which his principal intrusts him as an aid to the discharge of the duties he engages to perform. Being essential and necessary to the performance of the salesman's undertaking, no reasonable inference can arise that he is to dispose of them, for, if he

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does, he is left without available means for exhibiting the goods of his employer. Nor is the principle that the agent is entitled to employ all necessary and usual means of executing the authority imposed adequate to the purpose. Reinhard Agency, § 463; Mechem, Agency, § 343; Savage v. Pelton, 1 Colo. App. 148, 27 Pac. 948; Kohn Bros. v. Washer & August, 64 Tex. 131, 53 Am. Rep. 745. The contract has appended a schedule, which is denominated, "Suggestions and Instructions to Salesmen," and it is essential that the two instruments be read as one, in order to determine the intendment of the parties. Defendant's counsel rely upon the following paragraphs as having conferred upon Diener ample authority to sell the goods in question to defendant.

This in the contract proper:

"It is distinctly understood and agreed by the party of the second part, that in accepting and receipting for samples, he shall return all of same to the party of the first part, or sell them under the instructions of and according to the established rules of this house and account for the same in cash or an itemized statement, naming the firm they are to be charged to; and the party of the second part agrees to pay cash for all samples unaccounted for at the end of the year, or at the termination of this contract."

This in the schedule:

"4th. Samples are charged as cash and must be paid for by salesmen, unless returned or their sale properly accounted for. Samples sold must be entered on yellow sample department sheets and marked delivered. Otherwise you will not receive proper credit. Never leave samples of any kind about depots, hotels, or with irresponsible parties. Have them with you or in responsible hands, properly checked."

Three other paragraphs in the schedule are referred to as essential to an intelligent intrepretation of the above. They are the following:

"14th. Sell no goods for future delivery unless under instruction from the house."

"16th. If there are any of these instructions that you do not fully understand, get explanation before leaving the house.

"17th. We have made these suggestions and given these instructions to salesmen so they may fully understand our wishes regarding the manner of doing our business upon the road."

It is conceded that Diener received no instructions from the house relative to the samples, or the sale or disposal thereof, except such as were contained in the schedule. The clause of the contract providing that Diener shall return all samples, or sell them under instructions of and according to the established rules of the house, and account for the same in cash or an itemized statement, naming the firm they are to be charged to, recites an agreement exclusively on the part of the agent. It contains no agreement or direction on the part of the house. The fourth clause of the schedule, reciting that "samples are charged as cash, and must be paid for by salesmen, unless returned, or their sale properly accounted for," is a rule of the house, to which the agent has agreed, and by which he must abide when he takes out samples, and embodies neither a direction nor an instruction. By reference back to the contract it will be seen that the agent agrees to pay cash for all samples unaccounted for at the end of the year or the termination of his contract, so that the contract conforms to the rule, and there is no ambiguity in this particular. The clause following in the schedule, namely, "Samples sold must be entered on yellow department sheets and marked delivered. Otherwise you will

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not receive proper credit" — embodies both an instruction and a rule. What followed are instructions, but they have no especial bearing as matter important for interpretation. We look in vain for an instruction or direction under any conditions to sell these samples. The circumstance of charging the sample to the agent as cash does not obligate him to pay for them, unless he fails to return them or account for their sale; much less does it authorize him to sell them. This analysis indicates to our minds the true intendment of the contract. The agent agrees to one of two things — either to return the samples, or to sell them under instructions and according to the rules of the house, nor that in the latter alternative, he has instruction to sell embodied in the schedule, or that any rule of the house permits him to do so, but that he shall sell when so instructed, which must come as an independent direction from the house should it at any time or for any reason desire the agent to dispose of them; and that, when a sale is made in pursuance of such instruction, then that the agent shall account in cash or by an itemized statement, according to the nature of the sale.

It is argued that the fourteenth paragraph of the schedule, namely, "sell no goods for future delivery unless under instructions from the house," is a positive direction, unambiguous in any particular, and that, if the parties meant that samples should not be sold except under specific instructions, then that they would have said so in as direct language: hence we are to infer that instructions for the sale of samples were intended. But this does not follow. The language of the paragraph referred to is, it must be conceded, more direct than the setting forth Diener's agreement to sell under the instructions; yet it appears to us that its purpose is not more clear. The plain meaning of the agreement that he shall sell under instructions is that he shall sell only when he has them, and, none being found in the schedule, it must be concluded that he sold without the intended or requisite authority, as measured by the terms of the contract. Clauses 16 and 17 cast no light that aids us in construing the contract. They are simply designed as admonitions to the salesman to obtain a full understanding of the instructions before entering upon the discharge of his duties and obligations, so that the interests of the house may be better subserved in accordance with its manner and ideas of transacting business.

This disposes of the case. Diener being without authority or power under the contract to dispose of these samples, defendant obtained no title by its purchase from him without these instructions from the house to sell them.

The judgment of the trial court will therefore be affirmed, and it is so ordered.

Checks: Right of Holder to Bring Action Against Bank for Refusal to Pay Checks.

With the exceptions of the courts in a very few states, it has been held that the possession of a check, drawn by another, on a bank did not operate to transfer the amount called for in the check to the holder, nor did it give the holder any lien on the funds against which the check was drawn, nor did it give the holder of the check any right of action against the bank if it declined to pay the check — although the check was in every way regular, and there was funds of the drawer there to meet it —

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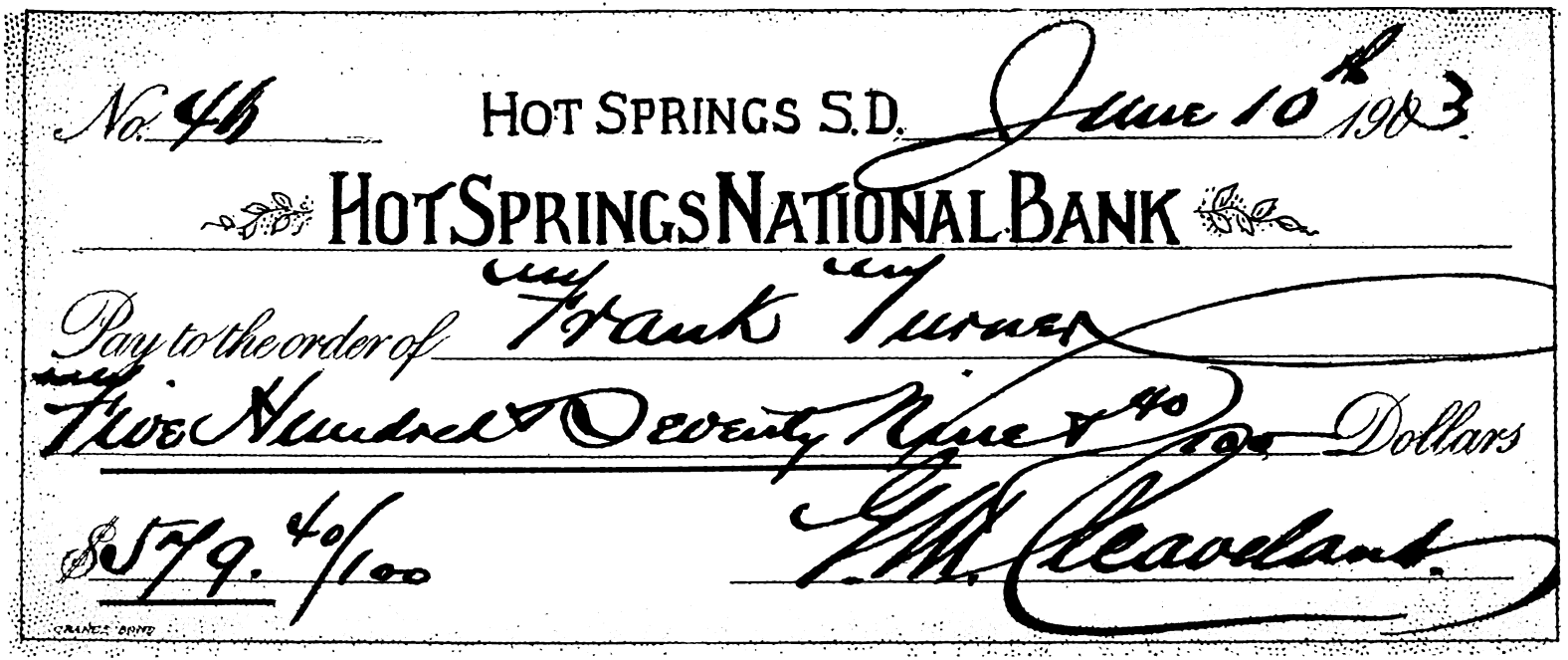

No. 46 HOT SPRINGS S.D. June 10th 1903

HOT SPRINGS NATIONAL BANK

Pay to the order of Frank Turner

Five Hundred & Seventy Nine & 40/100 Dollars

$579. 40/100

F. M. Cleveland.

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Frank Turner, the payee of this check, caused this check to be presented to the bank on which it is drawn, and, although the check was "good," the bank refused to pay it. Turner then brought an action against the bank for the amount in the State of South Dakota and obtained judgment against the bank in the appellate court.

In but few States can such an action be sustained, as the nearly universal rule is that the holder of a check, which the bank refuses for any reason to pay, has no right of action against the bank,—the *maker* of the check being the only one who can maintain such action: the holder's only action in case of refusal of the bank to pay is against the maker.

The Negotiable Instruments law adopts this general rule and says: "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." In some States the adoption of the Negotiable Instruments law will change the law previously existing there on this point.

Lack of harmony in the ruling of the courts in the different States on these every-day points of commercial law causes annoyance if not loss. The Illinois courts have always held that a check operates, pro tanto, as an assignment of the funds it is drawn against,—and, following the rule in that State, a bank in Chicago, as reported in 120 Fed., 212, paid, after the failure of the drawer, several thousand dollars of such checks drawn on it by a bank before its failure, such checks being held by bona fide holders before the failure. Under the rule of its State courts this payment was proper. But the drawers' affairs were wound up in the United States Court, sitting in Illinois, and it held that the general rule of commercial law would apply in that court—there being no State statute on the subject—regardless of the rulings of the State courts,—and the bank had to account a second time for the amount.

Where notes, checks and drafts that are made or indorsed, or are made payable in other States, circulate so freely in the different States, knowledge of the law of commercial paper of one's own State, only, is a limited knowledge.

McMasters Com. Cases, Vol. 1905, 101 N. W. 48.

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unless the check had been certified or accepted by the bank. The holder's remedy in case of non-payment is against the drawer of the check, the latter being the only one that can force the bank to pay. The negotiable instruments law recognizes this rule, and says:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

The courts of South Dakota have now held with the small minority of state courts that the holder of a check has a right of action against a bank on a check which it refuses to pay.

Illinois is one of the few States whose courts universally hold that the holder of a check has such a right of action, and in a recent case there, the drawer of checks on a bank in Chicago, aggregating $5,792.21 failed with such checks outstanding in third parties' hands. The account of the drawer of the checks was good both before and after the failure, and the bank following the rule laid down by the State court, that the holder of a check presented to the bank was the equitable owner of the funds which it represented, paid some or all of these checks after knowledge of the failure of the drawer. The United States Court, itting in Illinois, had jurisdiction of the insolvent's affairs, and it held that the Illinois State court rule, although good in that State, was contrary to the general rule and to the rule of the United States courts, and declined to follow it, and held that the amount paid out on the check must be returned by the bank to the account of the insolvent's estate.

It was conceded in this case that the check was good and that the bank had refused payment, the only question being whether the holder had a right of action against the bank.

This court, Supreme Court of South Dakota, held that he had (101 N. W. 348). Where checks, drafts and notes made, indorsed or made payable, in other States, circulate so freely, knowledge of the law of commercial paper of one's own State, only, is a limited knowledge.

(See Decision No. 824.)

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LEES et al. v. HARDING, WHITMAN & CO.

(Court of Errors and Appeals of New Jersey. March 20, 1905.)

CONTRACT — CONSTRUCTION — LEX LOCI CONTRACTUS — CONDITIONAL SALES.

1. Where a contract with reference to the title of tangible chattels situated in another State is made in that State between a resident thereof and a New Jersey corporation, and is to be performed there, the law of that State determines the effect of the contract.

[Ed. Note. — For cases in point, see vol. 43, Cent. Dig. Sales, §§ 153, 1323.]

2. The Act of 1889 (P. L. 1889, p. 421) as to conditional sales does not apply to contracts made and to be performed in another State with reference to chattels situated there, between a resident of that State and a New Jersey corporation; nor does the act become applicable when the chattels are subsequently brought into this State without the consent of the former owner.

[Ed. Note. — For cases in point, see vol. 43, Cent. Dig. Sales, § 1323.]

(Syllabus by the Court.)

Demand Note — Delay in Demanding Payment — Liability of Indorser: Rule Under Negotiable Instruments Law.

The German American Bank held an indorsed demand note, as shown, in effect, in accompanying illustration, made by H. P. Mills and endorsed by Charles W. Mayer, the latter having transferred the note to the bank soon after its date. The bank held the note until the 10th day of July, four months and six days after its date, when it protested the same for nonpayment, and later sued the indorser to recover the amount thereof. The main question sought to be raised in defense was that the note had been held an unreasonable time before payment was demanded, this delay releasing the indorser. This question was not passed upon on its merits, as the court said it had not been presented to the court in such manner as would allow the court to pass upon it — no proof having been offered at the trial as to the delay being an unreasonable one. The court held that the negotiable instruments law made a new statute of limitations as to negotiable instruments payable on demand, and said, in effect, that no delay — no matter how long — would be deemed, on its face, an unreasonable one, and that to raise that question it was incumbent on the defendant to properly present it and offer proof on it.

Heretofore it seems to have been the rule that delaying presentation for certain times, as shown on the face of the papers, would, as a matter of law, be deemed by the court a fatal delay, unless satisfactorily explained by the holder of the paper. The rule here set forth, if sustained by the Court of Appeals, shifts the burden of proof from the holder of the paper to the defendant, but it probably does not mean that new tests are to be applied as to the reasonableness or unreasonableness of the delay.

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The Negotiable Instruments Law wiped out, in effect, statutes in many States which fixed a definite time in which a demand note must be presented for payment in order to hold the indorser. In New York there was no statute on the subject, and its courts made a distinction between demand notes on interest and those not bearing interest — but that distinction, by reason of the Negotiable Instruments Law, does not, probably, exist now. As to notes on interest, payment could be delayed indefinitely without releasing the indorser, while as to those not bearing interest, it was held that they must be presented for payment within a reasonable time, or the indorser would be discharged. As to what was a "reasonable time" depended on the circumstances of each case. The Court of Appeals of New York said, in 23 N. Y. 28, "If the security be not on interest . . . no time of credit is contemplated by the indorser, and . . . the demand should be made as quickly as the law will require upon a check or sight draft." This would mean that a delay beyond the next business day would be fatal unless excused by special untoward circumstances. The same court held, 41 N. Y. 581, that, where all of the parties lived on the same street in the same city, a demand note not presented for payment within three months was overdue.

The note here was held without presentation for payment for over four months. Under different pleadings and with formal proof it would seem that Mayer would have been released by this court, even if he is not released by the Court of Appeals under the present pleadings and proof.

It is evident that in States where the Negotiable Instruments Law is in force, and in States that have no law defining when a demand note is overdue, the banker that locks up in his safe, for one day even, an indorsed demand note on which payment has not been demanded, is playing a game of a chance in which he can gain nothing, but in which he can lose the whole stake; and yet, if the vaults would give them up, quite a car wheel industry could be run for some time on that kind of paper.

The opinion of the appellate division, an intermediate court, is as follows:

"The defendant H. P. Mills made and executed his promissory note, bearing date March 4, 1903, whereby on demand, to the order of the defendant Charles W. Mayer, he promised to pay the sum of $5,203.95. After the execution and delivery of the note, Mayer duly indorsed the same to the plaintiff for value, and it became the owner and holder thereof. On the 10th day of July, 1903, four months and six days after the date of the note, the plaintiff caused the same to be duly presented for payment, and payment thereof was refused, and the same was thereupon duly protested for nonpayment, and a notice of protest was sent to the indorser by mail, directed to him at his last known place of residence. The maker of the note made default. The defendant Mayer by answer put in issue the proper presentation of the note for payment and the proper protest of the same for nonpayment, and he denies that he re-

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B. 17. Demand Note: Delay in Presentation: Liability of Indorser: Negotiable Instruments Law.

$ 5203 75/100 NEW YORK, March 4, 1903

On demand AFTER DATE I PROMISE TO PAY TO

THE ORDER OF Charles W Mayer

Fifty Two Hundred, Three & 75/100 ——— DOLLARS

AT German American Bank, with interest

——— VALUE RECEIVED

NO. ——— DUE D. ✓ H. P. Miles

EDWARD V. BROHAW & BRO., 54 BROAD ST., N.Y.

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On the execution of this note Meyer indorsed it and sold to a bank. The bank held it four months and six days without demanding payment, when it protested it for non-payment and then sued Meyer as indorser. Myer claimed that the bank by holding the note for four months and six days before demanding payment of the maker had, in law, released him as indorser. The merits of the defense were not passed upon by the Court, as it said, in effect, that Meyer had not properly pleaded such defense, and that if he had properly pleaded it that the burden of proof was on him to show that the delay in demanding payment was an unreasonable one; that the Court, without proof was offered, would assume that every presentation of a demand note was made within a reasonable time — no matter how long it was delayed.

This matter of how proof is to be made in a law suit is purely one for lawyers — and they may find something of interest in this decision unless the Court of Appeals should not indorse the doctrine of this Court.

The Negotiable Instruments Law provides that in order to charge the drawer and indorsers presentation of paper payable on demand must be made within a "reasonable time." This changes the law in New York, and also changes it in some States that provided a fixed time — 10 days — 30 days — 3 months, etc., etc., in which such paper was deemed overdue.

What is a "reasonable time" is a question to be fought out on the facts of each case. The New York Court of Appeals said, in 23 N. Y., 28: "If the security be not on interest . . . no time of credit is contemplated by the indorser, and . . . the demand should be made as quickly as the law will require upon a check or sight draft." This would mean that a creditor would hold an indorsed demand note at his peril for not longer than the next business day. The same Court held in 41 N. Y. 581, that where all of the parties lived on the same street in the same city that a demand note that was not presented within three months was overdue. This note was held over four months. Under different pleadings and ordinary proof, it would seem that Meyer would have been released. It has been held that sickness may be a valid excuse for delay in demanding payment — but that convenience of the holder is not to be considered; that no time of credit is impliedly contemplated by the indorser.

McMasters Com. Cases, Vol. 1905, 91 N. Y. Supp. 142.
(An intermediate Court.)

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ceived notice of the demand and nonpayment as set forth in the complaint. It also put in issue the amount of the protest fees. By the answer, therefore, the note was admitted to be a valid instrument, and the only substantial defense interposed was the sufficiency of the demand of payment and of the protest to charge the indorser. Upon the trial the plaintiff introduced in evidence the note, the certificate of a notary public, bearing date July 10, 1903, which showed its presentation for payment, the nonpayment thereof, and the mailing of notice of the same to the defendant Mayer, the amount due thereunder, and then rested. The defendant objected to the admission in evidence of the notary's certificate upon the ground that it was mailed to the indorser and not served upon him personally, and that there was no evidence showing that it had been mailed to the proper place. The defendant Mayer also moved for a dismissal of the complaint upon the grounds that the note had not been presented within a reasonable time, and that the proof was insufficient to charge him with notice of protest for nonpayment as an indorser. This motion was denied, and the defendant rested. Upon motion of the plaintiff the court directed a verdict against the defendant for the full amount secured to be paid by the note, with interest.

"No affidavit was filed by the defendant Mayer with his pleading or within ten days after joinder of issue, to the effect that he had not received notice of the nonpayment of the note; consequently the certificate of the notary and its service upon the indorser were deemed to have been made. Code Civ. Pro., § 923. The notice served was sufficient to charge the indorser. McLean v. Ryan, 36 App. Div. 281, 55 N. Y. Supp. 232, affirmed on appeal 165 N. Y. 620, 59 N. E. 1126.

"The main contention of the defendant upon this appeal relates not so much to these questions as it does to the question as to whether the note can be enforced, for the reason that it was not presented within a reasonable time. By the provisions of section 131 of the Negotiable Instruments Law (Laws 1897, p. 720, c. 612) a note payable on demand is required to be presented for payment within a reasonable time after its issue, and the defendant contends that four months and six days, in the absence of any explanatory evidence, is, as matter of law, an unreasonable lapse of time, which has the effect of discharging him as an indorser. The provisions of the Negotiable Instruments Law does not assume to define the limitations of a reasonable time within which a note payable upon demand shall be presented, and authority upon the subject is equally indefinite. It was said by Chief Judge Parker in German-American Bank v. Atwater, 165 N. Y. 36, 58 N. E. 763:

"'What is a reasonable time cannot always be measured by months; indeed, an investigation of a limited number of authorities discloses that as short a period as three months and as long a one as twenty-one months has been held to be within a reasonable time, depending upon the special facts of each case.'

"The combined provisions, therefore, of statute and authority seem to leave the question of reasonable time as one of fact, to be determined by the circumstances of the particular case.

"The question at once arises, however, upon whom devolves the burden of showing that the note was not presented within a reasonable time? In effect, section 131 of the Negotiable Instruments Law creates a statute of limitation. Indefinite as to time, it is true, but nevertheless imposing a duty upon the holder of a note payable upon demand to present it

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within a reasonable time. When not so presented, payment may not be enforced, not for the reason that the debt is not due and existing, but because the holder has allowed the bar of a statute to intervene to prevent a recovery; consequently, in making disposition of this question, we are to consider it as being analagous to other statutes of limitation. It has long been settled that in cases of this character, where the statute of limitations is relied upon as a bar to the enforcement of the cause of action, in order to be available it must be pleaded as a defense, and, if not so pleaded, the defendant is deemed to have waived its benefits. It would seem to follow, therefore, that, when a note payable on demand is presented for payment, such presentation is presumptively within a reasonable time after its execution and delivery; and the person sought to be charged with its payment is required, in order to raise the issue that its presentation was delayed for an unreasonable time, to plead such matter as a defense, and prove the same upon the trial; otherwise he should be deemed to have waived the benefits with which the Negotiable Instruments Law has sought to invest him. There may be such circumstances surrounding the entire transaction as to indicate that presentation has been unreasonably delayed, and which may appear upon the face of the proceedings, but in such case we see no reason why it does not devolve upon the defendant to plead such matter in defense, or else be deemed to have waived the provisions of the statute. Where the circumstances thus show an unreasonable delay, the defense interposed would be established thereby. In all other cases he would be required not only to plead, but establish his plea by affirmative proof. Such a defense admits nonpayment, and seeks by way of avoidance to be acquitted of the obligation to pay; and, under our system of pleading, such defense, save in exceptional cases not applicable to cases of this character, has always been required to be pleaded and proved. As the contract requiring the payment of money stands admitted, it is quite competent for a defendant to decline to avail himself of technical objections in avoidance of his assumed obligation. This rule is in harmony with that which ordinarily applies in cases where technical defenses are invoked, and we see no reason why, in principle, the defense that an unreasonable time has elapsed between the execution and delivery of a promissory note, payable on demand, and a demand for payment, should not be devolved upon the defendant, and in order to make the defense available he should be required to plead and prove it. In the present case the defendant has failed either to plead or prove that the presentation for payment was unreasonabably delayed. As the facts are undisputed, judgment for the amount of the note, with interest, was properly directed.

"The judgment should therefore be affirmed, with costs. All concur."

91 N. Y. Supp. 142.

Guaranty: Surety Released: Form to Avoid Such Releases: Payment: Application of Payments.

James Grant had several contracts, for paving, with the city of Detroit.

Julius Prath and John A. Mercier gave a bond to the city for the benefit of those who might furnish materials to be used in connection with one of these contracts known as "Alley No. 45."

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C. H. Little & Co. furnished materials to Grant on several of his contracts, charging the materials to him in one general account.

Prior to October 17, 1901, materials for "Alley No. 45" to the amount of $130.83 were charged in this general account, which, at that date, showed a debit balance of $1,629.62. After that date and up to February 1, 1902, Grant paid to Little & Co. $1,800, not specifying where it should be applied, and Little & Co. credited the $1,800 to the credit of the general account. Between these dates — October 17, 1901, and February 1, 1902 — Little made other charges to the general account for other goods furnished generally.

Grant failed to pay, and before suit was brought against the sureties on the bond for "Alley No. 45" Little & Co. readjusted the payments of the $1,800, so that none of it applied to material furnished "Alley No. 45," leaving, by the readjusted account, $130.83 due thereon.

It was held, on appeal, that this readjustment would have stood, and thus have held the sureties, but for the fact that Little & Co. had from time to time sent monthly statements to Grant showing that the $1,800 had been credited to the general account, thus discharging the debit of $130.83 by reason of "Alley No. 45," and, therefore, releasing the sureties.

In a recent case, 100 N. W. 1006 (see January Quarterly, 138a), Little & Co. lost the sureties on another bond for Grant, by reason of Little & Co. taking Grant's note for a certain balance due on account, thus extending the time of payment to the principal without the consent of the surety.

The records of contested cases in the courts are liberally sprinkled with decisions releasing sureties. So numerous are these cases that it seems impracticable for business men not versed in the law to deal in a general business way with a bonded principal without releasing his surety.

Where the beneficiaries in such bonds can control their terms, it is submitted that the following addition to the usual forms would hold many a surety who otherwise would be released:

> "It is hereby specially stipulated and agreed, that as to the beneficiary or beneficiaries of this instrument, the sureties hereto, and each of them, shall be held, in the principal amount named in this instrument, as principals, and with the same liabilities as though they were the principal obligor or obligors hereto — remaining, however, as sureties between themselves, and as between themselves and the principal obligor or obligors."

The court here said in part:

"The sole question for consideration is whether the creditor, C. H. Little & Co., had the right in June, 1903, to make the application of the

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payments previously made which was attempted. The rule of the common law as to application of payments is in most points clearly settled. It is, of course, clear that the debtor may, at the time of making payment, make his election as to the application. It is equally clear that the creditor may, in the absence of an application by the debtor, make such application as he chooses. Under the civil law this application must have been made at the time of the payment, but under the common law it is now settled that this is not necessary, some cases holding that the application must be made within a reasonable time, but the clear weight of authority is to the effect that it may be made at any time before suit. Mayor and Commonalty of Alexandria v. Patten, 4 Cranch, 317, 2 L. Ed. 633; Id., 1 Am. L. Cas. 268, and note.

"There remains the question as to the effect of entering the credit for payments in a general account and rendering a statement to the debtor showing such application. It seems that the mere entry of a credit to a particular account is not a conclusive application of the payment in the absence of notice to the debtor. Simon v. Ingham, 2 B. & C. 65. But when such credit is made, and an account rendered to the debtor showing such application, it is too late to make a new election. So it is held in numerous cases that, where a credit is entered to a general account, and an account thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.

"The leading case to this point is Clayton's, decided by Sir William Grant as Master of the Rolls, and reported in 1 Merivale, 604. This case was followed and fully approved by Judge Story in Postmaster General v. Furber, 4 Mason 334, Fed. Cas. No. 11,308, and again by the same learned jurist in United States v. Wardwell, 5 Mason, 82, Fed. Cas. No. 16,640. In the case last cited Judge Story states that the doctrine of Clayton's case 'stands upon irresistible reasoning.' The doctrine of these cases was approved in Chapman v. Commonwealth, 25 Grat. 742, in an opinion notable for the learning displayed. See also, Grasser & Brand Brewing Co. v. Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389. The counsel for plaintiff contends that the holding of this court in People v. Sheehan, 118 Mich. 539, 77 N. W. 88, makes for a different rule. Counsel has certainly misapprehended the ruling in that case. An examination of the record discloses that the trial judge held that 'the payments should be applied to the charges in their order of time.' This court said: 'Counsel for defendants also alleges error upon the application of payments, but cites no authority which prevents the application of payments by the parties to the contract under the usual rule, or, if they fail to specify how all payments shall be applied, justifies any other rule than that followed by the learned circuit judge.' In so far as the holding of this case is in point, it supports the defendants' position in the present case. We think that, after crediting the payment made in the manner stated, and notifying the debtor of such credit, it was too late to attempt another application.

"The judgment is reversed, and a new trial ordered."

See Decision No. 831.

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Guaranty: Surety — Collateral Released.

D. J. Anderson, a retail liquor dealer, desired to purchase goods and open an account with the Casey-Swasey Company. He was indebted to another house, with which he had been trading, in the sum of $600, which sum the Casey-Swasey Company loaned to him to discharge that indebtedness. To secure this $600, and also to secure the company for any goods that he might purchase from them during the years 1901, 1902, he and his mother signed notes for $600, and gave the company a mortgage on 320 acres of land in which the mother and son each had an undivided half interest. This mortgage contained this clause:

> "And it is further agreed and understood that this instrument is made and executed also for the purpose of securing the Casey-Swasey Company for any advances they may make or credits they may extend to the said D. J. Anderson upon open account or accounts as he, the said D. J. Anderson, may contract with them during the years 1900 and 1901, as shown by their books."

The notes for $600 were subsequently paid. Anderson purchased goods of the company to the amount of over $10,000, and made payments from time to time. On January 22, 1902, he owed the company a balance in open account of $3,002.75, and on that day he gave them his note, payable one day after date, as shown, in effect, in accompanying illustration. The note was given without the knowledge or consent of the mother. It extended the time of payment of the account she had guarantied and thus released her and the mortgage she had given on her land. The court said in part:

"It is well settled that the liability of a surety cannot be extended beyond the terms of the contract out of which his obligation arises. If the contract be altered without his consent, whether he sustains injury or the contract be to his advantage, it ceases to be his contract, and with that ceases his obligation. Mrs. Anderson's property stood in the relation of surety for the payment of her son's indebtedness to appellant, although she had not become personally responsible for the same. That there was a material change in the contract between appellant and D. J. Anderson there can be no question. The debt for the payment of which Mrs. Anderson pledged her land was originally in the form of an open account. This account bore interest at the rate of 6 per cent. per annum, and there was no agreement to pay any amount as attorney's fees. By the terms of the note sued on the time of payment was extended for four days, including the days of grace, the interest increased to 10 per cent. per annum, and the additional promise made to pay 10 per cent. of the amount of the note and interest as attorney's fees in the event the note was sued on, or placed in the hands of an attorney for collection. The promise to pay an increased rate of interest, etc., was sufficient consideration to support the agreement to extend the payment and make the new contract binding. Mrs. Anderson never assented to this contract. It is materially different from the one existing

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at the time the deed of trust was given. It enlarges the debt for which her property became surety, and imposes an obligation not assumed by the terms of the original undertaking. She did not pledge her property as security for the performance of this contract by her son, and it cannot be held bound therefor."

The general rule as stated by another court is:

"Mere indulgence extended the principal by the creditor will not discharge the guarantor. Shubrick v. Russell, 1 De S. Eq. 315; Witte v. Wolfe, 16 S. C. 274. In order that a new or collateral agreement shall have the effect of discharging the guarantor from liability by reason of the fact that it fixes the day of payment beyond that mentioned in the original contract, it is necessary that it should be based upon valuable consideration and be legally binding upon the parties entering into it. Parnell v. Price, 3 Rich. Law, 121; Witte v. Wolfe, 16 S. C. 274; Gardner v. Gardner, 23 S. C. 588; 27 Encyc. of Law (2d Ed.), 500. A collateral agreement between the principal and the creditor by which the creditor receives additional security for the debt will not suspend or postpone his right of action on the original agreement, so as to discharge the guarantor, unless it was the intention of the parties to the collateral agreement that the right of action on the original contract should be suspended or postponed until the time of maturity named in the collateral agreement. United States v. Hodge, 6 How. 279, 12 L. Ed. 437, cited in Gardner v. Gardner, 23 S. C. 588. The effect of taking a note or obligation is thus stated in 27 Enc. of Law, 491: 'Much controversy has arisen as to the effect to be attached to the mere acceptance by the creditor of a negotiable note or other obligation. Several difficulties arise. There may be doubt as to whether the note is accepted in satisfaction of the old obligation, or as collateral security merely, or in conditional payment. Again there may be a question whether the acceptance of the security operates as an agreement on the part of the creditor to extend time. The liability of the surety on the principal debt can, of course, be enforced only where the obligation is taken solely as collateral or additional security. If it be taken in satisfaction, or in conditional satisfaction, the surety is discharged. The understanding of the parties at the time of the transaction will, of course, control, but in many cases it is necessary to resort to the legal presumptions that arise. Where the creditor takes new negotiable paper from the debtor, the surety is prima facie discharged. This is true whether the question arises in those States where negotiable paper operates as prima facie satisfaction or in those States where it operates as conditional payment only. In the one case the debt is prima facie paid; in the other there is a prima facie extension of time. If, instead of being negotiable, the security taken consists in bonds, mortgages, or other choses in action, the presumption that it was taken in satisfaction or in conditional payment does not arise, and it is prima facie treated as collateral only. The fact that such collateral matures in the future is not of itself sufficient to raise the presumption of an extension of time such as to release the surety.'"

The books are full of cases where sureties are released from their obligations by reason of seemingly unimportant transactions between the principals to the various contracts where sureties appear. These

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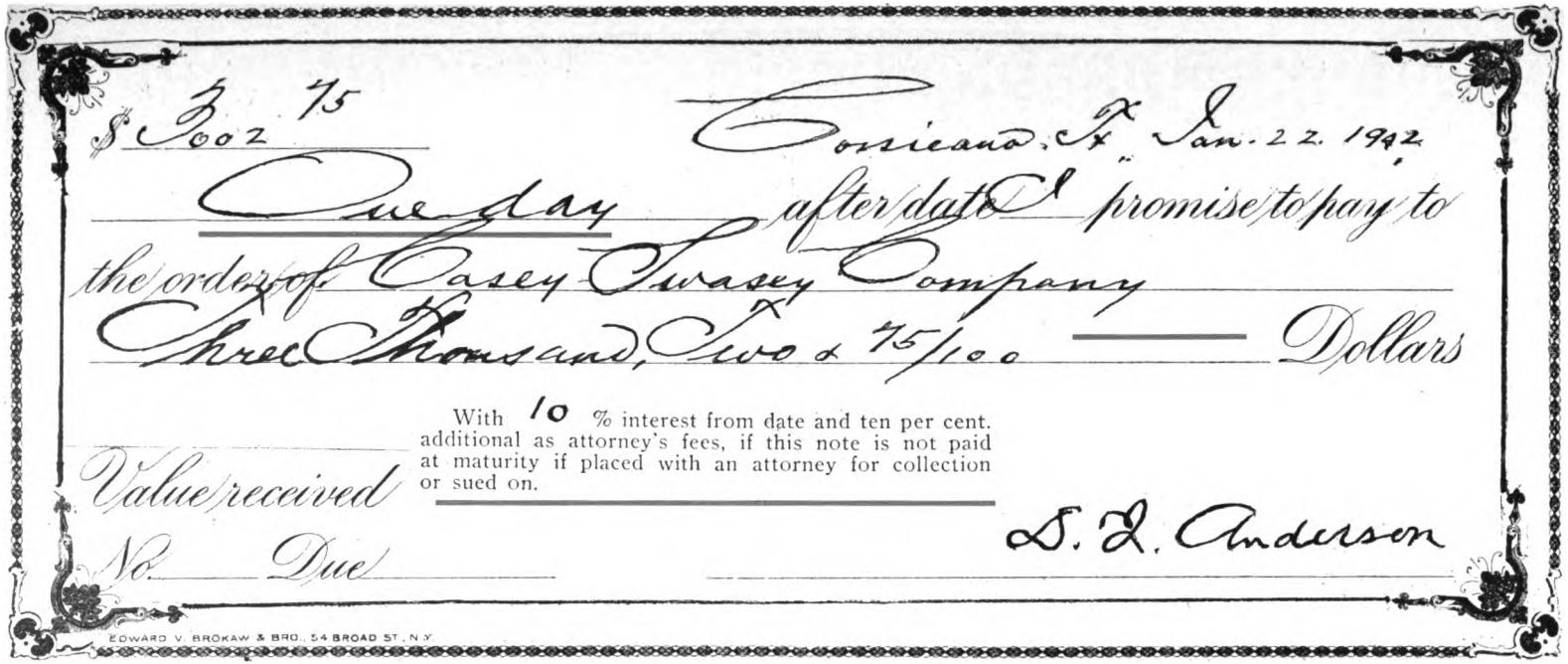
B. 18. Guaranty: Surety: Note: Extension of Time For One Day: Release of Surety: Form.



$ 3002 75

Corsicana, Tex. Jan. 22. 1942.

One day after date I promise to pay to the order of Casey Swasey Company

Three Thousand, Two & 75/100 Dollars

With 10 % interest from date and ten per cent. additional as attorney's fees, if this note is not paid at maturity if placed with an attorney for collection or sued on.

Value received

No. Due

S. L. Anderson

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

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This note was given under these facts and conditions: The maker, D. J. Anderson, was a retail dealer who was buying goods of the payee — Casey-Swasey Co. He owed them four notes for $150 each, signed by himself, and by his mother as surety. He desired further credit with the company. His mother and he each owned an undivded one-half interest in 320 acres of land, and they executed a mortgage on it which read in part: "This instrument is . . . also for the purpose of securing the Casey-Swasey Company for any advances they may make or credits they may extend the said D. J. Anderson upon open accounts or accounts as he . . . may contract with them . . . as shown by their books. On this security he was given further credit. Anderson paid the four notes of $150 each, but in a short time he owed the company a balance of $3,002.75, on open account, for which he gave them this note. It was not paid and the company sought to foreclose his mother's interest in the land on which she had given them security. The Court held that she and her mortgage was released. Her mortgage was given to secure "any advances . . . credits . . . upon account or accounts as shown by their books." This account was due; by giving the note the time of payment of the account was extended one day, and including days of grace — four days. The account bore 6% interest — the note 10%. There was no obligation to pay attorneys fees on the account — there was in the note. The promise to pay the additional rate of interest was sufficient consideration for the extension of time of payment, and such extension, even for a day, without consent of the surety, will release him. Mrs. Anderson's liability on the account was released by the extension of time of payment; she never agreed to become surety on this note — with enlarged liabilities. In an early case in New York, a guaranty read: "Fellows, Cargill & Co. I hereby guarantee to you the payment of such amount of goods at a credit of one year and six months . . . as you may credit to . . . John H. Prentiss .. . . " The credit was made in open account, and subsequently notes were given for the account, one of them being on one day's time. The Court said that the extension of the credit for one day would discharge the guarantor. 3 Denio 512. The books teem with cases where sureties are released from their obligations by reason of seemingly unimportant transactions between the principals to the various contracts where sureties are required or appear. These transactions do not usually go to the real merits of the case, and in most cases their irregularity would have been waived in advance (as presumably would have done in this case) if they had been anticipated and their irregularity known. The short clause given below would have cured many fatal defects in past guaranties. Its insertion in future ones would rarely ever be objected to, as at the time a guarantor consents to guarantee he really intends to perform if the principal does not; dodging is a thought that comes afterwards.

It is hereby specially stipulated and agreed, that as to the beneficiaries of this instrument, the sureties hereto, and each of them, shall be held, in the principal amount named in this instrument as principals, and with the same liabilities as though they were the principal obligor or obligors hereto; remaining, however, as sureties between themselves, and as between themselves and the principal obligor or obligors.

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transactions do not usually go to the merits of the case, and in most instances their irregularity would have been waived in advance had they been foreseen. Guarantors and other sureties do not expect, when they enter into the contract, that they will have to perform. If they did, they usually would not enter into the contract. They are not anticipating trouble. They expect to be considered as guarantors in fact — the thought of dodging is an after one. They will not at the time of execution of the contract object to any language that ties them tight. Indorsers of commercial paper are usually held to their liability. The contract on which they are surety is not usually one of varied transactions. A notation of the cases of other classes of suretyship that come before the courts would seemingly warrant the statement that not one-third of those executed could ever be enforced if they were litigated. The fault is not in the form of their execution, but in the dealings between the principals to the guarantied contract. The following short clause, inserted in formal contracts of suretyship, will cover almost any slip by which sureties are released:

> It is hereby specially stipulated and agreed, that as to the beneficiary of this instrument, the sureties hereto and each of them shall be held, in the principal amount named in this instrument, as principals, and with the same liabilities as though they were the principal obligor or obligors hereto, remaining, however, as sureties between themselves, and as between themselves and the principal obligor.

The following general form of guaranty fills up many holes:

171. GUARANTY OF ANY LIABILITY — MERCANTILE OR BANKING.

For value received, and in consideration of credit heretofore extended or which may hereafter be extended by A. B. to C. D., I hereby to the extent of dollars guaranty to A. B., his heirs, executors, administrators, transferees and assigns, the payment of any liability or indebtedness now incurred or which may hereafter be incurred by C. D. to A. B., and any ultimate balance that may be due by reason of such liability or indebtedness, either by open account or by negotiable or non-negotiable instrument on which C. D. is or may be directly or contingently liable, or for any other account or reason whatever. This guaranty shall extend and cover, in such amounts and places as C. D., his heirs, executors or administrators may elect, any liability or indebtedness of A. B. that C. D. may have sold, discounted, pledged, negotiated, or transferred. Acceptance of this guaranty by any beneficiary is hereby waived, as is also any notice of default. The renewal or extension of time of payment of any of the aforesaid liability or indebtedness is hereby agreed to, as is also any release, addition to, or change of other security. Any delay in presenting a claim under this guaranty or in prosecuting it or the principals, or any party hereto, is hereby waived. The application of any payments made in the discretion of any beneficiary, whether applied on the above mentioned liability or indebtedness or on other indebtedness of C. D., is hereby confirmed, as is also any and all acts of C. D. in relation to such liability, indebtedness or ultimate balance.

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This guaranty is a continuing one, binding myself, my heirs, executors, administrators; and in case of my death with this guaranty previously unrevoked, it shall cover all transactions made previous to the time when A. B. shall be actually informed of my death.

Witness my hand and seal this day of , 19 , at .

_____. [Seal.]

The above guaranty is intended to cover points which, if not specifically mentioned, are not included in many forms of general guaranty. It is drawn to cover individual indebtedness, and, as worded, would not probably cover indebtedness of a firm of which the principal debtor was a member. If that point is to be covered it should be particularly mentioned. The principal points, which are often held to release a guarantor if not specifically waived, and which are sought to be covered here, are: Waiver of acceptance; notice of default; change or release of other security; extension of time of payment; renewal; application of certain payments; delay in prosecution; advances made after death of guarantor, and the covering of various forms of the original or subsequently changed indebtedness.

See Decision No. 832.

Chattel Mortgage Made by Partners — Recorded Where Property Was, and Where One Partner Resided: Not Recorded Where Other Partner Resided: Void as to Creditors.

The firm of Burtch & Burgess, in contemplation of publishing a newspaper at Hancock, N. Y., induced A. St. Mart and others to guaranty the payment of their note for $100, with which to complete the purchase of a printing plant, promising to give the guarantors a first chattel mortgage on the plant.

The plant was bought December 3, 1900, of Frank S. Russell of Port Byron, Burtch & Burgess paying him $100 and giving him also at the time a chattel mortgage on the plant, payable December 3, 1901. The plant was removed to Hancock, and on December 21, 1900, the purchaser gave the guarantors a chattel mortgage thereon due February 26, 1901, to secure them as such guarantors. The note of $100 was not paid when due, February 26, 1901, and the guarantors took it up. The newspaper venture was not a success, and on the 1st day of March, 1901, Russell, at the suggestion of Burtch, took possession of the mortgaged property and sold it and bid it in, on March 7th. Later in the month, when Russell sought to remove the property, the guarantors of the $100 note seized it under their second mortgage. Litigation then followed as to the rights of the parties. In the lower courts the fight was over the regularity of the sale under the first mortgage, it not being due when it was foreclosed, and the mortgagee not having seized the

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property under the danger clause in the mortgage. The owner of the first mortgage was beaten in the trial court, but won in the first appellate court. He was beaten in the court of last resort on this ground:

Burtch, one of the mortgagors, resided in Hancock, but Burgess, the other mortgagor, resided in Auburn; the mortgage was filed only in Hancock, where the property was and where one of the firm resided. It should, to have been valid, as to creditors, as well as subsequent mortgagees in good faith, have been recorded also in Auburn. The court said in part:

"As between Burtch & Burgess and the defendants, the latter, having paid the note they had guaranteed, and their mortgage being due, were proceeding strictly within their legal rights. The question then arises, what was the legal position of the plaintiff on the 1st day of March, 1901, when he took possession of the property, and a week later undertook to make title under a foreclosure of his mortgage? The referee expressly found, on sufficient evidence, that the plaintiff did not take possession under the danger or unsafe clause in the mortgage, but acted on the erroneous assumption of his agent that the mortgage was due, and could be foreclosed. The fact was that the mortgage was not due until the following December, 1901. There is, however, an underlying fact that rendered this seizure of the property by the plaintiff unauthorized in law. The failure to file his mortgage in Auburn, county of Cayuga, where Burgess, one of the mortgagors, resided, rendered it absolutely void as to these defendants. Laws 1833, p. 402, c. 279, § 1. The nonfiling of a chattel mortgage, under the provisions of this statute, renders it absolutely void 'as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith.' The learned referee rested his decision upon the ground that the defendants were creditors of the mortgagors.

"It is urged on behalf of the plaintiff, although vigorously controverted by defendants, that the defendants are not mortgagees in good faith, under the statute, as their mortgage was given to secure a precedent debt; that is, they guaranteed the note on the 26th of November, 1900, and the mortgage to secure the same bears date the 21st of December, 1900. We assume, without deciding it, that the defendants are not mortgagees in good faith. This court held that the failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this although the mortgage was given in good faith to secure an actual indebtedness. Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11. It follows that the plaintiff, armed with a chattel mortgage not properly filed, not due, and not exercising his right under the safety clause, in taking possession of the property, was a mere trespasser.

"It is argued on behalf of the plaintiff that, at the time the defendants took possession of the property under their chattel mortgage, they were simple contract creditors, and in no position to attack the plaintiff's mortgage or possession. This court has held that a simple contract creditor is as much within the protection of the statute as a creditor

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whose debt has been merged in a judgment. Karst v. Gane, 136 N. Y. 316, 323, 32 N. E. 1073. The defendants were, as matter of fact, not in the position of simple contract creditors on the 29th day of March, 1901, when they seized this property, as events subsequent to the execution and delivery of the mortgage had changed their position. Their mortgage having fallen due on the 26th of February, 1901, and they having paid the note which matured at that time, they became creditors, holding an instrument which, as the contract of the parties, entitled them to take immediate possession of the property. The right of the defendants to do this was as absolute as that of a simple contract creditor who had proceeded to final judgment and execution. It follows that the taking possession of the property by the defendants on the 29th of March, 1901, was fully authorized in law, and the complaint of the plaintiff was properly dismissed.

See Decision No. 833.

Guaranty Void Because It Did Not Express a Consideration.

One Goodrich, and A. L. Smith, desired to control the stock of a corporation in which they were interested.

G. D. Rowell, who held some of the stock, agreed with Goodrich and Smith to sell each of them some of the stock.

For that to be sold to Goodrich it was agreed, orally, by Smith that he would guarantee five notes made by Goodrich for $1,000 each. The notes were executed by Goodrich, and on the back of each of them Smith wrote:

"I hereby guarantee the payment of the within note.

"A. L. SMITH."

The notes were uniform except as to time of payment, and are described in effect in the accompanying illustration.

The second note went into the hands of a bank, which paid value for it, and it brought an action against Smith on his guaranty. Smith escaped liability on the ground that the guaranty did not express a consideration. He defeated recovery on this note on the same grounds. In some States it is absolutely essential that a guaranty express a consideration. In such States the words "value received" are a sufficient statement of the consideration.

The court said in part:

"When the transaction between plaintiff, Goodrich, and Smith in regard to the stock was closed up, Smith and the plaintiff were represented by their respective attorneys. The guaranty, as signed, was submitted to such attorneys and approved by them. They and all of the parties interested then believed the guaranty to be sufficient to satisfy the statute of frauds. Plaintiff agreed to sell the 470 shares of stock to Goodrich upon the express condition that three of the $1,000 notes should be satisfactorily guarantied. The stock was transferred to Goodrich upon the faith of Smith's promise to guaranty the payment of such

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$ 1000 Portage, Wis. Jan. 4 1900 -

Three years AFTER DATE I PROMISE TO PAY TO

THE ORDER OF G. D. Rowell

One Thousand ——— DOLLARS

AT First National Bank, with interest

VALUE RECEIVED

NO. ✓ DUE Jany 1/03 O. H. E. Goodrich

EDWARD L. BROKAW & BRO., 54 BROAD ST., N.Y.

B. 19. Guaranty Void Because It Did Not Express a Consideration.

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Hereby guarantee the payment of the within note. A. L. Smith.

Goodrich, the maker of this note, and Smith, who signed the above guaranty, each purchased of Rowell, the payee of the note, some stock in a corporation which they wished to control. It was agreed that for the purchase price of part of the stock Goodrich was to have, he should make three notes which Smith agreed to guaranty. This was the second of the three notes so given, all of which bore a similar guaranty signed by Smith. This note was not paid, and Rowell sued Smith's estate on the guaranty. The above facts were proved, and the principal question litigated was whether the guaranty — no consideration mentioned — was sufficient in form to bind Smith. The Court — the Supreme Court of Wisconsin — held that it was not, and it also so held in another action on one of the companion notes which had been purchased by a bank. This rule, which says, in effect, that an accommodation guaranty — even if the guarantor receives pay for his guaranty — is void unless it mentions a consideration, prevails also in New York and some other States as well as in Wisconsin. In such States — "value received" is a sufficient expression of consideration. In construing such guaranties on miscellaneous securities, offered in one's own State, it must be remembered that the law of the State where such guaranty is written usually governs the liability of the guarantor. When the first of this set of notes became due Smith seemingly acknowledged his promise to guaranty them, as he waived protest on it and placed another guaranty on it which did express a consideration, but the court held, in effect, no matter how conclusively his promise to guaranty was proved, it would avail nothing if, in reducing the guaranty to writing, a consideration was not expressed in writing. The Court said in part: "A distinction must be made, however, between a beneficial consideration, which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute. The promisor may receive money consideration for his promise, or he may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing (and, in some States the writing must state a consideration), but if the performance of the main contract, to which his suretyship is collateral is a benefit to him, a verbal promise in guaranty is sufficient."

The statute of frauds does not affect the strict indorsement of commercial paper, and, except in Missouri, the use of the words "value received," or any other expressions of consideration in promissory notes or other negotiable instruments are superfluous.

McMasters Com. Cases, Vol. 1905, 102 N. W. 1.

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three notes. It was agreed in writing between Smith and Goodrich that the stock should be assigned in trust to secure Smith against liability on account of his guaranty. He demanded that as a condition of becoming guarantor on the notes. In the year 1896, without any new consideration, Smith signed upon the back of the two-year note a guaranty good in form and duly waived demand for payment of such note, and protest for non-payment.

"A distinction must be made, however, between a beneficial consideration, which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute. The promisor may receive a money consideration for his promise, or he may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing, but if the performance of the main contract, to which his suretyship is collateral, is a benefit to him, a verbal promise in guaranty is sufficient.

"If we could treat the verbal agreement to make a valid guaranty as separate from the writing, as before incidentally suggested, we would yet face the fact that the former is void because there was no circumstance rendering it a fraud in Smith not to perform it, so as to take it out of the statute. An agreement to make a collateral promise is as much within the statute as the promise agreed upon would be imperfectly reduced to writing. Wills v. Shinn, 42 N. J. Law, 138; Dee v. Downs, 57 Iowa, 589, 11 N. W. 2; Carville v. Crane, 5 Hill, 483, 40 Am. Dec. 364; Bushell v. Beavan, 1 Bing. (N. C.) 103; Whitechurch v. Bevis, 2 Bro. C. C. 565; Wood v. Midgley, 5 DeG., M. & G. 41; De Golyar's Law of Guaranties, etc., p. 59. This language is used on the subject in the work last cited: 'It has not bee made the subject of discussion whether or not a promise to give a guaranty (as distinguished from a promise to procure one) is a special promise which falls within the statute. It is, however, obvious that a promise to give a guaranty at a future time entirely falls within the mischief which the enactment was intended to guard against, and, indeed, that if the statute could be evaded by making such a promise it would be useless.' The author quotes from the opinion of Pollock, C. B., in Mallett v. Bateman, L. R. 1 C. P. 163, as follows:

"'If we were to hold that a contract of guaranty must be in writing but that a contract to give a guaranty need not, we should, I think, be committing the same mistake as our predecessors did with reference to the statute of uses. . . . Whether the decision of the courts of equity as to uses and trusts were beneficial or not I do not stop to inquire, but undoubtedly the whole doctrine arose out of a desire to frustrate the intention of the statute of uses. I trust that we shall not commit a similar mistake in construing the statute now under consideration.'"

See Decision No. 834.

Fixtures Placed in Mortgaged Building Under Agreement to Be Removed by Seller If Not Paid For.

John McMillin entered into a contract with the Metropolitan Investment Company by which he was to furnish the materials and do the plumbing in a building being constructed by the company.

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The agreement contained a provision that "all materials furnished to the building above mentioned are to remain the property of the contractor until fully paid for." This agreement was not recorded. The building was mortgaged to third parties, who foreclosed the mortgage and sold the property. The contractor was not paid for the plumbing materials and he sought to remove them. The trial court said that he could. The appellate court said that he could not. The agreement that the contractor could remove the materials if not paid for was good as between the original parties, but not as to third parties, who took a mortgage on the real estate or who bought it without notice of the agreement. Nor would this agreement protect the contractor, in many States, if there was a mortgage on the real estate at the time the plumbing was put into the building, as such existing mortgage would attach to such materials, in spite of any contract between the contractor and the owner of the property, unless the holder of the existing mortgage assented to such agreement.

The court said in part:

"I am of the opinion that the judgment should be reversed. The plumbing equipment of which the plaintiff has been awarded possession was a part of the realty. The building could no more be used without such equipment than it could without the doors, windows, or the roof. It was put into the building with the intention of making it a part of the realty and an accession to the freehold. The contract between the plaintiff and the investment company contemplated physical annexation of the plumbing materials to, and incorporation of them in, the building, as a permanent improvement. All the essentials to change the character of the property from personalty to realty were complied with. These are physical annexation of one to the other, adaptation of the improvements to the use for which the realty was devoted, and an intent on the part of the plaintiff to make a permanent improvement. Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Voorhees v. McGinnis, 48 N. Y. 278; Hoyle v. Plattsburgh & Montreal R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811. The plaintiff and the investment company, as between themselves, of course, were competent, by agreement, to preserve the character of the plumbing materials as personalty. Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 75 N. Y. 542; Tyson v. Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409. But this they could not do as against a bona fide purchaser or mortgagee, who had never asseted to, nor had notice of, the agreement. McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Clary v. Owen, 15 Gray, 522; Meagher v. Hayes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819; Hawkins v. Hersey, 86 Me. 394, 30 Atl. 14; Fuller-Warren Co. v. Harter (Wis.), 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; Andrews v. Powers, 66 App. Div. 216, 72 N. Y. Supp. 597; Jermyn v. Hunter, 93 App. Div. 175, 87 N. Y. Supp. 546. To hold otherwise would not only be contrary to the spirit and intent of the statute requiring conveyances of interest in real estate to be recorded, but against numerous decisions of our own courts. Thus in McFadden v. Allen, supra, the Court of Appeals held that the lien of

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a mortgagee covered all that was realty when the security was accepted, as well as all accessions thereafter made, unless such accessions were made under an agreement to which the mortgagee was a party. In Andrews v. Powers, supra, this court held, where a vendee in possession under a contract for the purchase of a house, without the knowledge or consent of the vendor, purchased and put therein a mantle, gas grate, and necessary connections, under an agreement with the seller that the title to such property should remain in the seller until fully paid for, that such property, in the absence of an agreement with the owner of the land, became part of the realty, and could not be removed without his consent. This case was cited with approval and followed in the recent case of Jermyn v. Hunter, supra, where boilers were placed in a building for the purpose of heating and supplying it with hot water under an agreement with the person placing them therein that title should remain in the seller until the purchase price had been paid. A mortgage upon the building was thereafter foreclosed and the premises sold, and it was held, as between the vendor of the boilers and the person who purchased the building at the foreclosure sale, that the title to the boilers passed to such person, as a part of the realty. Mr. Justice Hatch, delivering the opinion of the court, said:

"'By undisputed evidence we think that it is established that the property sought to be recovered was at the time of the commencement of this action real property. It was procured for the purpose of being placed in the building then in process of erection, as a necessary and permanent adjunct to it. Its purpose was to supply the building with heat, which was necessarily essential to the use and occupation of the building, and as much required in its use as was light and access. . . . The sale of the property at the foreclosure carried with it the title to these fixtures, and the defendant, as purchaser at the sale, acquired good title.'

"It is true that in some of the States a different view has been entertained, but such view is not in harmony with the decisions of our own the federal, or some of the other States — notably those of Massachusetts, Maine, and Wisconsin. In Massachusetts the court, in Clary v. Owen, supra, said:

"'We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which, as between the mortgagor and mortgagee, would become a part of the realty.'

"In Meagher v. Hayes, supra, the court said that a building put on mortgaged land, and annexed to it in the usual way, without the mortgagee being a party to the transaction, becomes a part of the mortgaged security, notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property, with the right of such owner to remove it, and that the purchaser of the land at a foreclosure sale became the owner of such building; and this notwithstanding the fact that he purchased with notice of the agreement.

"These decisions of the Massachusetts court were followed by the Supreme Court of Maine in Hawkins v. Hersey, supra, the court saying:

"'When machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for will not bind

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or affect the mortgagee of the realty, without notice, and such machinery will pass to the mortgagee as a part of the realty.'

"In Fuller-Warren Co. v. Harter, supra, the court of last resort in Wisconsin held that a hot-air furnace and the necessary connections put into a building for the purpose of heating it became part of the realty, and that the same could not be removed without the consent of a mortgagee, notwithstanding an agreement between the purchaser and seller that title was to remain in the seller until the purchase price had been paid. See, also, Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267–282, 7 Sup. Ct. 1206, 30 L. Ed. 1210; Phœnix Ironworks Co. v. New York Security & Trust Co., 54 U. S. App. 408, 83 Fed. 757, 28 C. C. A. 76. Here the agreement between the plaintiff and the investment company was never recorded, and, so far as appears, neither the mortgagee nor the defendant in this action had any notice of it. Under such circumstances, upon reason and authority alike, it must be held that the sale at the foreclosure carried with it the title to the materials which constituted the plumbing equipment, and the defendant, as purchaser, acquired good title. If this conclusion be correct, then it necessarily follows that the plaintiff was not entitled to recover.

"I am also of the opinion that, as against the defendant, the plaintiff is estopped from asserting a claim to or lien upon the property for which a recovery has been had. The plaintiff, while not actually present at the foreclosure sale, admitted he was present in the salesroom on the day the sale took place, and that he knew the property was to be sold, notwithstanding which fact he gave no notice of his claim, nor did he then attempt in any way to enforce it. He is not, therefore, in a position to assert, as against an innocent purchaser, a claim which would deprive him in a very material way of a portion of his purchase. If he intended to assert a claim to any part of the property about to be sold, good faith and fair dealing required that would-be purchasers should be informed of that fact. Thompson v. Blanchard, 4 N. Y. 303; De Herques v. Marti, 85 N. Y. 609.

"Other errors are alleged, but it is unnecessary to pass upon them, in view of the conclusion reached.

"The judgment and order appealed from must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur."

91 N. Y. Supp. 1055.

Bona Fide Holder: Credit to a Depositor: Unexplained Reduction of the Credit Did Not Constitute Bank Bona Fide Holder.

The Consolidated National Bank placed to the credit of Andrew Wilson the proceeds of a note made by Elmer E. Kirkland to the order of Wilson for $2,121.90, as shown in accompanying illustration. The note was obtained by Wilson by fraud, and if it had remained in his hands the maker could have successfully defended it. Wilson died insolvent the next day after he had credit for the note. The balance to his credit at the time of his death was much less than the amount credited to him as proceeds of the note, but at the trial of the action by the bank against Kirkland it was not shown whether this depletion of credit arose from

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B. 20. Note Discounted and Credited Depositor: Bank Not a Bona Fide Holder: Negotiable Instruments Law.

No. 42
$ 212 90/100
Binghamton, N.Y. July 2nd 1903
Sixty months after date I promise to pay to
the order of Andrew Wilson
Twenty One hundred twenty two 90/100 Dollars
at Consolidation National Bank
Value received
Amos E. Kirtland

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Andrew Wilson indorsed this note, and the Consolidated National Bank discounted it for him and placed the proceeds to his credit in the regular course of business and without any notice of an infirmity in the note. Wilson died the next day, and when the note became due the maker established to the satisfaction of the Court that the note was fraudulent in its inception. This being the fact the bank could not enforce it against Kirtland unless it could show that it was a holder in due course. Placing the proceeds of the note to the credit of Wilson on the books would not constitute the bank a bona fide holder for value. But if the bank had in good faith paid out the money so credited, it would have been holder in due course to the extent of such payments and, for that amount, it would have been entitled to a judgment against the maker. The bank did not show that it had paid out any of this money on the checks or the specific order of Wilson — it simply proved that, accounting for all other credits and payments, the account of Wilson was $900 less on the morning of his death than it was after credit was given for this note. If such diminution of the credit was made on the order of Wilson it would, to that extent at least, have constituted the bank a bona fide holder. But a majority of the intermediate Appellate Court held that if this diminution of credit was caused by paying an overdraft of Wilson's, or by charging to the account his past due obligations, then the bank would not be in the position of a bona fide holder for value, unless Wilson had expressly agreed to such application of the funds. (57 N. Y. Supp. 103; 81 N. Y. 218.) This was held, in spite of the language of the Negotiable Instruments Law which was in force in this (New York) State. This law says: "An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

A judge who dissented from the decision wrote some business common sense in his dissenting opinion, even if it does not prove on further appeal to be better law, and said in part: "While I do not think it can be presumed that Wilson had any overdraft at the time of making the deposit, for it is irregular and unauthorized banking . . . "What would be the effect of a drawer making a general deposit after having thus overdrawn his account? Would he not be presumed, without any express direction, to intend to pay his overdraft?" In the general course of business he would know that instantly upon making his deposit the amount of his overdraft would be taken out and be credited with the balance. "This must be the legal effect of the transaction." (But three judges — to one — said, in effect, it was not.)

McMasters Com. Cases, 91 N. Y. Supp. 353.

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money paid on checks drawn by Wilson, or whether it might not have been caused by Wilson having had an over-draft at the bank or having had charged against the credit some past due obligation held by the bank. In either of the last two cases the bank, a majority of the intermediate appellate court held, would not be in the position of a bona fide holder for value. The court held that under the above state of facts the bank could not recover. The court said:

CHESTER, J. "The finding that the note sued upon was fraudulent in its inception is sustained by sufficient evidence. That being so, the burden was upon the plaintiff, to whom it was transferred by Wilson, the payee, to show, before it could recover against the defendant, that it was a bona fide holder for value. Negotiable Instruments Law, § 98 (Laws 1897, p. 733, c. 612); Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Grant v. Walsh, 145 N. Y. 502, 40 N. E. 209, 45 Am. St. Rep. 626; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043. We do not think the plaintiff sustained this burden in this case. It does not appear that the plaintiff paid anything to Wilson at the time it discounted the note in question for him, which was made by the defendant, but it does appear that the entire amount of the avails of the note discounted was placed to Wilson's credit on the books of the plaintiff's bank. That credit alone, however, was not a payment for the note or a parting of value on the part of the plaintiff. Albany County Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773. Wilson died insolvent the next day after the note was so discounted. It is true that at the time of his death the amount to his credit was a sum much less than the amount of such avails, but there is no proof as to what caused the difference — whether it came from the payment by the plaintiff of an overdraft of Wilson's or by the payment of some other past-due obligation held by the plaintiff against Wilson, or by the payment of checks drawn by Wilson against his account — and we have no right to infer or presume that the difference resulted from any such payments. Spring Brook Chemical Co. v. Dunn, 39 App. Div. 130, 57 N. Y. Supp. 100.

"If the avails of the discount were applied to the payment of an existing indebtedness of Wilson's to the plaintiff it was incumbent on the plaintiff to show that it was expressly agreed between it and Wilson that the avails should be so applied in payment and extinguishment of such indebtedness, in order to establish that the plaintiff was a bona fide holder for value. Case last cited, and Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 Am. Rep. 494. But there was no such proof. Nor was there any proof that any checks were drawn by Wilson against his account, and paid by the plaintiff, or charged to his account, after the discount and before his death. We think, therefore, that the plaintiff failed to satisfy the burden resting upon it, and that its complaint was properly dismissed.

"The judgment should be affirmed, with costs."

PARKER, P. J., and SMITH and CHASE, JJ., concur.

HOUGHTON, J. (dissenting). "I differ from my associates upon the proposition that there was sufficient evidence authorizing the trial court to find that the plaintiff was not a bona fide holder for value of

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the note in question. On the contrary, it seems to me that the uncontradicted evidence shows the plaintiff to be such holder.

"The case was evidently tried upon the theory that the discounting of the note and placing it to the credit of Wilson on plaintiff's books was sufficient to establish that plaintiff paid value. I agree that this was not enough to establish that fact. But incidentally, through its cashier, whose evidence was uncontradicted, the plaintiff proved that on the 6th of August, between 10 and 11 o'clock, Wilson obtained the discount of the note in suit, together with five other notes, and that the proceeds of all of them were credited to him before that hour. The proceeds of the note in suit were $2,121.90, and the aggregate proceeds of the other five notes were $1,064.24; the plaintiff giving him credit at that time for $3,186.14. The witness further testified that at the close of the bank on that day there remained to his credit in the bank $1,264.16. Wilson died the following morning before banking hours, and two small checks were paid out of this balance, which are not taken into consideration. The cashier was unable to state which checks were first paid on the day before Wilson's death, and it is apparent from the reading of the evidence that such checks as were paid were in court and exhibited to him on his examination. It is upon the interpretation of this evidence that I differ from the majority of the court. It seems to me that by fair interpretation it must be said that the bank, in due course of business, before it had any notice of the infirmity of the note in question, paid out for Wilson the difference between the balance of $1,264.16 remaining at his death and the $3,186.14 credited to him on the same day. Even if it be assumed that the proceeds of the five small notes were first paid, still the plaintiff had paid out nearly $900 of the proceeds of the discount of the note in suit; and, under section 93 of the Negotiable Instruments Law, it became a bona fide holder to that extent, at least, before it received any notice of infirmity in the instrument.

"But it is said that the showing of a deposit of $3,100 and a balance of $1,200 on the same day at the close of banking hours does not establish the fact that the bank paid out the money upon Wilson's order or for his benefit. It seems to me, no other interpretation can be put upon it. It certainly cannot be presumed that the bank officers misappropriated the money or defrauded Wilson of it, for fraud or larceny cannot be presumed. Nor can we presume that the plaintiff falsified its books. Upon the deposit by a customer of a sum of money in a bank, the relation of debtor and creditor is created, and the bank agrees to discharge the indebtedness by paying the checks of the depositor. This is the ordinary and usual course of business. The courts have long taken judicial notice of the general course of business, including the universal practice of banks. Merchants' National Bank of Whitehall v. Hall, 83 N. Y. 345, 38 Am. Rep. 434; Hutchinson v. Manhattan Co., 150 N. Y. 256, 44 N. E. 775. It therefore seems right to presume that the $900 was paid out in due course of business and by check.

"It is further claimed that this amount may have been applied upon past-due notes held by the bank against Wilson, or upon an overdraft made by him. There is no evidence that either one of these existed. But if we assume that in the usual course of business the plaintiff did have past-due notes of Wilson it had the right to pay them, if they were payable at his banking house, without any express direction from Wilson, because the making of a negotiable note payable at a particular bank

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is equivalent to authorizing such bank to pay it out of the moneys of the maker. Griffin v. Rice, 1 Hilt. 184; Ætna National Bank v. Fourth National Bank, 46 N. Y. 88, 7 Am. Rep. 314; Manderville v. Union Bank, 9 Cranch, 9, 3 L. Ed. 639. No further agreement, therefore, was necessary, because the making of the note payable at the bank in the first instance, was a sufficient request that it be paid. Even if a note were not payable at the bank, still it would seem that the bank was at liberty to apply the moneys of the depositor to the payment of such note as it owned. In Straus v. Tradesmen's Nat. Bank, 122 N. Y. 382, 25 N. E. 372, Bradley, J., says:

"'As a rule, a deposit made in a bank by a person on general account becomes its fund, and the relation between the depositor and the bank is that of debtor and creditor; and, in the absence of any agreement to the contrary, the bank is at liberty to apply the money upon a demand due to it from the depositor.'

"While I do not think it can be presumed that Wilson had any overdraft at the time of making his deposit, for it is irregular and unauthorized banking to permit it, and a species of fraud on the part of the depositor to create it (Morse on Banking [2d Ed.] 374), and every officer of a national bank is prohibited from certifying a check under such circumstances (Rev. St. U. S. § 5208 [U. S. Comp. St. 1901, p. 3497]), yet, if there were an overdraft, it was a simple loan, payable absolutely and in full (Payne v. Freer, 91 N. Y. 48, 43 Am. Rep. 640).

"What would be the effect of a drawer making a general deposit after having thus overdrawn his account? Would he not be presumed, without any express direction, to intend to pay his overdraft? In the general course of business, he would know that instantly upon making his deposit the amount of his overdraft would be taken out, and he credited with the balance. This must be the legal effect of the transaction.

"If the plaintiff thus paid any such pre-existing debts upon the purchase of the note in question, it became a purchaser for value, under section 51 of the Negotiable Instruments Law. To the extent of the $900, at least, which the plaintiff paid out before it had notice of any infirmity of the note in suit, it was a bona fide holder, and the evidence did not warrant the trial court in finding to the contrary. I therefore dissent from an affirmance of the judgment."

91 N. Y. Supp. 353.

Guarantor of Lease Released.

E. B. Jewett and others, owners of certain premises in Buffalo, made an oral agreement with the agent of the Pharmacal Drug Co. to lease the premises to the company for five years. Following this agreement, Jewett had duplicate forms of lease prepared which were sent, unsigned, to the drug company, and it returned them duly executed on their part. On these forms of lease was a written guaranty, as follows:

"For and in consideration of the letting of the premises within described, and for the sum of one dollar, I hereby become security for the punctual payment of the rent and performance of the covenants in the

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within written agreement mentioned to be paid and performed by ———, and if any default shall be made therein I do hereby promise and agree to pay unto ——— any deficiency and fully satisfy the conditions of said agreement without requiring notice of non-payment or proof of demand being made. Given under my hand this ——— day of———, 190–."

When these papers were returned this guarantee was signed by Louis Griesheimer.

These papers were not signed by Jewett or the other owners on their return, but they were retained by them. The drug company went into possession of the premises and paid the rent, as provided in the papers, for more than a year, when default was made. After default, Griesheimer was sued on his guaranty.

A lease for more than one year must, to be valid, be in writing and be subscribed by the parties thereto.

The form of lease signed by the drug company was not signed by the lessors, and they sought to cure this defect by putting in evidence the letter in which the forms were enclosed to the drug company. The material part of the letter was as follows:

"Pharmacal Drug Company: Enclosed we hand you lease for store, No. 329–331 Washington street, Buffalo. We will agree to make the following repairs . . .

"EDGAR B. JEWETT et al.,
"Per F. A. Jewett."

This letter, the court held, was not equivalent to signing the lease, and did not take the case out of the statute of frauds — and left the tenancy of the drug company as one from year to year. Griesheimer did not guaranty such a lease; his guaranty was of a five-year lease, one which never went into effect, and he was, therefore, not liable for the default of the drug company.

The New York statute of frauds provides that in the following cases every agreement shall be void unless such agreement or some note or memorandum thereof shall be in writing, and subscribed by the party to be charged therewith:

1. Every agreement that by its terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default, or miscarriage of another person.

* * * * * * * *

Substantially the same law is in force in all of the States.

The court said:

"The action is brought to recover rent alleged to have become due under a lease which it is alleged the defendant had guarantied. The plaintiff and several others were owners, as tenants in common, of an undivided four-fifths of the premises described in the complaint; and the

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plaintiff and others were, as between themselves, joint tenants of the remaining one-fifth of the premises. The plaintiff was orally authorized by the other owners to look after the renting of the premises and the collecting and distribution of the rents, and, while such authority was in existence, was also orally authorized to lease the premises to the principal of the defendant. Subsequent to this oral authority, a duplicate form of lease was prepared and sent to the drug company, the lessee and principal of the defendant. At the end of each of said duplicate written instruments was the following written guaranty:

"'For and in consideration of the letting of the premises within described and for the sum of one dollar I hereby become security for the punctual payment of the rent and performance of the covenants in the within written agreement mentioned to be paid and performed by ———, and if any default shall be made therein I do hereby promise and agree to pay unto ——— any deficiency and fully satisfy the conditions of said agreement without requiring any notice of nonpayment or proof of demand being made. Given under my hand this ——— day of ———, 190–.'

"The plaintiff subsequently caused said written instruments thereto attached, but unexecuted by any of the defendants, to be sent to the drug company, together with a letter dated April 11, 1902, as follows:

"'Pharmacal Drug Company, Buffalo, N. Y. — Gentlemen: Enclosed we hand you lease for store No. 329–331 Washington street. We will agree to make the following repairs and alterations to this store and basement.'

"Then follows a statement of certain work which was to be done, in the way of kalsomining, plastering, plumbing, and partitions; the letter being signed, 'Edgar B. Jewett, et al. per F. A. Jewett.'

"The written instruments in due course reached the drug company, and were executed by it, and the guaranty was signed by the defendant without filling in the blank spaces. In this condition they were returned to the plaintiff, who has ever since retained the same.

"The court has found that:

"'The plaintiffs in this action did not, nor did any of them, sign or subscribe their names to either of said duplicate leases, nor was the name of any of the plaintiffs subscribed to any writing relating to the letting of said premises, except the letter of April 11, 1902, above set forth, signed by the plaintiff Frederick A. Jewett.'

"He also finds that since the commencement of the action —

"'The plaintiffs have caused to be inserted in the written guaranty signed by the defendant, and attached to the duplicate lease retained by the plaintiff Frederick A. Jewett, after the words "performed by," the words "The Pharmacal Drug Company," and after the words "pay unto" the words "Edgar B. Jewett and Frederick A. Jewett, individually and as trustees of Carrie J. McKibbon, Risley Tucker, and Mathilda J. Tucker."'

"The court has also found that the drug company, the lessee named in said duplicate leases, paid the rent stipulated in the leases down to November 1, 1903, and has neglected to pay since then. He also finds that the plaintiff Frederick A. Jewett was never authorized by any written instrument to subscribe the names of the plaintiffs to the leases above referred to, or to any lease of said premises to the Pharmacal Drug Company.

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"It was held in Laughran v. Smith, 75 N. Y. 205, that a lease executed by the lessee, but not executed by the lessor, under which the tenant had gone into possession, was not a valid lease, being for more than a year. It was further held that the tenancy under such circumstances was only from year to year. The claim is made in behalf of the plaintiffs here that the signature to the letter inclosing the leases to the lessee was such a signature as would comply with the statute. We think that this is an erroneous view. The most that can be said for it is that it would raise a question of fact as to the intention of the parties to consider that an execution, and that fact, having been found against the contention of the plaintiff, is binding upon us; and we think the finding of the court was right. There is no intimation anywhere that the letter was to be construed as a part of the lease, but the fair interpretation of it is that it was an inducement to have the lease executed on the part of the lessee. There is no need of explanation with reference to any portion of the lease, and it would seem that the fair import of the letter is that, while it referred to the premises in question, it was simply an inducement for the execution of the lease, and was not to be taken as a portion of the lease itself. At all events, we think the finding was one for the trial court to make, and, having made it, we see no reason for disturbing it.

"The situation was this: The defendant had guarantied the payment of the rent under the lease; but, under the ruling of the case above cited, this lease was a void one, and the lessee was not holding as a tenant for a definite term of five years, but simply as a tenant from year to year, and the defendant has at no time agreed to be bound to pay the rent accruing under such a tenancy. There seems to have been no reason why the plaintiff should not, if he desired to become bound under the lease, have signed and delivered one of the duplicates to the lessee. It is fairly to be inferred that it was the intention of the parties when preparing the form that it was to be signed by all of the parties, each to retain one. The plaintiff has given no sufficient explanation of the failure to carry out the agreement. There can be no question that the lease was to be executed in duplicate. If the signature of the plaintiff to the letter is to be considered a signature to the lease, then it should appear upon both of the copies; and the fact that it does not appear upon each duplicate is a circumstance sufficiently strong to warrant the conclusion that neither of the parties understood that the letter was to be considered a part of the agreement between them. It was within the power of the plaintiff at any time to conclude the contract by placing his signature to the instruments that had been prepared for that purpose. If he took the chance of retaining both duplicates without signing, he cannot now complain.

"The defendant is entitled to have his guaranty strictly construed, and he has guarantied to pay the rent under a lease for five years. It needs no argument for the proposition that under such a guaranty he cannot be made liable upon a tenancy from year to year. We think the conclusion of the trial court was right, and the judgment should be affirmed."

Judgment affirmed with costs. All concur, except McLENNAN, P. J., who dissents.

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Municipal Warrants: Non-Negotiable Instruments: Title: Partnership.

George I. O'Brien was one of three partners comprising the firm of "John J. Morrison & Co. & O'Brien."

The firm had certain contracts for work done for the town of Cicero under which they were entitled to receive from the town $2,053.90. In payment thereof, warrants, in form as shown in accompanying illustration, were issued to the firm and came into the hands of O'Brien. He indorsed them and delivered them to his father, Thomas O'Brien, in payment of an individual debt due to his father. Thomas O'Brien indorsed them and sold them for value to the Austin State Bank. The other members of the firm, hearing of the disposition of the warrants, brought an action to recover them from the bank. The bank won in the lower courts, but was beaten on appeal.

The warrants were held to be non-negotiable instruments, on the general ground that such warrants are not classed as commercial paper, and for an additional reason, if one was needed, that they were payable out of a special fund.

The father, Thomas O'Brien, saw the son using partnership property to pay an individual debt. This would have made his title defective, even if the warrants had been negotiable instruments. The paper being non-negotiable, the bank took it with the same chances that it would take in buying a horse. If the horse had been stolen from the owner, or procured from him by fraud, the bank would get no title to it, even if it bought it from a third party. It is generally held that one who writes his name on the back of a non-negotiable instrument incurs no financial responsibility. This fact is not always of importance, as such paper is often taken, as was the case here, on the well-known responsibility of the maker. But, as in this case, there is a greater danger in handling such paper than the fact of lack of responsibility of those who indorse it. It may have to be surrendered to an undisclosed owner, or, after it is paid, the one receiving payment is yet liable to have to refund the amount to the payor, as the person who presents for payment a negotiable or non-negotiable instrument thereby warrants that he has title to it.

The court said in part:

"When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants or vouchers in question for the payment of money that belonged to the partnership, of which appellant was one, in payment of a past-due debt to himself from his son, and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and, being a party to that fraud, he did not and could not take anything by it. As between him and the partnership, it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in

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good faith, or an assignment of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the partnership, and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past-due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership, and knows that he is thereby working a fraud upon the partnership. Such a transaction is not merely voidable. It is void. Fraud vitiates and so poisons a transaction that it has no vitality. Property contracted for or obtained through fraud is like Dead Sea fruit, that can neither be gathered nor enjoyed when possessed. The transaction may be ratified by the partnership and may be validated, as one may elect to waive a tort and proceed in assumpsit as for goods sold; but until, with a full knowledge of all the facts, the partnership has ratified the transaction, it is void. When Thomas O'Brien received the orders from his son, he knew the partnership was to receive nothing for them, and the transaction was fraudulent and void. If, however, the instruments so obtained by him are negotiable in the sense that promissory notes and bills of exchange are under the law merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

"We have looked to the act authorizing the issuance of these warrants or vouchers, and there is no provision found in it giving them the required characteristics of negotiability. We have looked to the statute in relation to negotiable instruments, and find that by sections 3 and 4, c. 98, Hurd's Rev. St. 1899, certain instruments are mentioned and are given the quality of assignability by indorsement, so that they may be passed by assignment in writing in the same manner as bills of exchange are, 'so as absolutely to transfer and vest the property thereof in each and every assignee successively.' By section 5 it is provided that the assignee may sue in his own name and maintain the same kind of action that the original obligee or payee could have done; and section 7, which was section 1 of an act approved June 4, 1895, in relation to promissory notes, etc. (Laws 1895, p. 262), states just what instruments, among all the instruments referred to in the act, shall be clothed with the attributes of negotiability according to the custom of merchants, and by it those qualities are only extended to promissory notes payable in money, and it contains the further provision that the holder or owner of any other evidence of indebtedness mentioned in the act may sue the assignor when he has shown due diligence to collect from the maker. So it will be seen that neither by the act authorizing the issuance of the vouchers in question nor by our statute in regard to negotiable instruments are the instruments in question given the qualities necessary to protect appellee as an innocent purchaser, unless such instruments can be held to be promissory notes within the meaning of our act.

"It seems to have been generally held that municipal corporations

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B. 21. Municipal Warrant: Bona Fide Holder: Partnership Indorsement: Non-Negotiable Instrument.

This warrant is payable only from the special assessment named when collected.

Cook County, Illinois.
Town of Cicero.

Treasurer, Town of Cicero, Clerk's Office, Austin, Feb. 21 1901.

Pay to John J. Morrison & Co. & O'Brien

Twenty Two Hundred Eight & 10/— Dollars

out of the appropriation for the special No. 27 fund only, and charge same to the appropriation for said fund $ 2208

I hereby certify that the above bill was ordered paid by the Board of Trustees of the Town of Cicero.

Signed D. E. Tristan
Town Clerk.

Countersigned Alan L. James
President, Town of Cicero.

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Geo. I. Morrison & Co. v. O'Brien

Thos. O'Brien

George I. O'Brien was one of the four partners comprising the firm of "John J. Morrison & Co., & O'Brien." He indorsed the firm name on this warrant and gave it, in payment of his individual debt, to his father Thomas O'Brien. As between the firm and Thomas O'Brien the latter would get no title to the warrant, as the creditor had notice that a partner was using partnership funds to pay his individual debt. Thomas O'Brien then indorsed the warrant and sold it to the Austin State Bank, the bank having no notice of any defect in Thomas O'Brien's title. The other members of the Morrison-O'Brien firm, hearing of the transaction, brought an action to determine the ownership of the warrant. The bank claimed title as purchasers of a negotiable instrument without notice of ownership in any one but Thomas O'Brien. It seems to be well established that municipal warrants or orders are not negotiable instruments, and although negotiable in form, the municipality can always set up its defences to them, if it has any, even in an innocent purchasers hands. But in this case the municipality had no defense to the instrument, and the question litigated was whether this lack of negotiability so infected the instrument that a previous owner would take it from a bona fide purchaser with as little ceremony as he would if it had been a stolen horse. It was held, in effect, that he could.

It is urged as one of the dangers of handling paper that is negotiable in general form, but is non-negotiable by reason of objectionable phrases or terms on its face, or on its indorsements; that one who writes his name on the back thereof is not an indorser and is not held to an indorser's liabilities. But, as in this case, there is the more serious objection, that one who buys it on an apparent straight chain of title, as evidenced by genuine indorsements, is liable to have to account to the true owner for it. The fact that such a tainted instrument after passing through one's hands has been paid by the maker or the drawee, would not relieve the previous holder from his liability, directly or indirectly, to some previous owner. This liability does not attach to the holder in due course of a negotiable instrument. The Court said in part, in quoting from another opinion: "An innocent purchaser in good faith of commercial paper gets a good title, even though he purchase from a thief. This is so because of the law merchant . . . But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser. Municipal warrants though negotiable in form, are non-negotiable in fact." There was an insuperable reason why this warrant was non-negotiable, it provided in the margin that it was to be paid out of a special fund. The Court said in part on this point: "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future are not negotiable bills or notes."

McMasters Com. Cases, Vol. 1905, 72 N. E. 1109.

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have no power, in the absence of an express grant, to issue unimpeachable evidence of indebtedness; and so it was held in Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251: 'It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable obligations, which may be multiplied to an indefinite extent.' And in Mayor v. Ray, 19 Wall. 468, 22 L. Ed. 164, it is said: 'Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and the incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose."

See Decision No. 835.

STEINFELD et al. v. NATIONAL SHIRT WAIST CO. et al.

99 N. Y. Supp. 964.

(Supreme Court, Appellate Division, First Department. December 9, 1904.

PARTNERSHIP — DISSOLUTION — PURCHASE BY PARTNER — RIGHT TO FIRM NAME — INJUNCTIONS — PRELIMINARY INJUNCTION — WHEN ISSUED.

1. Upon the dissolution of a firm, where one of the partners succeeds to the business, he acquires the good will of the firm with the exclusive right, as against the retiring partners, to the use of the firm name, although no express mention of such name is made in the agreement of dissolution.

2. Where a retiring partner, who had sold out to his copartner, organized a corporation, and adopted the same name under which he and his partner formerly traded, evidently for the sole purpose of appropriating a portion of the custom of the firm, a preliminary injunction should be awarded at the instance of the purchasing partner, to restrain the continued use of such name by the retiring partner, until the question of his right to use such name should be determined.

Sunday Contract.

SHERRY v. MADLER.

101 N. W. 1095.

(Supreme Court of Wisconsin. Jan. 10, 1905.)

1. A written contract, void because executed on Sunday, cannot be validated by subsequent acts of the parties recognizing its existence.

* * * * * * * *

"It is admitted by appellant that the written contract for building the house was in fact executed on Sunday, but it is claimed that it was vali-

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dated by the subsequent acts of the parties set forth in the statement of facts, which recognized its existence. This contention is effectually answered by the decision in the case of Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787, where a lease of a mill and house was executed on Sunday, and possession taken under it, and rent paid under its terms for a considerable time. Notwithstanding these acts of subsequent recognition, it was held that they constituted no ratification of the original lease, because it was absolutely void, and hence incapable of ratification. A new contract might be made between the parties, either expressly or by implication, from their dealings; but this would be an independent contract, and not a ratification of that which was void. The cases relied on by the appellant to sustain his contention, such as Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771, will be found upon examination to be cases where such new and independent contract was made on a subsequent secular day."

Partnership: Definition.

The following quotations as to what constitutes a partnership are from 133 Fed. 462:

"But does the contract in suit actually create the relation of partners between the complainants and the defendant corporation, assuming the corporation to have the power to enter into such relation? The question here presented is not whether the nature of the agreement is such that liability as a partner might exist as to third persons, but whether this contract provides for an actual partnership.

"The defendant has repudiated the contract, and defends, when sued, upon the ground that it had no power to enter into a partnership agreement. To make good this defense, it must show that the contract is one for a partnership — an actual partnership — and it will not do to say that, although no actual partnership was intended or existed, it is enough to show that third persons might hold both complainants and defendants liable as partners, although in fact no such relation existed. Liability as a partner to third persons misled by appearances may sometimes arise, though no actual partnership exists. But this rests upon the doctrine of estoppel. Partnership is a fact — a fact sometimes made out, like other facts, from circumstances, as well as by direct evidence. Evidence may raise a presumption of a partnership so strong as to be conclusive when third persons are involved. And this is the case when one has held himself out as a partner to one ignorant of the actual fact. But this case presents no such question, as the rights of third persons are not involved. Indeed, it would be difficult to imagine a case of liability to third persons upon the ground of holding out, when the supposititious partnership was with a corporation incapable, as matter of law, of entering into such a relation. If the contract sued upon is not one which deprives the stockholders of the corporation of their power and duty to manage the corporate affairs, or subjects the corporation to the domination incident to the affairs of a copartnership, it is not ultra vires. It devolves, therefore, upon the defendant to establish that the contract into which it has entered is, in substance and legal effect, one of partnership.

"It is not very prudent to define a partnership. Many definitions have been attempted, and Sir George Jessell, Master of the Rolls, in Pooley

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v. Driver, L. R. 5 Ch. Div. 459, 471, referred to the fact that no less than fifteen such definitions by different learned lawyers, no two of which he says agree, are given in the third edition of Lindley on Partnership, pp. 2, 3. Concerning these he says: 'And I suppose anybody, by reading the fifteen, may get a general notion of what a partnership means.'

"The Supreme Court, in Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 973, 36 L. Ed. 835, has, through Mr. Justice Gray, defined a partnership. The very learned justice in that case said:

"'The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.'

"All would possibly not agree that the contribution by each of 'property or service' is essential.

"Sir George Jessell, in Pooley v. Driver, cited above, states that under English law you can have a partner, a dormant partner, 'who puts nothing in — neither capital nor skill, nor anything else.'

"Undoubtedly, there must be an association of two or more persons for the purpose of carrying on a trade or business or adventure together and dividing the profits. The presence or absence of certain other incidents of a partnership by special arrangement between the parties would not seem to be of the essence of the matter. Fleming v. Lay, 109 Fed. 952, 955, 48 C. C. A. 748.

"There is found in some of the earlier cases a disposition to regard evidence of a participation in profits as affording so cogent a presumption of a partnership as to make one liable to third persons, though ignorant of the fact, in defiance of the positive agreement of the parties that they should not be partners. Grace v. Smith, 2 W. Black. 998; Waugh v. Carter, 2 H. Bl. 235; Berthold v. Goldsmith, 24 How. 536, 542, 16 L. Ed. 762; Wood v. Vallette, 7 Ohio St. 172.

"This rule — that by operation of law one was liable as a partner to third persons, irrespective of the actual agreement between the parties, or of any misleading, seems to have been rested upon the theory that one who shares in the profits must also share in the losses and stand liable for the debts. The reason given in Waugh v. Carver, 2 H. Bl. 235, for this, is that in taking part of the profits he takes a part of the fund which the creditor relies upon for payment. This reasoning has been repeated in many cases following Waugh v. Carver. But, as Judge Story observes, this reasoning is utterly fallacious, inasmuch as profits do not exist until creditors are paid or provided for, as well as because creditors rely upon the entire assets, and not the net profits. Story, Part. 36, and note 3.

"If the presumption arising from evidence of a participation in profits had been as rigid as some of the judges have supposed, it was possible from that circumstance alone to fasten liability in the face of other evidence showing that in actual fact no partnership existed. But as this doctrine was based only upon a presumption of the fact of partnership from evidence of a participation in profits, it has never been regarded as an irrebuttable presumption, and its cogency as evidence of a partnership has been much relaxed by subsequent cases in which a wider view of the subject has been taken. The most that can be said of it, as the law is now understood, is that a participation in profits is strong evidence of a partnership, and enough, unless explained by other circumstances

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showing a different relation. Cox v. Hickman, 8 H. L. Cases, 268, 304, 306, 312, 313; March & Co. v. Court of Wards, L. R. 4 P. C. 419, 435; In re Eng. & Irish Soc., 1 Hem. & Mil. 85; Ross v. Perkins, L. R. 20 Eq. 331, 335; Pooley v. Driver, L. R. 5 Ch. Div. 458, 476, 479.

"While the reference to agency as a test of partnership has not been accepted with much favor by the courts of either England or the United States, inasmuch as an agency is a consequence, and not a cause, of partnership, made so prominent in Cox v. Hickman, the case has otherwise met with general approval as a more reasonable statement of the inferences deducible from evidence of a participation in profits. Davis v. Patrick, 122 U. S. 138, 151, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Story on Partnership, §§ 38, 49, notes; Meehan v. Valentine, 145 U. S. 611, 620, 623, 12 Sup. Ct. 972, 36 L. Ed. 835; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387.

"If participation in profits is only evidence of a partnership, and subject to be explained even as to third persons, it must follow that the intent and agreement of the parties themselves should govern in all cases, and that the same rule should apply in favor of third persons, unless there has been conduct calculated to deceive, which applies between the parties themselves. This was the view taken by Judge Story before Cox v. Hickman and Meehan v. Valentine, as shown in his forty-ninth section of his work on Partnership, where he says:

"'In short, the true rule, ex æquo et bono, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons. It is upon this foundation that the decisions rest which affirm the truth and correctness of the distinction already considered as a qualification of the more general doctrine contended for.'

"Nor is there anything in conflict with this conclusion in the summary of the law in Meehan v. Valentine, 145 U. S. 611, 623, 12 Sup. Ct. 972, 975, 36 L. Ed. 835, where, speaking by Justice Gray, it is said:

"'In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.'

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"The intent to be partners is made out when we find a business carried on for the joint benefit of two or more persons, with an agreement for a mutual participation in profits, as profits. The fact that one of the incidents of a partnership — mutual liability for debts — has been eliminated by agreement does not change the essential nature of the relation, which is nevertheless that of a partnership. Fleming v. Lay, 109 Fed. 952, 955, 956, 48 C. C. A. 748. Such a stipulation, though good between the parties, will not be valid as against third persons. This view reconciles the inconsistency of holding that a partnership exists in defiance of the agreement and intention of the parties, as exhibited in some of the cases, which seem to sanction the notion that there may be a partnership as to third persons, though there had been no conduct to create an estoppel, and none between the parties themselves.

"But in every phase of the question as to the cogency of evidence of a participation in profits it has been understood that the person sought to be charged as a partner must have an interest in profits, as profits. Thus it is said by Judge Story in section 49 of his work upon Partnership, adopting the view of Collier upon Partnerships, 'that in order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual; that is, each person must have a specific interest in the profits as a principal trader.' Meehan v. Valentine, 145 U. S. 611, 619, 623, 12 Sup. Ct. 972, 36 L. Ed. 835. Hence it always has been the rule that if you could show that the participation in profits was not a sharing in profits as a principal — in profits as profits of a joint business — but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or money advanced as a loan, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership, for there would be no participation in profits as a principal, no receipt of profits as profits. Upon the contrary, the relation of creditor would be made out; the amount of the debt being a sum of money estimated by a certain proportion of the profits, as a mere measure or yardstick. 'The way in which the profits are to be participated in is the essence of the whole matter.' Cotton, L. J., in Ex parte Tennant, 6 Ch. Div. 303, 316. This definition of sharing in profits as evidence of a partnership is supported by all the cases, and we need cite but a few of the more recent and controlling: Berthold v. Goldsmith, 24 How. 536, 542, 543, 16 L. Ed. 762; Meehan v. Valentine, 45 U. S. 611, 619, 12 Sup. Ct. 972, 36 L. Ed. 835; Story, Part. §§ 33, 34; Burnett v. Snyder, 81 N. Y. 550, 37 Am. Rep. 527.

"Applying these principles, the case at bar is of easy solution. The contract in suit does not in terms provide for a partnership, nor contemplate any of the incidents of a partnership, unless the provision in reference to the participation of each in the profits of the business of the other establishes the relation and liability of partners. But it is very clear that the provision for a participation in profits does not contemplate any sharing in profits as a principal or division of profits, as profits. 'Profit' implies, without more, the gain resulting from the employment of capital — the excess of receipts over expenditure. Black's Law Dictionary, citing Connolly v. Davidson, 15 Minn. 519, 530 (Gil. 428), 2 Am. Rep. 154; Story, on Part. § 36, note 3.

"The old cases drew a distinction between net profits and gross profits. In discussing the kind of participation in profits which operated to create the relation of partners, it is said that:

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"'The true meaning of the language, an "interest in profits, as profits," seems to be that the party is to participate, indirectly at least, in the losses, as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits. If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the gross profits, then it will be otherwise.' Story on Part. §§ 34, 42, and cases cited.

"Under the contract in suit, the sharing was to be not in the net gains or profits made by the one party in the business carried on by the other, but in the gross profits. That net profits were not meant, they make plain by a definition found in the fifth paragraph, where it is stated, in substance, that 'gross profit' means the aggregate sales made, whether collected or not, after deducting the cost, import duties, and carriage, and that 'no other charges, expenses, or losses of whatever kind or nature shall be deducted from said gross profits.' Thus the participation was in the gross amount of sales after the deductions above mentioned were made. The losses in bad debts and the cost of business might consume the margin between the cost and sale price, and yet the complainants would be entitled to receive a certain per cent. of the gross profit, though the business had made no actual gains, or had even made a loss. There was, then, no sharing in losses, and, under the old cases, no participation in profits, as profits, such as would, without more, raise a presumption of partnership."

Silence as Assent: Responsibility of One Who Fails to Answer Adverse Statements Made by Letter.

The following quotations state the law as to how far one may be bound by the statements of another contained in a letter received from the latter.

"The authorities make a distinction between statements made orally and those contained in letters which are unanswered or not acted upon. In the former case, the party to whom statements hostile to his interest are made may, with much reason, be required to contradict, or be held to acquiesce in their truth. In the latter case he is not called upon to go to the trouble and expense of writing a denial, and silence cannot be construed into acquiescence in the truth of the written statements." 98 N. W. 20.

"It may well be that under most circumstances what is said to a man to his face, which conveys an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the person to whom the letter is addressed." 97 N. Y. 12.

"Nor did defendant's receipt and failure to answer the written communications make him liable for the remainder of the year's salary on the principle of estoppel. Defendant did not voluntarily accept these communications. Plaintiff mailed them and the postman delivered them. Defendant never replied to them, never used them, and never

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opened them. He simply preserved them. To make the principle of estoppel applicable, it must be held that from defendant's silence — from his failure to answer the communications — plaintiff had a right to infer, and did infer, his desire to continue the contract. Plaintiff had no right to draw any inference from defendant's silence, unless defendant was under an obligation, which the law will notice, to answer his communications. There is no such obligation. While politeness will ordinarily induce a man to answer letters, he has the legal right to ignore them, and to determine for himself whether he will answer them. Cases may arise in which this right is of great value, and the courts are not at liberty to destroy it. No inference may be drawn, therefore, merely because one does not return or answer a letter received by him. See State Bank v. McCabe (Mich.), 98 N. W. 20; Canadian Bank of Commerce v. Coumbe, 47 Mich. 358, 11 N. W. 196." 101 N. W. 820.

Draft: Forged Indorsement — Rule as to Who Bears the Loss Thereby: Indorser: Warranty: Bill of Sale.

Boudinot Whitlock, the drawer of the draft described in accompanying illustration, had an arrangement with the drawees, La Fayette & Bro., by which he was to purchase cattle from various persons, giving such persons his draft on La Fayette & Bro., accompanied by a bill of sale of the cattle from the seller.

The draft was fraudulent. Whitlock drew the draft and forged the indorsement of the payee, Smith, and also forged the name of Smith to the bill of sale on the back. He then induced the Merchants' Bank of Fort Smith to give him the money on it. No cattle were, in fact, purchased of Smith. The Merchants' Bank indorsed the draft and sent it for collection to the First National Bank, to whom La Fayette & Bro. paid the money. Several months after the payment, La Fayette & Bro. discovered the fraud and then sued the Merchants' Bank for the amount. They were beaten in the lower court, but won on appeal.

The rule is that if the drawee pays, to an innocent holder, a check or draft on which the drawer's signature is forged, the loss is on the drawee. But if the indorser's signature is forged, the loss is on the holder who had demanded and received payment, with the exception that if the drawer has forged the payee's signature, and then put the paper in circulation, the drawee, who pays, has no recourse on the innocent holder who has received payment. This exception did not aid the bank in this case, as it was beaten on the ground that in demanding and receiving payment of the draft it had impliedly warranted the genuineness of the bill of sale which was written on the back of the draft.

The court said in part:

"It is a general rule that money paid under a mistake of fact may be recovered. The right of recovery proceeds upon the theory that the plaintiff has paid money which he was under no obligation to pay, and

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which the party to whom it was paid has no right to receive or to retain; and the law therefore raises an implied promise on his part to refund it, and an action will lie to recover it. The reasons which permit a recovery are equitable in their nature, and the rule does not apply in any case where it would be unjust or inequitable to compel the return of the money. For instance, if one in ignorance of the date of the maturity of a note pays it, and afterwards discovers that it is barred by statute of limitations, he cannot recover the money paid; and there was a moral obligation on him to pay his debt, whether barred or not. 15 Am. & Eng. Encyc. Law (2d Ed.), pp. 1103 to 1106, and cases cited. But no such reason exists in this case. When the draft was presented to the plaintiffs for payment, it had the endorsement of the defendant bank upon it, as well as the indorsement of the name of the payee, and his signature to the bill of sale on the back of the draft. The plaintiffs had the right to suppose that the bank had taken proper precautions to ascertain that these signatures were genuine. The presentation of the draft for payment under such circumstances was, in effect, a representation on the part of the bank either that it had paid or that it would pay to the payee or to his order the amount named in the draft, and that his signature both to the bill of sale, and indorsed on the draft, was genuine.

"Under these circumstances the plaintiffs paid over the money to the collecting bank, acting as the agent of the defendant in making the collection; and it seems to us that the equities are in favor of the plaintiffs, and that a recovery should be allowed unless there is some rule of law that forbids it.

"Now, there is an exception to the rule permitting a recovery of money paid under a mistake of fact in the case of a drawee paying a draft or check upon which the name of the drawer had been forged. The reason of the rule is said to be that the drawee should know the signature of the drawer, and that he is guilty of carelessness in paying a check where the drawer's name has been forged, and that, as between him and an innocent holder, no recovery should be allowed. Defendant contends that the exception applies also where the name of the drawer is genuine, and where the drawer has himself forged the signature of the payee. There is authority to support that position. The Supreme Court of the United States so declared the law in an opinion delivered by Chief Justice Taney. The court said that 'the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring to the contrary in a suit brought against him by the holder.' Hortsman v. Henshaw, 11 How. 177, 13 L. Ed. 653; Bigelow on Bills & Notes, 568. But though there are cases that seem to hold to the contrary (Merchants' Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Northampton Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283), still we may admit that the rule declared by Chief Justice Taney is correct in cases where there is nothing on the draft to give notice that the drawee does not pay out of funds of the drawer in his hands. But that is not the case here. The bill of sale on the back of the draft was notice to every one taking it that the drawee was paying or would pay not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale, and a transfer of the property described therein. The form of the draft was notice to the bank that the drawee would not pay unless the bill of sale and the signature thereto were genuine, and it should have

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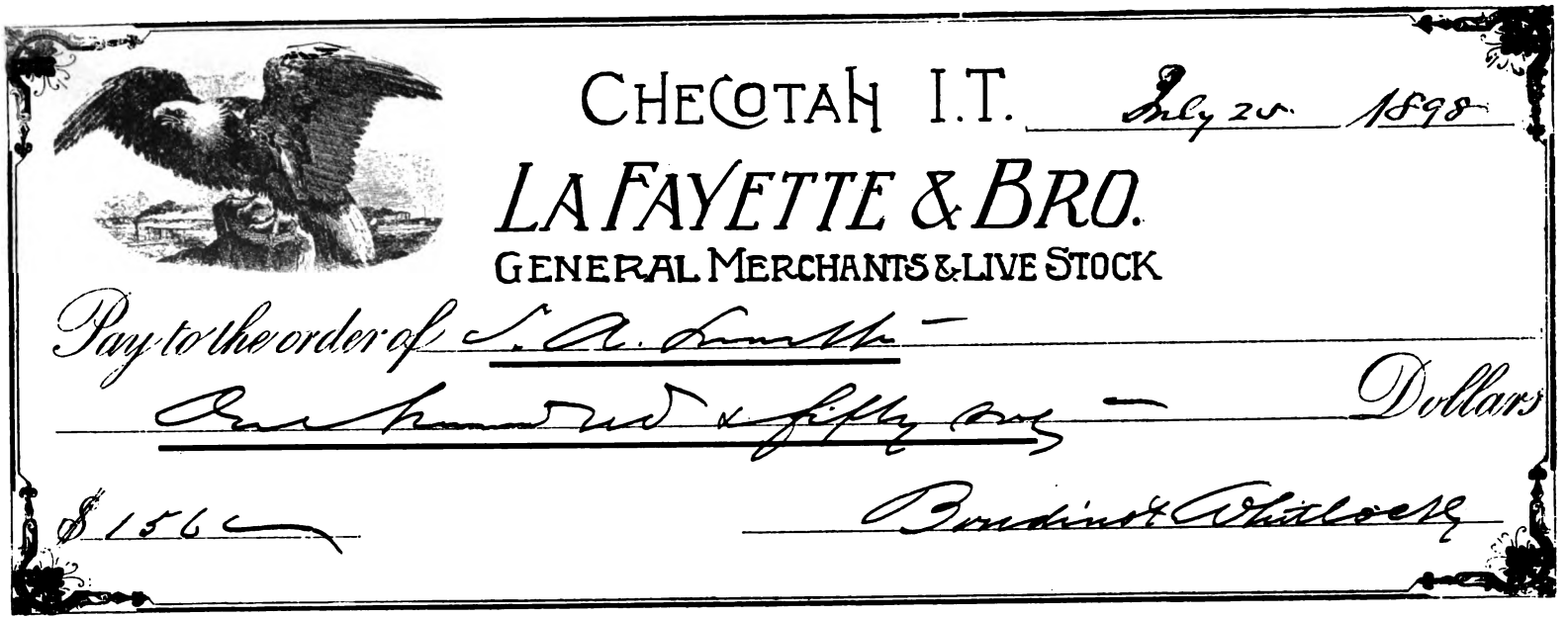
B. 22. Draft: Forged Indorsement: Bona Fide Purchaser: Liability of Parties.



CHECOTAH I.T. July 25 1898

LA FAYETTE & BRO.

GENERAL MERCHANTS & LIVE STOCK

Pay to the order of L. A. Smith

One hundred & fifty six ——— Dollars

$156 ——

Bruden & Whitlock

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When this draft was issued the following bill of sale was on the back:

"Know all men by these presents that for and in consideration of the sum of one hundred and fifty-six dollars to me in hand paid the receipt of which is hereby acknowledged, I, S. A. Smith, of Lena, I. T., do hereby bargain, sell and deliver unto La Fayette & Bro., of Checotah, I. T., all the following described property, namely (here follows description of ten head of cattle). I covenant that I am the absolute owner of the property aforesaid and have the lawful right to dispose of the same; also, that I will warrant and defend the title hereby conveyed against whomsoever claiming or to claiming the same . . . S. A. Smith."

S. A. Smith
Pay First Nat. Bank
or order
Merchants Bank
C. S. Smart, Cashier.
R. L. Martin, Cas.

Whitlock the drawer of this draft was a cattle buyer who had an arrangement with La Fayette & Bro., the drawees, by which they were to pay drafts, similar to this, where the payee would execute on the draft a bill of sale of the cattle for payment of which the draft was given. Several similar drafts were issued and paid. Whitlock bought no cattle of Smith, the payee of this draft, but he forged Smith's name to the above bill of sale and forged his indorsement thereon, and presented the draft to the Merchants' Bank of Fort Smith and got the money on it. This bank indorsed the draft and sent it to the First Nat. Bank for collection. La Fayette & Bro., paid the draft, and some time later on discovering the forgery sued the Merchants' Bank for the amount. The bank won in the lower Court, but was held liable on appeal; not on the ground that Smith's indorsement of the draft was a forgery, but for the reason that his signature to the bill of sale was forged. The rule is that if one on whom an indorsed draft is drawn pays it, with an indorsement forged, he may, on discovering the forgery, recover the amount from the one to whom he paid it. But this rule does not prevail where the drawer forges the payee's name and puts the draft in circulation — as in this case. On this point the United States Supreme Court said: (11 How., 177) "We take the rule to be this. Whenever the drawer is liable to the holder (and he is if the drawer forges the payees indorsement) he is entitled to a credit if he pays the money, and he (the acceptor) is bound to pay upon his acceptance when the payment will entitle him to a credit in his account with the drawer.' In the case in which this statement was made, Fisk & Bradford of Boston drew their draft, on John Horstman of London, to the order of Fisk & Bridge. The drawers, Fisk & Bradford, forged the payee's indorsement on the draft and put it in circulation. Horstman paid the draft, after accepting it, to a firm of bankers, and, on discovery of the forgery of the payee's name, sued the bankers for the amount paid. The United States Supreme Court held that he could not recover. But, in the case of this draft, La Fayette & Bro., won on the point that the Merchants' Bank impliedly warranted the signature to the bill of sale.

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taken the usual precautions to ascertain that they were genuine before parting with its money. It obtained this money not by presenting the draft alone, but by presenting it in connection with this forged bill of sale. The drawee was ignorant of the forgery, and the case, as we think, comes within the general rule that one who has paid money under a mistake of fact may recover it. Northampton Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283; Merchants' Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Insurance Co. v. Bank, 60 N. H. 442; Carpenter v. Bank, 123 Mass. 66.

"It is true that the drawee did not notify the bank of the mistake and the forgery until five or six months after the money was paid, but the reason of that was that they were themselves ignorant thereof. Having no reason to suspect that a forgery had been committed, they were not guilty of negligence in failing to discover it sooner, and so soon as they discovered if they notified the bank. Nor is it shown that the bank was injured in any way by the delay. So we think that it furnishes, under the circumstances, no defense to the action."

See Decision No. 836.

Guaranty of Certain Contract by a Corporation Held Void, as It Being Beyond Its Power to Execute Such Guaranty.

The S. P. Smith Lumber Company was sued as co-contractor or guarantor of a contract by which one Brown agreed to construct a house for R. H. McNatt. The court held that it was beyond the power of the company to enter into such contract of guaranty, and said in part:

"The sole inducement for the bankrupt signing the contract in any capacity is found in the following recitation: 'Whereas, the S. P. Smith Lumber Company, a corporation, is proposing to furnish lumber for the erection of said building out of which it is supposed to make a profit, it is hereby agreed on its part that it becomes,' etc. This recitation neither binds the owner of the building, McNatt, nor the contractor, Brown, to purchase from the bankrupt any of the lumber for the building. While this language cannot be construed as a valid consideration for the making of the contract on the part of the bankrupt, it is an appropriate recitation, and throws light upon the intentions of the parties. It is the inducement for its undertaking 'to complete the job according to the plans and specifications and this contract' in event Brown for any reason failed or refused to do it. In consideration of its contemplated profit on sales of lumber 'it guaranties the full and perfect completion of the contract according to said plans and specifications.' By these provisions the bankrupt seeks to bind itself to McNatt for the due fulfillment of the undertaking and engagement of Brown. This is a contract of guaranty. 2 Parsons on Contracts (8th Ed.), p. 3; Pingrey on Suretyship and Guaranty, § 339; Atwood v. Lester, 20 R. I. 660, 40 Atl. 866; Gridley v. Capen, 72 Ill. 13. In event this guaranty had been given by a natural person, it would have been valid and binding, as the contract between McNatt and Brown for the erection of the building was founded on a good consideration, the guaranty was executed concurrently as a part of the same instrument, and is recited to be the consideration moving McNatt to let the contract for the erection of the building

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to Brown. Under the authorities the consideration for the erection of the building would be regarded a consideration also for the guaranty. 2 Parsons on Contracts (8th Ed.), p. 7; Campbell v. Knapp, 15 Pa. 27; Klein v. Currick, 14 Ill. 237; Bickford v. Gibbs, 8 Cush. 156. Was the bankrupt, under its charter, authorized to become guarantor of Brown in his undertaking as a building contractor? It was incorporated for the purpose of buying and selling at wholesale and retail lumber and all other manufactured building material. The power to become a guarantor was not expressly conferred upon it by its charter. Can it be implied therefrom? A purpose of its creation was to sell lumber. Becoming guarantor for Brown furthered this end. It secured for it the sale of the lumber to be used in the construction of the McNatt house. But the power to sell lumber and to enter into all contractual arrangements in the line of the accomplishment of such sales and incident thereto cannot be held to include the power to become guarantor of the undertaking of another in an entirely different line. In thus acting it risks the funds of the company in a different enterprise and business under the control of another, contrary to what its stockholders, its creditors, and the State have the right from its charter to expect. Mor. Priv. Corp. § 423; Humboldt Min. Co. v. Am. M. M. & M. Co., 62 Fed. 356, 10 C. C. A. 415; Clark and Marshall on Corp. § 184; Davis v. Old Colony R. R. Co., 131 Mass. 258, 41 Am. Rep. 221; Best Brewing Co. of Chic. v. Klassen (Ill.) 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26. In becoming a guarantor for Brown it acted in excess of its charter power, not only in view of the common law, but also in view of the express statutory law of the State of Texas. Rev. St. 1895, art. 665.

"In McCormick v. Market Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817, Mr. Justice Gray in the course of his opinion says:

"'The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate power is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of its stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.' — Citing Pearce v. Madison & Indianapolis R. R., 21 How. 441, 16 L. Ed. 184; Pittsburg, etc., Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 18, 11 Sup. Ct. 478, 35 L. Ed. 55.

"In the course of his opinion in California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198, Mr. Justice White, speaking for the court, says:

"'A contract of a corporation, which is ultra vires in the proper sense — that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature — is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

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— Citing and quoting from Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

"Upon the bankruptcy of the lumber company the contractor ceased work, and failed to fulfill his contract. The owner, under its provisions, continued the work, and completed the building at an advanced cost to him, above the contract price, of the amount of his claim here. He seeks to participate in the distribution of the bankruptcy estate pro rata to the extent of such claim with the contract of guaranty as the basis therefor. Any dividend paid him would virtually be a recovery on the contract to that extent. Having enjoyed the probable profits arising from the sale of the lumber as a result of giving the guaranty, would the bankrupt company have been, and is the trustee of the estate now, estopped to deny liability under the guaranty notwithstanding the act of giving it was ultra vires? The bankrupt did not receive and appropriate valuable property under this contract payment for which the trustee is seeking to avoid by invoking the doctrine of ultra vires. It simply procured for itself the sale of lumber. It sold lumber to the contractor and received value for it. All that it was presumed to make under the contract was a profit on the lumber sold. Therefore there is not present that element which appeals so strongly to the chancellor, and which seems to have carried the courts of last resort of some of the States so far in the application of the doctrine of estoppel as it relates to ultra vires acts of corporations. Claimant let the contract for the building of his house to Brown on the strength of the bankrupt's guaranty, and he has suffered loss thereby. But he was bound to take notice of the company's legal limitations, of its lack of authority to make valid contracts of guaranty.

"In Humboldt Min. Co. v. American Man. M. & M. Co., cited supra, a case largely analogous to the present one, Judge Taft, in delivering the opinion of the court, says:

"'It is said, however, that the contract has been performed on behalf of the plaintiff, and therefore that the defendant is estopped to deny its power to make it. We do not think that any such principle has application here. Strictly speaking, a corporation is never estopped to deny its power to make a contract where the extent of its powers and of the facts relevant thereto were or should have been known to the parties seeking to enforce the contract when it was entered into. In cases where property has been received or money paid to the corporation seeking to avoid the obligations of an ultra vires contract, the person delivering the property or paying the money has the remedy of recovering back that which was given to the corporation on the faith of the ultra vires contract. This, however, as has been said several times by the Supreme Court of the United States, is not a recovery on the contract, but is, in effect, an avoiding of the contrnct and a restoration of the parties to their status quo ante. St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; Central Transp Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. In this case no money or property was paid by the plaintiff to the guarantor defendant, and there is no way by which the parties can be restored to their condition before the contract was entered into and performed. However this may be, the suit here is upon the contract, and, as the contract is void, it gives the plaintiff no right of action against the corporation.'

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"For the foregoing reasons I am of the opinion the contract of guaranty could not have been enforced against the bankrupt company, and cannot be against the estate of the bankrupt. The order entered by the referee disallowing McNatt's claim is approved and confirmed, and the costs of this certificate will be taxed against claimant."

132 Fed. 620.

Payee: Indorsement Where More Than One Payee is Named.

The following quotation from 79 Pac. 343, states the law as to the indorsement of commercial paper payable to more than one payee:

"The point is made that the notes given by the plaintiffs in payment for goods sold and delivered to them are made payable to G. Winehill and the Anti-Trust Distilling Company, and therefore Winehill alone could not assign and transfer them. The rule of law seems to be that, where a promissory note is made payable to two persons, one cannot assign the whole, or even his own moiety, but it can only be transferred by the joint indorsement of the two payees. Smith v. Whiting, 9 Mass. 333; Johnson v. Magnum, 65 N. C. 146; Ryhiner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130; Wood v. Wood & Wood, 16 N. J. Law, 428. The notes in question, however, were not made payable to two persons. Winehill was doing business, as the evidence shows, under the name of G. Winehill Anti-Trust Distilling Company. The notes were so made payable. Winehill and the Anti-Trust Distilling Company were, therefore, for the purpose of these notes, in legal effect, one and the same. The notes were in favor of Winehill, and could be assigned by him. Bryant v. Eastman, 7 Cush. 113; Medway Cotton Manufactory v. Adams et al., 10 Mass. 360."

It is said that if John Jones dies leaving a will naming three executors, who qualify as such, that any one of the three can properly indorse a note payable to John Jones. But if the note is payable to the three executors, naming them, as executors of the estate, such note requires the indorsement of the three. One partner can indorse for the firm if the paper is drawn in the firm name. But it is held that if the firm has adopted a firm name, one partner has implied authority to bind his partners to commercial paper only by using the firm name. So if paper is drawn payable to several persons it requires the indorsement of each of them, although the persons named may comprise a firm or may be collectively acting as agents, trustees, executors, etc. The indorsement of one of several payees transfers no interest whatever in the paper.

Bona Fide Holder: Certificate of Deposit: Transfer: Gaming Contract.

J. F. Wassell was the owner of the certificate of deposit described, in effect, in accompanying illustration. While in Washington, D. C., he indorsed and transferred it to J. Edward Thomas, who had charge of the office of E. J. Arnold & Co., who were engaged in betting on horse races, or in soliciting money from the public which it was alleged was to be bet on horse races.

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B. 23. Certificate of Deposit: Check: Transfer in Gaming Transactions: Bona Fide Holder: Indorser.

No. 2734

Certificate of Deposit

First National Bank

Belleville, Ill. Sep. 11. 1902

L. B. Russell has deposited in this Bank

Thirteen Hundred & Thirty Five Dollars

payable to himself ____ or order on return of this certificate properly indorsed. 4% interest if left six months.

$1335

James Knickern

Cashier.

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Arnold & Co., of St. Louis, had a branch office in Washington, in charge of J. E. Thomas, where patrons were invited to invest money and participate in profits made by Arnold & Co., in betting on horse races. J. F. Wassell, the owner of the certificate, desired to invest the amount of it with Arnold & Co. Thomas told him that Arnold & Co., would accept nothing but cash, but that he, Thomas, would take the certificate and turn in the cash, which was done. Arnold & Co., failed soon afterward and Wassell could not get his money. He then notified the bank of the facts and directed them not to pay the certificate, and they did not. Thompson then brought an action against them for the amount. By the statutes of Illinois: "All promises, notes, bills, bonds . . . or other securities . . . where the whole or any part of the consideration shall be for any money . . . won by gaming . . . or bet upon races . . . shall be void and of no effect. Under this law the Court held that Thompson could not recover, and it seems that an innocent purchaser of the certificate from Thompson would have fared no better. The Court said in part: "In . . . 57 Ill. 295, it was held that where a party, in possession of two drafts for $1,000 each, drawn in his favor, had lost $1,500 at gaming, indorsed the drafts, and delivered them to the winner, and received the difference, $500, in money, under our statute against gaming the indorsement was void, and the property in the drafts remained with the payee, *and although in the hands of an innocent holder for value, such indorsement had no more effect that could be given to it provided it had been forged.*" The question was raised as to whether the laws of the District of Columbia, where the certificate was assigned, did not govern as to the validity of the assignment. The Court — the Supreme Court of Illinois — held that it did not. Colorado has a statute to the same effect of the Illinois one as to the validity of the assignment or indorsement of negotiable paper made under circumstances similar to this, and in a recent case in its courts, 70 Pac. 162, McM. Com. Cases, No. 617, Where a certificate of deposit issued by a Colorado bank was indorsed and transfered in Texas in payment of a present gambling debt, it was held that an innocent holder, for value, could enforce it against the Colorado bank, there being no law in Texas making such indorsement or transfer void.

The Colorado Court said, in part, on this last point: "By this independent contract (indorsement) the indorser is regarded as undertaking to pay *at the place* where his indorsement is made . . . (and) in determining the liabilities . . . growing out of this contract of indorsement, the indorser is bound by the law of the place where he made the indorsement, even though the instrument, bill, or note which he indorsed was expressly payable elsewhere."

McMasters Com. Cases, Vol. 1906, 72 N. E. 801.

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Wassell transferred the certificate for the purpose of investing the money in the Arnold & Co. game, and it was so placed. The money was lost to Wassell, and he notified the bank of the facts and instructed them not to pay the certificate.

Thomas sued the bank on the certificate and was beaten. The court said that under the Illinois statute in relation to gaming contracts, Thomas could not have recovered even if he had been an innocent purchaser of the certificate. The statute mentioned, after declaring instruments representing gaming transactions void, provides: "No assignment of any bill, note, bond . . . shall, in any manner, affect the defense of the person giving, granting, drawing, entering into, or executing the same, or the remedies of any person interested therein."

The law of the State where an indorsement is made or where an instrument is transferred usually governs the liability of the indorser and the legality of the transfer. It was not shown that this indorsement and transfer was void in Washington, where it took place. But the Illinois court held that this was immaterial, as its law declaring such transfer void would be enforced by its courts, no matter where the transfer took place. Colorado has a statute, on this point, similar to the Illinois one, and, in a recent case arising under it, its courts held that a transfer as above set forth would give a subsequent innocent holder a good title. (79 Pac. 162; McM. Com. Cases, No. 617). The Illinois court says that such indorsement gives no better title than a forged indorsement. The court said in part:

WILKIN, J. (after stating the facts). "It is contended by counsel on behalf of appellant that the certificate of deposit sued on, when indorsed by the original payee, became, in effect, a promissory note, and upon being presented to the bank for payment by the holder, properly indorsed, it was the duty of the bank to immediately pay the same. This, it is said, is so because the title to the certificate was absolutely vested in and became the property of the assignee at the time of its indorsement, and that the only defense which the bank could make to this suit was such as would go to the ownership of the instrument, affecting the title thereto, such as forgery. Conceding the law to be as claimed in all legitimate transactions, it has no proper application to the facts in this case. The defense does question the title of the plaintiff to the certificate of deposit sued on. Section 131 of chapter 38 of our statute (Hurd's Rev. St. 1903) provides: 'All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, . . . where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, . . . shall be void and of no effect.' Section 136 of the same chapter provides: 'No assignment of any bill, note, bond . . . shall, in any manner, affect the defense of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein.' It is

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insisted by appellant that section 131, above quoted, has no proper application to the transaction between the appellant and J. F. Wassell, because the latter, as a customer of Arnold & Co., did not agree to enter into a gambling transaction, but was a mere depositor with them, investing his money in the business of that firm. In the case of Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15, it was held, where a party in possession of two drafts for $1,000 each, drawn in his favor, had lost $1,500 at gaming, indorsed the drafts, and delivered them to the winner, and received the difference, $500, in money, under our statute against gaming the indorsement was void, and the property in the drafts remained in the payee, and, although in the hands of an innocent holder for value, such indorsement had no more effect than could be given to it provided it had been forged. Under that authority the indorsement made by Wassell to appellant in furtherance of a gambling transaction was null and void, and the title to the certificate of deposit remained in the payee. When the suit mas brought appellant had no more claim against the bank than if the indorsement had never been made; and it had not only the right, but it was its duty, to question plaintiffs title to the instrument sued upon. Williams v. Judy, 8 Ill. 282, 44 Am. Dec. 699. It certainly cannot be seriously contended that the business of Arnold & Co. was not that of gambling, so far as they were engaged in bookmaking, pool selling, and betting on horse races, nor that the scheme by which they obtained money from customers was not for the purpose of carrying on that illegitimate business. Their agreement to pay customers the unprecedented profit of 2 per cent. per week strongly tended to prove that calling them depositors was a mere subterfuge. At least, the evidence fairly tended to show that the money which was deposited with Arnold & Co. was nothing more nor less than placing money in their hands to be used in gambling, 2 per cent. per week to be the depositor's share of the winnings. Whether the transaction was an honest, legitimate one, or a mere device to avoid liability under the statute against gambling, was a mixed question of law and fact, which has been settled adversely to the appellant by the judgment of affirmance in the Appellate Court. It seems to us unreasonable, under the evidence in this case, to contend that the appellant was a bona fide assignee of the certificate. He was the agent and promoter of Arnold & Co. in their gambling transactions, and he knew their methods of doing business. Wassell had the right to stop payment on the certificate in order to protect himself against loss. It then not only became the right, but it was the duty, of the defendant bank to interpose the defense interposed.

"It is next insisted that, the assignment being made in the city of Washington, and the principal office of Arnold & Co. being located in St. Louis, and no law of either the State of Missouri or District of Columbia having been offered in evidence condemning the transaction in those jurisdictions, the assignment should have been sustained, and judgment entered for the plaintiff, notwithstanding the statute of this State. The principal office of Arnold & Co. was in St. Louis, but the evidence shows that they carried on their gambling business to a greater or less extent in Illinois. The certificate of deposit was issued by an Illinois bank, the assignor, Wassell, was a resident of this State, and the suit to recover the amount of the certificate was brought by the plaintiff in a court of this State. A contract made in one State, though lawful there, will not be enforced in another, where to do so would contravene

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the criminal laws of the latter, or where to do so would be against the express prohibition of its laws. Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No jurisdiction is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Story on Conflict of Laws, § 27. Therefore, conceding that there was no law in the District of Columbia or in the State of Missouri prohibiting the making of gambling contracts, it was contrary to the laws of this State, where appellant sought to enforce his remedy."

72 N. E. 801.

Savings Bank: Payments Made to Person Presenting Book After Death of Depositor.

In 1871, Ellen Neville opened in her name an account with the Buffalo Savings Bank. She died in 1878. In the meantime she had made sixteen deposits and had drawn two checks on the account. At the time of her death the balance to her credit was $884.43. At this time she was living with her two sisters and her mother, and one or all of them took possession of her pass book. During the next five years this pass book was presented to the bank ten times by either the mother or one of the sisters, and on such occasions entries of interest were made or checks were paid signed with the name of Ellen Neville — the bank being ignorant of her death.

In 1883 the account was closed. In 1901, twenty-three years after Ellen's death, and eighteen years after the closing of the account, one of the sisters — the mother and the other sister being dead — applied for and received letters of administration, and sued the bank for $884.43 and compound interest thereon — some $2,100. She was beaten in the lower courts, but on appeal the payments by the bank after the death of Ellen were held bad.

Two rules of the by-laws of the bank were important factors in the litigation. They were: (1) "The secretary will endeavor to prevent fraud, but all payments made to persons producing the deposit books, or duplicates thereof, shall be good and valid payments to the depositors respectively." (2) "On the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded."

The court of last resort held, in effect, that if these payments had been made, as they were, in good faith, the bank would have been protected, under the first rule above stated, but for the fact that the second rule binds the bank, under any and all circumstances, to pay the money to the legal representatives of the deceased depositor.

This court said that it was in the power of the bank to adopt a by-law

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that would bind future depositors' estates to good-faith payments made after the depositor's death, as well as before such event.

A form now in use to cover this point, excepting the mention of the power of attorney, is:

"On the decease of any depositor the amount standing to the credit of the deceased shall be paid to the person presenting his pass book (or his power of attorney?), until the bank shall be notified in writing of the death of the depositor by some person interested in his estate. After such notice the deposit shall be paid to the legal representative of the deceased on production of letters of administration or letters testamentary."

Savings banks, and other banks as well, often pay money on the authority of a power of attorney issued by the depositor and addressed to the bank.

In a recent case in New York a depositor had executed a power of attorney, in form as directed by the bank, the original, or a duplicate of which, was filed with the bank. The depositor died early one morning, and after such death, and before the bank had heard of it, the person named in the power of attorney, as having power to draw the money, drew $2,000 from the bank. The death of the person executing the power of attorney terminated the power instanter, and payments thereafter on the strength of it would be at the peril of the bank, regardless of whether the bank knew of the death or not. This danger exists in all transactions under the ordinary power of attorney. In the last mentioned case the executor of the depositor sued the bank and recovered judgment for the $2,000. The judgment stands reversed on the ground that certain evidence was not admitted at the trial which would tend to show that the person drawing the money under the power of attorney was the owner of it by gift from the depositor on her death bed.

The statement of law as to the termination of the power, and the risk of subsequent payment under it, was not questioned.

Doubt has existed as to the power of a person to execute, in the ordinary manner, a power of attorney that would bind his estate as to transactions taking place after his death. The Court of Appeals of New York has said that by assenting to a by-law of a bank a person may bind his estate to a possibly fraudulent transfer of his money, after his death, by one armed with the depositor's bank book. Certainly a power of attorney directed to a bank is a higher character of instrument than is the depositor's pass book. Then why should not a power of attorney ratifying irregular payments made in good faith after the death of the principal, before his death is made known to the bank by some one interested in his estate, be good? If such an instrument is good between the bank and the depositor's estate, then why not between two individuals? If so, the following clause inserted in a special power of

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attorney — one directed to a specific person or institution — must be of great cautionary value:

> "The power hereby conferred on ——— shall cover any transactions, of the nature covered by this power, which may be had with ——— after my death, until written notice of my death shall be served on ——— by some person interested in my estate."

The court said in part:

"I concur for reversal, but upon a more radical ground. While the defendant could have adopted a rule that would cover a payment made in good faith to a person in possession of the pass book of a deceased depositor, it had not done so when the payments in question were made. As its rules then stood, such a payment bound the depositor when he was alive, but did not bind his estate after he was dead, for they expressly provided that 'on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded.' This rule is absolute and a part of the contract. It is the law of the case made by the parties. The language is that of the bank, and hence, if ambiguous, is to be construed in favor of the depositor, who is not responsible for the ambiguity. If we add to it, in effect, the proviso, 'But payment to one presenting the pass book of a deceased depositor shall be good unless the bank has notice of the death,' we make a new contract."

See Decision No. 837.

Stolen Note: Alteration: Indorser: Bona Fide Holder: Negotiable Instruments Law.

H. W. Stevens gave a note, as shown, in effect, in accompanying illustration, to one Snow, who indorsed it in blank and put it in his desk. Snow alleged that subsequently Stevens stole the note, so indorsed, from his desk. It was discounted for Stevens by the Massachusetts National Bank. Stevens died, and, thereafter, the bank sued Snow as indorser of the note.

Snow set up the defense of alteration of the note, — the words "seven per cent. having been written in after the words "with interest" on the face of the note, and also the fact that the note was stolen from him. The bank was beaten in the lower court, but this judgment was reversed on appeal. The rule as to a stolen negotiable note seems to be that the subsequent bona fide holder gets good title if the note was originally put in circulation by the maker. If it is stolen from the maker before he has delivered it to be put in circulation it is a nullity so far as the maker is concerned. As to the material alteration of a negotiable instrument, the rule has been that it released all of the parties to the instrument that did not consent to the alteration. In States where the Negotiable Instruments Law is in force the rule now is that the bona fide holder of such altered instrument may enforce it according to its original tenor. The court said in part:

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"The notes, being endorsed in blank, were payable to bearer, within the meaning of the statute. Rev. Law, c. 73, § 26 (5). When the notes were taken to the plaintiff for discount, Stevens was the bearer. Rev. Laws, c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. Pettee v. Prout, 3 Gray, 502, 63 Am. Dec. 778. Upon the undisputed evidence, and upon the defendant's admission that the plaintiff took them in good faith, and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. Rev. Laws, c. 73, §§ 69–76; Boston Steel & Iron Company v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments, or defect in the title of Stevens, under the rule prescribed by the statute. Rev. Laws, c. 73, § 73. This rule, namely, that, to constitute such notice, the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is the same as prevailed in this commonwealth before the enactment of the statute. Smith v. Livingston, 111 Mass. 342; Lee v. Whitney, 149 Mass. 447, 21 N. E. 948; International Trust Co. v. Wilson, 161 Mass. 80–90, 36 N. E. 589.

"The defendant's contention that, after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the Negotiable Instruments Act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. Wheeler v. Guild, 20 Pick. 545, 550, 553, 32 Am. Dec. 231; Worcester, etc., Bank v. Dorchester, etc., Bank, 10 Cush. 488, 57 Am. Dec. 120; Wyer v. Same, 11 Cush. 51, 53, 59 Am. Dec. 137; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; London Joint Stock Bank v. Simmons (1892), App. Cas. 201, and cases cited; Smith v. Bank, 1 Q. B. D. 31; Goodman v. Simonds, 20 How. 343–365, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. Ed. 645; Kinyon v. Wohlford, 17 Minn. 239 (Gil. 215), 10 Am. Rep. 165; Clarke v. Johnson, 54 Ill. 296; Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Kuhns v. Gettysburg National Bank, 68 Pa. 445. The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course: 'But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed.' Rev. Laws, c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course, this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See Greeser v. Sugarman (Sup.), 76 N. Y. Supp. 922. Upon

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B. 24. Stolen Note: Bona Fide Holder: Title: Alteration: Negotiable Instruments Law.

$1000
Boston, Mass. December 4, 1899
Three Months after date I promise to pay to
the order of Chas. Brown
Geo. Howard ——— Dollars
at Massachusetts National Bank
Value received, with interest -7%
No. ——— Due 3/9
A.B. & Attorney.

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The facts in this case, as alleged by Snow, the indorser of the note of which this is an illustration, and as assumed by the court, were: H. W. Stevens, doing business as H. G. & H. W. Stevens, delivered this note to Snow in payment of a debt; Snow endorsed the note and placed it in his own desk, from which Stevens stole it and took it to the bank and had it discounted for his own benefit. Stevens died, and the bank sued Snow as indorser of the note. Snow defended the action on the ground that the note was stolen from him and that the bank was not therefore a holder in due course, and further, that after it was indorsed it was altered without his consent by the words "seven per cent" being written after the words "with interest" on the face of the note. Snow won in the lower court, but it was held on appeal that conceding the truth of his allegations he was liable on the note. The negotiable instruments act is in force in Massachusetts, and that act provides that a holder in due course, not a party to the alteration, may enforce payment of the altered instrument according to its original tenor. As to a stolen negotiable instrument the general rule has been — and the negotiable instrument law so, in effect, provides — that if it is stolen after the maker has lawfully parted with it — has fully executed it and delivered it — has negotiated it, a subsequent innocent purchaser's title is not tainted by the theft and all parties to the instrument are liable. If, however, a complete instrument is stolen from the maker before he has negotiated or delivered it to be negotiated or put in circulation, then an innocent purchaser cannot enforce it against the maker, although it might be enforced against one who had indorsed it after the theft, whether ignorant of the theft or not. 21 Mich. 415, 72 Ill. 559, 50 At. 897. It was conceded that the bank had no actual notice of the defect in the title of Stevens, and no notice that would successfully charge it with bad faith in the transaction. The negotiable instruments law holds, in effect, that the notice of defects in an instrument, to an otherwise innocent purchaser, which will of itself defeat his title, must be notice which will stamp his action with bad faith. The law — the negotiable instrument law — has materially strengthened the position of the good faith but careless purchaser of tainted paper. "Holder's rights cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide his title, according to the settled doctrine, will prevail. 150 N. Y. 59.

McMasters Commercial Cases, Vol. 1905, 72 N. E. 959.

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the defendant's statement and the counsel's theory of the case, the rule is applicable. The note was not only complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, 'Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto,' was inapplicable. The instrument had taken effect, and was subsequently negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer. Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise. We are of the opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute. There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141, it is provided that 'when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.' This language is directly applicable to the present case. See Scholfield v. Earl of Londesborough (1894), 2 Q. B. 660, (1895) 1 Q. B. 536, (1896) A. C. 514; Schwartz v. Wilmer, 90 Md. 136–143, 44 Atl. 1059."

See Decision No. 838.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Company, Appt. v. UNITED STATES.

25 Sup. Court, 202.

CONTRACTS — EFFECT OF USAGE — PERFORMANCE.

* * * * * * * *

2. The delivery and receipt of 4,634 tons of coal, under a contract for the delivery and acceptance of "about 5,000 tons," does not so complete the contract as to entitle the vendee for that reason to refuse a tender of the remaining 366 tons.

* * * * * * * *

2. By the terms of the second contract (June 23, 1898) the appellant agreed to deliver and the United States agreed to "receive about 5,000 tons" of coal, delivery to commence with about 2,200 tons, to arrive at Honolulu on or about the 1st day of October, 1898. By the 7th of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor, and tendered the coal to the United States in fulfilment of the contract to deliver 5,000 tons. The United States refused to receive it, and the appellant sold it in the open market for $3.06¼ per ton less than $9, the contract price. This was the best price which could be obtained, and the loss to appellant was $1,120.87. The Court of Claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to re-

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ceive, about 5,000 tons of coal, and equally reciprocal is the liability for non-performance of the obligations. The only question can be, Is 366 tons less than 5,000 tons, "about 5,000 tons?" We think not. The difference is too great. We said in Brawley v. United States, 96 U. S. 168, 172, 24 L. Ed. 622, 624, that in engagements to furnish goods to a certain amount the quantity specified is material and governs the contract. "The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." See also Cabot v. Winsor, 1 Allen, 546, 550; Salmon v. Boykin, 66 Md. 541, 7 Atl. 701; Indianapolis Cabinet Co. v. Herman, 7 Ind. App. 462, 34 N. E. 579; Cross v. Eglin, 2 Barn. & Ad. 106; Morris v. Levison, L. R. 1 C. P. Div. 155, 158; Bourne v. Seymour, 16 C. B. 337, 353; 38 N. Y. Supp. 341, 342.

The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

Judgment reversed, and cause remanded with directions to enter judgment for appellant (claimant) in the sum of $1,120.87.

Mr. Justice Holmes concurs in the result.

GALVIN v. BEALS.

SAME v. WINCHENDON SAV. BANK.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 6, 1905.)

LANDLORD AND TENANT — DUTIES OF LANDLORD — REPAIR OF PREMISES — PROMISE TO REPAIR — NEGLIGENCE — EVIDENCE.

1. A tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the demised premises, unless the landlord agrees to repair, makes the repairs, and is ngligent in making them.

2. The fact that a landlord makes other repairs is not evidence that he agreed to keep the demised premises in repair.

3. Where there is an agreement to repair, the landlord cannot be held liable for a defect unless reasonable notice thereof is given to him.

4. Where a tenant complained of a defect in the door and in the steps, but said nothing about a defective piazza railing, and the landlord promised to make repairs, and did remedy the defects complained of, he was not negligent in failing to repair the railing, and the tenant could not recover for injuries sustained by the giving way of the same.

5. A tenant was injured by the giving way of a defective piazza railing. Previous to the injuries she had complained of other specified defects in the premises, and the landlord had promised to repair them, but nothing was said about the piazza railing. Held, that evidence that the landlord assured the tenant, after making some repairs, that everything was safe and sound, and that she need not fear to use the piazza, did not show negligence in failing to repair the piazza railing.

LATHROP, J. These are two actions of tort, tried together in the Superior Court, to recover for personal injuries sustained by the plaintiff in consequence of the giving way of a railing of the piazza of the house

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in which she was the sole tenant. At the close of the plaintiff's evidence the judge ruled that there was no evidence of misfeasance on the part of the defendant as distinguished from a mere nonfeasance, and that there was no evidence to warrant a verdict for the plaintiff; and on that ground directed a verdict for the defendant. This ruling was excepted to, and is the principal question in the case. There is also an exception to the exclusion of evidence, to which we shall refer hereafter.

The bill of exceptions leaves us in doubt whether there was sufficient evidence to hold either defendant as the landlord of the plaintiff, but we shall assume, for the purposes of this case, that one or the other of the defendants might have been found to be the landlord, and that the ruling was made on another branch of the case.

The plaintiff's evidence tended to show that she hired the house in question in April, 1899, of George C. Beals, son of the defendant in the first case; that Beals let houses for his father, and also for the defendant in the second case, in the same neighborhood where the house he let to the tenant was situated. George C. Beals had made repairs upon the house at several different times prior to September 1, 1899. The plaintiff testified that about September 1st, when George C. Beals came to collect the rent, she told him that she would not stay in the house any longer, and that he said: "Well, Mrs. Galvin, my father wants you to stay here, and I will make repairs right away. Just tell me what you want of them, and I will see that it is done next week." She further testified that she told him that "the front door would not fasten, that there was no lock and knob on it, and that the front steps were not fit for use;" that Beals then said, "Everything will be fixed up next week, sure;" that within a few days Beals brought lumber there, and two days after he put a new board in the floor of the piazza, a new tread in the steps, a door bell on the door, and that she heard him hammering there for quite a while. The plaintiff further testified that two days later she made use of the piazza for the first time, that she stepped out of the front door onto the piazza, and went to the railing on the right as she came out to air a rug, and as she was in the act of doing so, leaning over the railing on the right, the railing as a whole gave way, and she fell to the ground below. On cross-examination the plaintiff testified that she did not remember that in any of her talks with Beals she had said anything about this rail nor that he did. George C. Beals, who was called by the plaintiff as a witness, testified that his father, the defendant in the first case, was the treasurer of the defendant in the second case; that he (the witness) let the house, and that his father had nothing to do with the letting or keeping the premises in repair. The witness also denied the conversation which the plaintiff testified to, but admitted repairing the steps, and testified that about two weeks before the accident he happened to notice the railing which gave way, and found it weak and shaky, but made no repairs upon it. The testimony of George C. Beals is reported at length. The most significant part is that his father told him to take charge of certain houses and collect the rents, and that he felt that in taking charge he could make repairs. For the purpose of showing negligence on the part of the defendants the plaintiff offered to prove that immediately after Beals had finished the work he assured the plaintiff that everything was safe and sound, and that she need not fear to use the piazza. The judge refused to admit the evidence on the question of the negligence of the defendants, but admitted it upon the question of the plaintiff's due care.

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The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them. Rowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471; Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465; McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; McLean v. Fiske Wharf & Warehouse Co., 158 Mass. 472, 33 N. E. 499; Marley v. Wheelwright, 172 Mass. 530, 52 N. E. 1066. The fact that the landlord makes other repairs is not evidence that he agreed to keep the premises in repair. McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; McLean v. Fiske Wharf & Warehouse Co., 158 Mass. 472, 33 N. E. 499. It also has been held that where there is an agreement to repair, the landlord cannot be held liable for a defect unless reasonable notice of such defect is given to him. Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127; Marley v. Wheelwright, 172 Mass. 530, 52 N. E. 1066. The plaintiff seeks to bring this case within Gill v. Middleton, 105 Mass, 477, 7 Am. Rep. 548, where the landlord was held liable for negligence in making repairs which he had promised and undertaken to make. But there is no evidence in the case before us that the alleged agent undertook to do anything about the railing, or that he did anything about it. The plaintiff complained to him of certain defects, and these he remedied. Nothing was said about the railing. The plaintiff has failed to bring her case within the one upon which she relies. The ruling of the court that there was no evidence of a misfeasance was therefore right. The evidence offered was immaterial to the issue. It did not tend to show that the agent had made repairs as to the railing, or had undertaken to do so. It must be shown, in order that the plaintiff may maintain her action, that repairs as to the railing were actually made, and that the work was negligently done. The evidence, if admitted, would not have tended to show either of these essential elements.

Exceptions overruled.

Check as Evidence of Gift.

John W. Collins, believing that he was on his death bed, delivered to his friend, Frank Phinney, the check described in accompanying illustration, drawn by Collins to the order of Phinney. The check was delivered with the statement by Collins, in presence of the attending physician, "If I don't get over this I want Frank to have my money. I don't want it to go to Skagit county." Collins forwarded the check for payment by mail to the bank on which it was drawn. The letter containing the check was misdirected, and before it reached the bank Collins died, and the bank, hearing of his death, refused to pay the check. Collins made no will, and he left no known relatives. Phinney claimed the check, and the amount it represented, as a gift. The rule is, as stated by the Supreme Court of California: "It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive. The check in the pres-

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B. 25. Check as Evidence of Gift: Death of Drawer Before Presentation of Check.

LACONNER. WASH. February 1907

BANK OF LACONNER

Pay to the order of Frank Phinney

Four Thousand ——— Dollars

$4000 ——

Jno. W. Collins

Edward V. Brodrick & Bro., 34 Broad St. N.Y.

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Collins, the drawer of this check, who was in a dying condition, had no family or relatives. He was attended by a close friend, Frank Phinney, the payee of the check, and by a doctor. Believing that he would not recover, Collins instructed the doctor to fill out this check, which Collins then signed and delivered to Phinney, saying; "If I dont get over this, I want Frank to get my money. I dont want it to go to Skagit county." The check was not presented to the bank until after Collins death, when the bank refused to pay it to Phinney. The Appellate Court said that Phinney was entitled to the money. This ruling is apparently contrary to all of the decisions of other States in which a check does not operate as an assignment, pro tanto, of the funds against which it is drawn, and a check does not so operate in Washington, where the negotiable instruments law is in force. The Court intimate that their decision would have been different if the deceased had died leaving a family or relatives or creditors. The rule, generally, is that where one in contemplation of death desires to make a gift which shall be operative in case he dies of his then illness, he must deliver to the donee, or to some one for the donee, the thing to be given or some symbol of it, or something representing it. Neither the donor's own note nor his check on a Commercial bank operate as a gift at such time, if they remain unpaid at the donor's death. The note is a mere promise to make a gift, and so is the check until the bank pays it. At the donor's death the direction of the drawer to the bank to pay the check is revoked and the check becomes, like the maker's note, his promise to pay, void as a gift. The delivery of a savings bank book accompanied with appropriate words operates as a gift under such circumstances, but this is not so as to pass books in other banks. 110 Mass. 325, 36 Conn. 88, 78 Iowa 426.

In a recent case in California the Court said: "It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive. The check in the present instance was a mere order or authority to the payee to draw the money, and, being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee . . . Until the check was either paid or accepted, the gift was incomplete, and in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check." 71 Pac. 83; 13 Mich. 282; 130 Mass. 350; 111 Pa. 130.

Collin's said that he did not want his money to go to Skagit county, and the Court saw that it didnt. In doing so it seemed to have adopted a new rule as to gifts and as to the disposition of property after death. The decision worked justice, fairness at least, in this case, but it probably ought to go out to laymen with a red lantern on the rear.

McMasters Commercial Cases, Vol. 1905, 78 Pac. 927.

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ent instance was a mere order or authority to the payee to draw the money, and, being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee. . . . Until the check was either paid or accepted, the gift was incomplete; and, in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check. 71 Pac. 83; 13 Mich. 282; 130 Mass. 350."

There is, possibly, an exception to this rule in States where a check operates as an assignment of so much of the fund it is drawn on, as it calls for. But it does not so operate in Washington, where this case arose, such State having adopted the Negotiable Instruments Law. It is held universally that the delivery of a savings bankbook with appropriate words of gift will entitle the donee to the fund, if the gift is made in contemplation of death, and the donor dies from the disease from which he then fears death, without intervening recovery, but this is not the case with the delivery of an ordinary pass book of a commercial bank.

The decision in this case is printed, not to show "what the law is," but as illustrating what perseverance may do in face of "the law" where common sense, fairness, and apparent equity are with the litigant. The court cites, as apparently sustaining its position, from Daniel on Negotiable Instruments, second vol., section 1643: "We have seen already that a check operates as an assignment of the fund on which it is drawn pro tanto, from the very time it is drawn and delivered, as between the drawer and the payee or holder."

The court also cites "Morse on Banks and Banking." The rule cited was law in a very few States, but never was in a great majority of them. It never was the rule of the United States courts, and one of such courts sitting in Illinois refused to adopt it, although it was the rule of the Illinois State courts. It is not the rule of the Negotiable Instruments Law, which is in force in Washington. That law says: "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank." . . .

Collins said that he did not want his money to go to Skagit county, and the court saw that it didn't. In doing so it seems to have adopted a new rule as to gifts, and as to the disposition of property after death. The decision worked justice, doubtless, in this case, but it probably ought to go out, to laymen, at least, with a red lantern on its rear.

See Decision No. 839.

Savings Bank: Title of Account: Payment: Gift.

John C. Roof and Sarah Ann Roof were husband and wife. Each had an account in the Jefferson County Savings Bank. January 8th, 1896, they signed a paper, of which the following is a copy: "Theresa, N. Y., Jan. 8, 1896. To Jefferson County Savings Bank — Gentlemen:

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We, the undersigned, owners of bankbooks No. 23,661 and No. 25,472, issued by your bank, desire to have the accounts therein merged into an account running to John C. Roof or Sarah Ann Roof or the survivor of them; our object being that in case of the death of either the other may draw the whole amount. John C. Roof, Sarah Ann Roof. Witnesses: Mary E. Countryman, Lizzie Countryman." This paper was delivered to John C. Roof. Ten days thereafter Sarah Ann Roof died. The paper was presented to the bank by John C. Roof, and the bank changed the account of Sarah Ann Roof by writing after her name in the ledger and in the pass book, "and John C. Roof." The administrator of the estate of Sarah Ann Roof demanded of the bank the amount standing to the account previously in her name, alleging that the order directing the change in the account was not presented to the bank until after her death. The court of last resort held that the answer to this allegation was the turning point of the case. If the order was presented before the death of the wife, then the husband was entitled to the money, but if presented after her death he was not entitled to it.

It is not here decided that this form of account, even if opened in the lifetime of both parties, will in all cases entitle the survivor to draw the money. In this case there was a consideration for the agreement. In most of these cases there is no consideration for the agreement, and the money is in fact the property of one of the two, not of both.

The court said in part:

"This brings us to a consideration of the question as to whether the order is deemed to be revoked by the death of Mrs. Roof before it was delivered to the bank and the change in the deposit made. The order was executory until its delivery to the bank and the changes in the deposits were made. It, consequently, could be revoked by either party at any time before the order had been complied with. It is contended that Mrs. Roof did revoke by her statements in monosyllables, but these declarations were too vague and uncertain to warrant a finding of fact to that effect. If it was revoked, it was by reason of her death before it was delivered to the bank. The paper, as we have seen, was a mere executory order, which did not constitute an executed gift, or make either of the parties thereto a creditor of the other. Mrs. Roof only intended to give her husband the same right to draw upon their joint account that she had until her death, and then, if he survived her, the right to draw the whole; but before her order had been executed she died, and her estate at once became vested in her heirs at law, or, upon proof of her will, in her collateral relatives specified, subject to the life use of her husband. If her husband had become her creditor, he could prove his claim as against her estate; but he was not a creditor. If the execution of the paper was a gift in præsenti, then, of course, the money on deposit became his; but it was not such a gift, nor so intended, for she retained the right to draw every dollar of the fund and use it for her own purposes. It was not a gift inter vivos, for the reason that, as we have shown, the order was executory and not executed. It was not a gift causa mortis, for the reason that the parties, at the time

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of executing the paper, were not suffering from any disease or apprehensive of death from any impending perils. The paper, as we have seen, was left in the possession of John C. Roof. He is deemed, therefore, to have become the agent of his wife to take the paper to the bank; but, if he failed to do this within her lifetime, his agency, by the happening of that event, is deemed to have been revoked. Schouler on Personal Property (volume 2, § 86) correctly states the rule as we understand it: "An agency is revoked by the principal's death; therefore the agent of one who intends a gift inter vivos must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime, otherwise the gift fails as though the donor himself had failed to make a seasonable delivery. Nor can a gift inter vivos be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease, for a gift of personalty made after this fashion must stand, if at all, as a gift causa mortis, or else on the footing of a testamentary disposition, with all the formalities of a will. Delivery, then, in all cases of ordinary gift, must have been made during the donor's lifetime. But if the gift has been once completed, so as to fully transfer the beneficial interest from donor to donee, in accordance with their mutual intent, and so as to make any third party holding the custody the trustee for carrying out the original purposes of the donation, or the donee's agent, the subsequent death of the donor, sooner or later, will leave the gift unimpaired." Story on Agency, § 488; Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 289, 34 N. E. 784, 36 Am. Rep. 696.

"We conclude that the question as to whether the order was delivered to the savings bank during the lifetime of Mrs. Roof is material, and under the evidence the question as to whether it was so delivered was for the jury, and that the exception taken by the appellant to the nonsuit raises an error of law which requires a reversal of the judgment.

"A contract by which each of two owners of a fund, as tenants in common, transfers his interest therein to the other if he survives him, is supported by a good consideration, and I see no reason why the intention of the parties should not be enforced by the courts. While such an agreement cannot be performed until after the death of one of the parties, it is complete and irrevocable, for neither can withdraw therefrom without the consent of the other. It is not testamentary in character, because it is founded on a valuable consideration, and is not subject to revocation. It is as absolute as a deed, 'which is to take effect so as to pass the title at' the death of the grantor. Worth v. Case, 42 N. Y. 362, 366; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. 845, 24 Am. St. Rep. 424. When a husband takes securities payable to himself or his wife, they become hers if she survives him, and the delivery thereof to her by him is not necessary to perfect the gift. Sanford v. Sanford, 45 N. Y. 723; Fowler v. Butterly, 78 N. Y. 68, 72, 34 Am. Rep. 507. This is upon the theory of a gift where there is no consideration but where there is a contract between husband and wife, resting upon a mutual and equal consideration, providing that the security created by both and standing in their names severally shall belong to the survivor, effect must be given to it, or the law of contracts is violated.

"Without prolonging the discussion, I am of the opinion that there was a question of fact, other than that discussed in the prevailing opinion, which should have been sent to the jury, and I therefore concur in the result."

See Decision No. 840.

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Legal Position of Maker of Note Changed to That of Surety: Release of Such Maker: Statute of Limitations.

March 21, 1887, E. H. Williams borrowed of Timothy Ryan $4,000, giving his note therefor secured by a deed of trust of certain lands. The note is described in accompanying illustration. November 29, 1897, Williams sold the land to the Scott Investment Company, and it agreed to pay this note. September 4, 1890, the company sold the land to N. W. Carey, who agreed to pay the note and incumbrance. Interest was paid on this note regularly by the company during the times it owned the property, and Carey paid interest from September 4, 1890, until March 21, 1892, after which no interest was paid by any one. These interest payments, and $1,000 of principal paid by the company, were indorsed on the note at the times of payment. March 17, 1894, the land was sold by the trustee under the deed of trust and the proceeds of the sale indorsed on the note, leaving a balance of some $1,500 due thereon. The holder of the note sued Williams for this balance. It was held, that as to Williams, the claim was barred by the statute of limitations. The court said:

"This cause comes to this court on a certificate by the St. Louis Court of Appeals that the opinion of said court herein is in conflict with an opinion by the Kansas City Court of Appeals in Vender v. Markle, 37 Mo. App. 234.

"The statement and opinion by Goode, J., of the St. Louis Court of Appeals, is as follows:

"'March 21, 1887, the respondent executed to Timothy Regan, the father of the appellant, a promissory note for $4,000, due two years after date, and bearing compound interest at the rate of 8 per cent. The note was given for part of the purchase price of some land in Springfield, and to secure it a deed of trust was executed and delivered, on the same day, by the defendant and wife to Charles H. Goffe, trustee for said Timothy Regan, beneficiary. It contained the usual covenants and powers to the trustee to sell in case of default, "and receive the proceeds of the sale, out of which should be paid, first, the costs and expenses of this trust, and, next, all amounts expended for taxes and other purposes, and, next, the amount that may remain unpaid on said note and the interest thereon." November 29, 1887, the defendant and wife conveyed the real estate covered by said deed of trust to the Scott Investment Company, which, with the full consent and approval of the payee, Regan, assumed and agreed to pay the note as part of the purchase price of the land. Interest was paid at the end of each year to March 21, 1890, on which date not only the interest, but $1,000 of the principal, were paid by the Scott Investment Company. The following indorsement was put on the note: "Paid on the within $1,000.00 as principal in part and $320.00 as interest to March 21, 1890, and time on Bal. of note extended one year." September 4, 1890, the Scott Investment Company conveyed the land to A. W. Carey, who likewise assumed and agreed to pay the incumbrance on it. Interest was paid to March 21, 1892. Afterwards defaults occurred, and on the 17th day of May, 1894, the trustee, Goffe, at the request of the beneficiary, sold the property under the deed

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B. 26. Maker of Note Liable Only as Surety: Release of Surety: Statute of Limitations.

St. Louis Mo Mch 21 1887
Two Years after date I promise to pay to
the order of Cyrus Keran
Four Thousand Dollars
at the Linden Bank at 6% Annually
Value received.
No. 6161 Due
W. Williams

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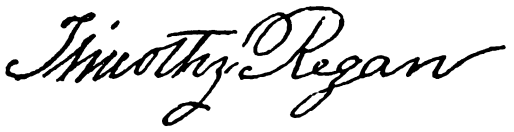

Williams, the maker of this note, borrowed of the payee, Regan, $4,000, giving as security therefor this note secured by a mortgage on real estate. The same year, Williams sold the real estate to the Scott Investment Company, the company assuming the mortgage and the payment of this note. The company paid the interest promptly each year until 1890, and, March 21, 1890, it paid $1,000 of the principal, all of which was indorsed on the note. That year the company sold the land to A. W. Carey who assumed and agreed to pay the encumbrance. Carey paid the interest until March 21, 1892, when he defaulted. In May, 1894, the mortgage was foreclosed and the property was sold for $2,000, the net proceeds of the sale being indorsed on the note. The holder of the note sued Williams, the maker of the note and mortgage, for the balance due thereon -- some $1,500. The principal defense interposed by Williams was the statute of limitations. The payments indorsed on the note were made in time and manner sufficient to bind the person primarily liable on the debt when the payments were made, but not sufficient in time and manner to bind one who became surety after the inception of the note. When Williams sold the property and the purchaser assumed the debt, and the holder of the note was informed of the fact, Williams' obligation became of that of a surety only (and in many States this is so whether the holder of the debt acquiesces in the changed relation or not), and the payments on the note did not bind him so as to stop the running of the statute of limitations, and he was therefore released from all liability. The court said in part: "The rule is that payments made by the principal, or by one of several joint obligors before the debt is barred, will stop the statute. But the reason why a payment by the principal stops it as to a surety is not because one is principal and the other surety, but because both are usually joint promisors . . . Whether or not the statute ceased to run in favor of (Williams) when the payments were made by the subsequent (purchasers of the land) depends, then, on whether he can be considered a joint promisor with them. Undoubtedly he was not. They were not parties to the note when it was made, and only became obligated by subsequent contracts . . . with Williams. In no sense were they joint obligors with him. Their promises neither coincided with his in point of time, nor were made with the same person, nor based on the same consideration. They were separate and distinct undertakings. As to the credit on the note made by the trustee, from the proceeds of the sale, under the deed of trust or mortgage, the court said in part: We do not find any clause in the deed of trust authorizing (the credit), but such act was in the scope of his (the trustee's) authority. To say that he was empowered by Williams . . . when the deed of trust (mortgage) was executed to make such credit . . . would be, in our estimation, a very strained deduction."

McMasters Com. Cases, Vol. 1905, 84 S. W. 959.

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of trust for $2,000, and, after deducting the expenses of the sale, credited the remainder, $1,934.80, on the note. The present plaintiff was the owner and holder of the instrument when this action was commenced, but is affected by whatever equities exist against the payee. The defenses are that Williams was released by extensions given by Timothy Regan, and that the debt was barred by the statute of limitations. There is testimony tending to prove that the Scott Investment Company purchased the property with an understanding with Regan that the time of payment should be extended, and would not have purchased without it. The trial court made a special finding of the facts, in which it found against the view that there was an agreement as to the extension of time when Williams sold to the Scott Investment Company. It also found that the defendant had neither made, nor caused to be made, any payment on the note, except that the trustee, under the authority of the deed of trust, credited thereon the amount received at the sale. This finding is supported by the evidence. The action was instituted on the 4th day of May, 1900.

"'Opinion of the Court.

"'The sale of the land by the original mortgagor, Williams, to the Scott Investment Company, and the assumption of the incumbrance by the latter, converted said company into the principal debtor with reference to the incumbrance, and the defendant into a surety. Wayman v. Jones, 58 Mo. App. 313; Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1017, 71 Am. St. Rep. 602. Timothy Regan, who then held the note and knew all about the arrangement, was bound thereafter to recognize said parties in those capacities. Nelson v. Brown, supra.

"'We must be controlled by the finding of the lower court that there was no agreement for an extension of the time of payment, either between Williams and the Scott Investment Company, or between the latter and Timothy Regan, at the time the company purchased the land. When the extension was entered on the note, the entire principal and one year's interest were due. The accrued interest and $1,000 of the principal were paid. It is the law in this State that a contract like that, for the extension of the time of payment, is without consideration and not binding, so that the creditor may, if he chooses, immediately press for payment despite his agreement to extend; that therefore a surety is not released by such a transaction between the maker and payee. Brown v. Kirk, 20 Mo. App. 524; Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154. In some jurisdictions the rule is otherwise where there is not simply an agreement to forbear proceedings to collect, but a formal, executed stipulation to postpone the maturity of the instrument. Benson v. Phipps, 87 Tex., loc. cit. 580, 29 S. W. 1061, 47 Am. St. Rep. 128, and many cases cited. The decisions of the court to which we owe fealty must be followed, and we approve the ruling of the learned trial judge that the extension did not discharge the defendant as surety.

"'In reply to the defense that the statute of limitations had run against the note before this action was begun, plaintiff asserts that the payments of interest by the Scott Investment Company and Carey to March 21, 1892, prevented the running of the statute, not only in favor of said parties, but of the defendant as well. The ruling that payment by a principal will suspend the statute as to a surety is invoked as ap-

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plicable because, by operation of law, the subsequent grantees of the land covered by the deed of trust became principals and the defendant a surety. The proposition contended for is sound enough, generally speaking. Craig v. Callaway County Court, 12 Mo. 94; McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378; Block v. Dorman, 51 Mo. 31; Vernon County v. Stewart, 64 Mo. 408, 27 Am. Rep. 250; Bennett v. McCanse, 65 Mo. 194. These payments were made while the note was still alive, and the rule is well established that payments made by the principal or by one of several joint obligors, before the debt is barred, will stop the statute. But the reason why a payment by the principal stops it as to surety is not because one is principal and the other surety, but because both are usually joint promisors; that is, the surety is affected by the act of the principal in his capacity as a joint promisor. The idea is that persons who jointly bind themselves are all liable to the promisee by virtue of their original agreement, so that performance or part performance by one is the act of all. Sigourney v. Drury, 14 Pick. 387; Brandram & Wharton, 1 Barn. & Ald. 463; Atkins v. Tredgold, 2 Bar. & Cresw. 23. The principle only applied where the payment was made by one originally liable. Sigourney v. Drury, supra.

"'Whether or not the statute ceased to run in favor of the defendant when the payments were made by the subsequent grantees depends, then, on whether he can be considered a joint promisor with them. Undoubtedly he was not. They were not parties to the note when it was made, and only became obligated to pay it by subsequent contracts between themselves and the maker, Williams. Their responsibility, far from resting on a promise by them given in conjunction with Williams to the payee, Regan, rests exclusively on the promises they made afterwards to assume the debt. In no sense were they joint obligors with him. Their promises neither coincided with his point of time, nor were made with the same person, nor based on the same consideration. They were separate and distinct undertakings. Maddox v. Duncan, 143 Mo., loc. cit. 621, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678; Corbyn v. Brokmeyer, 84 Mo. App. 649. Those cases hold that a payment made by one whose promise is collateral does not interrupt the statute as to the original obligor. The precedents are all against this contention of the appellant. Trustee of Old Almshouse Farm v. Smith, 52 Conn. 434; Cottrell v. Shepherd, 86 Wis. 649, 57 N. W. 983, 39 Am. St. Rep. 919; Barlock v. Ashberry, 19 Ch. D. 539; Home Life Insurance Company v. Elwell, 111 Mich. 689, 70 N. W. 334; Princeton Savings Bank v. Martin, 53 N. J. Eq. 463–465, 33 Atl. 45; Underwood v. Patrick, 94 Fed. 468, 36 C. C. A. 330. Zoll v. Carnahan, 83 Mo. 35, is in point by Analogy. We hold that the payments of interest made by the Scott Investment Company and by Carey did not prevent the statute from running in favor of the defendant.

"'It is insisted by the appellant, in the second place, that the case is taken out of the statute by the credit Goffe, the trustee, put on the note of the proceeds arising from the foreclosure sale of the land. The trustee, it is claimed, was the agent of both the mortgagor and mortgagee, and for certain purposes he was; not for that one, however. It was his duty to protect the interests of both parties in the performance of his office, and he was liable to either for damages resulting from his malfeasance. Sherwood v. Saxton, 63 Mo. 78. We do not find in the deed of trust any clause authorizing the trustee to enter a credit on the

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note of the proceeds of sale in case of foreclosure, but such an act was in the scope of his legal authority. To say that he was empowered by Williams to make such a credit on the latter's behalf, or that it was contemplated or expected he should do so when the deed of trust was executed, would be, in our estimation, a very strained deduction. Notes secured by deeds of trust are commonly paid and the trustee not called on to act; often the land passes from the mortgagor before the debt falls due, under an agreement by the purchaser to assume and pay the incumbrance, as happened here. Williams had no control over the trustee, whose agency, as far as it went, was irrevocable. It is going too far, then, we think, to hold the trustee first named, or his possible successors in the persons of different sheriffs, was or were empowered or appointed by the mortgagor to bind him at any subsequent date by crediting the proceeds of a foreclosure on the note. As has well been said, it is not the indorsement of a credit, but the payment, that operates as a renewal of a promise and removes the bar of the statute of limitations. Curtis v. Nash, 88 Mo. 476. The party relying on a payment to stop the statute must not only establish that it was made, but made by the authority of the defendant. Murdock v. Waterman (N. Y.) 39 N. E. 829, 27 L. R. A. 418; Bender v. Blessing (Sup.) 31 N. Y. Supp. 481. "Part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it." 1 Wood on Limitations, § 99. The payments must be made by or with the consent of the payor. Gardner v. Early, 78 Mo. App. 346; Phillips v. Mahan, 52 Mo. 197. If credits are entered by the holder without the knowledge or consent of the payor, they are ineffective to check the statute. Goddard v. Williamson's Adm'r, 72 Mo. 131; Loewer v. Haug, 20 Mo. App. 163. The prima facie showing from the fact that the credits were entered when it was against Regan's interest to do so, is overcome by the positive proof that the defendant had nothing to do with them and knew nothing about them. The credit made by the trustee, instead of being the result of a payment directed by Williams expressly or by necessary implication, was made in invitum. It was a collection enforced by foreclosing the security.

"'The question we are considering has been several times passed on by the courts, and we believe, with one exception, the judgment was that such an application by the trustee or mortgagee of the money obtained by sale did not stop the statute. It was held by this court in Leach v. Asher, 20 Mo. App. 656. The Kansas City Court of Appeals ruled differently in Bender v. Markle, 37 Mo. App. 234, without noticing the previous case. These opposing decisions were commented on by the Supreme Court of Nebraska in a controversy as to the effect of such a credit by the trustee in a deed of trust on lands in Missouri. The proposition is ably discussed in that opinion, and the view of this court adopted on the ground, "that such payment was not a voluntary one on the part of Carr (the mortgagor), but one made in invitum and by operation of law." Moffit v. Carr, 48 Neb. 403, 67 N. W. 150, 58 Am. St. Rep. 696. To the same purport is the impressive voice of the Supreme Court of Massachusets in a recent case. The opinion says: "The ground upon which part payment is held to take a case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay

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it or the balance. To have this effect it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment. Roscoe v. Hale, 7 Gray, 274; Stoddard v. Doane, 7 Gray, 387; Richardson v. Thomas, 13 Gray 381, 74 Am. Dec. 636. In the case at bar the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate, and to appropriate the proceeds to the payment of the mortgage debt. But this cannot fairly be construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations. At the time of the sale the plaintiff had no interest in the property. He had no right to the proceeds of the sale. The money which, it is claimed, was applied in part payment of the note, was not his money. It would be applied by law to the extinguishment pro tanto of his debt, but the application was not under his control and involved no action of his mind. It does not appear that he had any knowledge of the sale. It is absurd to say that the fact in this case would fairly lead to the inference that the plaintiff intended to renew his promise to pay the note." Campbell v. Baldwin, 130 Mass. 199. It is noteworthy that the law in Massachusetts and Nebraska is that a sale by a pledge of collateral security and the application of the money in part payment of the debt will toll the statute. But the Supreme Courts of those States did not think such instances analogous to this one, which they likened rather to transactions in which credits are given for dividends declared by an assignee, that are always held not stop the course of the statute in favor of the debtor. Marienthal v. Mosler, 16 Ohio St. 566; Stoddard v. Doane, 7 Gray, 387; Pickett v. King, 34 Barb. 193; Roosevelt v. Mark, 6 Johns. Ch. 266; Light's Estate, 136 Pa. 211, 20 Atl. 536, 537. Involuntary payments are, we believe, usually held not to take the case out of the statute. Whitney v. Chambers, 17 Neb. 90, 22 N. W. 229, 52 Am. St. Rep. 398; Roscoe v. Hale, 7 Gray, 274; Stoddard v. Doane, 7 Gray, 387; Battle v. Battle (N. C.) 21 S. E. 177. In Hughes v. Boone, 114 N. C. 54, 19 S. E. 63, it was ruled that a partial payment of a judgment made on execution would not interrupt the running of the statute. It is held that the credit is applied by the assignee as a legal duty, and not by direction of the assignor.' So it is of the credit of a trustee or mortgagee. The proposition that such an act by either affects the statute as to the mortgagor is incompatible with the principle on which payments are given suspensive effect. This principle, as stated, is that the payments, whether made by the mortgagor in person or by his accredited deputy, are a recognition by him of his debt and a tacit promise to discharge it. The reasoning which deduces such a conclusion from the credit made by the trustee or mortgagee is extremely artificial; in fact, opposed to common knowledge. It is consistent with the ordinary conduct of men to think that Williams desired or empowered Goffe to bind him to pay his note by the credit which the latter indorsed.

"'The decision has gone quite far enough towards defeating the purpose of the limitation law. Woonsocket Institution v. Ballou (R. I.) 16 Atl. 144, 1 L. R. A. 555. The indisputable reception accorded by the courts to the two great legislative policies embodied in the statutes of limitations and of frauds has often provoked regret, and a disposition more favorable to them has supervened. We have no inclination to encroach further on the limitation law or create fresh exceptions to it

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and rule, therefore, that the credit made by Goffe does not impair the defense of the statute, and affirm the judgment.'

"The foregoing opinion of the St. Louis Court of Appeals correctly announces the law upon the facts of this case, and is in all things approved and adopted as the opinion of this court, and the views expressed by the Kansas City Court of Appeals in Bender v. Markle, 37 Mo. App. 234, in conflict therewith, are disapproved, and will no longer be followed."

84 S. E. 959.

Bill of Lading Attached to Draft: Delivery of Bill of Lading Before Payment of Draft: Sales.

Brogden & Bryan bargained to one Cox, a resident of another State, a carload of apples, subject to inspection on arrival, and accordingly shipped the apples, drawing on Cox for the amount, attaching to the draft a bill of lading for the shipment. The draft with bill of lading attached was sent to a bank for collection. The bank delivered the bill of lading to Cox before payment of the draft, and Cox disposed of the apples and did not pay the draft.

Cox was insolvent during all of the times mentioned, and it seems that the apples arrived in a damaged condition.

The shippers sued the bank for the amount of the draft. The lower courts were of the opinion that the bank was liable for the face amount of the draft irrespective of the condition of the apples and of the insolvency of Cox.

The court of lest resort held that, under these circumstances, the true measure of damages was the value of the apples at the time of their arrival.

The court said in part:

"On a former day of this court the judgment of the trial court was affirmed. On the filing of a motion for a rehearing, we certified to the Supreme Court the question whether or not the ruling in sustaining the demurrer was proper. The answer given is as follows: 'The exceptions should not have been sustained. If the facts alleged be true, the plaintiffs are not entitled to recover the face of the draft. The same measure of damages is applicable to this case as applies to ordinary agents. Hamilton-Donaldson & Co. v. Cunningham, 2 Brock. (U. S.) 350, Fed. Cas. No. 5,978. According to the allegations of the answer, the appellant did not receive the draft drawn by Cox upon Hineman & Johnson in payment of the draft of appellees upon Cox, but received it for collection, as a means of collecting the appellees' draft then in its hands. It is averred in the answer that Cox was insolvent, and that the draft could not have been collected. Therefore the appellees did not, by the act of appellant, lose the amount of the draft on Cox, but, by surrendering the bill of lading, appellant enabled Cox to convert the apples to his own use, thereby depriving Brogden & Bryan of the carload of apples. The loss was the value of the apples at Ennis at the

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time Cox took possession of them, less the freight charges, and that is the measure of damages applicable to the facts set up in the answer. Thomas v. Morse, 80 Tex. 290, 16 S. W. 48; Brightman v. Reeves, 21 Tex. 77; Griggs v. Day (N. Y.) 32 Am. St. Rep. 725, note; First National Bank v. Fourth National Bank, 77 N. Y. 320, 33 Am. Rep. 618; 3 Am. & Eng. Encyc. Law, 814.' 83 S. W. 1098, 11 Tex. Ct. Rep. 586.

"The motion for rehearing is granted, and, in compliance with the views of the Supreme Court, the judgment of the trial court is reversed, and cause remanded."

84 S. W. 601.

Sales: Warranty.

"W. F. Main & Co., who claimed to be 'manufacturing jewelers,' and to have the 'largest jewelry factory in the world,' sold to Dearing & Wallace, merchants at Prairie Grove, Ark., a varied assortment of jewelry. The contract contained an invoice thereof, stating what each article was and its price. The bill aggregated $180. Aside from a 'profit guaranty,' which does not enter into this case, the contract contained a 'warranty and exchange obligation,' which reads as follows: 'Warranty and exchange obligation: Any jewelry in this assortment failing to wear satisfactory will be duplicated free of charge if returned to us within five years. Jewelry can be exchanged for new jewelry in plated, filled, or solid gold any time within twelve months from date of invoice. The purchaser hereby waives all right to claim failure of consideration, or that goods are not like sample, or not according to order; unless he has exhausted the terms of warranty and exchange.' After the goods were received, examined, and some sold, all of which was returned as worthless, Dearing & Wallace sent them back to appellants, who did not take them out of the express office. Main & Co. sued Dearing & Wallace for the contract price. The plaintiffs proved the shipment and contract, and this as to the value: 'Reasonable value of jewelry is $180, and especially is this true under the agreements of the contract, providing for warranty and exchange and for profit guaranty, all of which is plainly printed in contract.' The defendants testified that the jewelry was not of the character they bought. All they sold was returned as brassy and worthless. The entire lot was cheap, brassy goods, and worthless. They wrote the plaintiffs they would not handle it, and getting no reply, returned it to them. Other witnesses testified it was worthless. Dearing & Wallace did not ask for exchange under the terms of the contract, nor did Main & Co. offer it. The court instructed the jury, in substance, that if the goods were worthless and valueless, and not of the kind described in the contract, the defendants were authorized to terminate it, and ship the goods back, and not be liable for the price. The jury returned a verdict for the defendants, and the plaintiffs appealed."

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HILL, C. J. (after stating the facts). "App
is no fraud proved to vitiate the contract, and b
were required to exhaust the exchanging proc
before they could defend a suit for failure of
written in the contract, but there is also writte
bolder letters, the law. Ordinarily the law im
ity, leaving that a matter of contract between t
exception to this rule as thoroughly recognize
a manufacturer offers his goods for sale, wh
spection is not present before the purchase, th
on his knowledge of his own manufacture.
implies a warranty that the articles shall be me
fit for the purpose for which they were inten
48 Ark. 325, 3 S. W. 517; Weed v. Dyer, 53
Bunch v. Weil Bros. & Bauer, 72 Ark. ——, 8
80. Mr. Benjamin thus amplifies this statemer
not, without any warranty, insist that it shall be
or fineness, but the intention of both parties n
it shall be salable in the market under the den
contract. The purchaser cannot be supposed to
on a dunghill.' Benjamin on Sales, § 656. Th
be true the testimony that these goods were wor
warranty which the law wrote into this contr
terms of it.

"*There is no error in the judgment, and it is*

84 S. W. 640.

Broker: Unauthorized Sale of Principal's Stoc

The rule of damages, where a broker makes a
the stocks of principal, as here set out, is a quotat
in the Supreme Court of Connecticut:

"The court rightly refused to instruct the
damages in actions of this character is the value o
of the sale, with interest. Although contracts lik
the purchase of stocks of a fluctuating value upo
lative in character, they are not, for that reason, i
bona fide employment of the broker to make an
stocks to be held for delivery upon payment
Hatch v. Douglas, 48 Conn. 116, 40 Am. Rep. 15
contract with the defendants, for the purpose of
nized by the law as valid, he may recover as dam
it compensation for the loss of profits caused by
of the defendants, and which could not have bee
cise of reasonable prudence and diligence on his
tiff was required, after notice of the sale, to 'so a
ages as small as he reasonable could. The law g
he should have by indemnifying him for the da
sarily sustains.' Wright v. Bank of the Metropo
18 N. E. 79, 83, 1 L. R. A. 289, 6 Am. St. R

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measure of the plaintiff's damage was therefore 'the excess, if any, over the price realized (at the sale of June 10th) of the lowest sum for which he could have repurchased the stocks after notice of the sale had he given an order to that effect with reasonable promptness.' Wiggin et ux. v. Federal Stock & Grain Co., 77 Conn. —, 59 Atl. 607; Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. To enable a customer to recover damages from his broker for such an unauthorized sale of stocks, it is not necessary that the former should have actually repurchased them, or have ordered them repurchased. The question is, when, in the exercise of reasonable diligence and judgment, ought he to have ordered a repurchase, if he desired to obtain the benefit of a possible future advance in price? But in determining when the customer had the first reasonable opportunity to replace the stocks sold his financial inability to do so is not an element to be considered, although, when he has sufficient means, he is entitled to a reasonable time to convert his securities into cash in order to raise the sum required to replace the stocks. Burhorn v. Lockwood, 71 App. Div. 301, 75 N. Y. Supp. 828. The trial court therefore erred in instructing the jury that the plaintiff's financial condition was to be considered in determining when the first reasonable opportunity was afforded him to replace the stocks which had been sold.

"Proof that after the sale on the 10th of June the price of the stocks advanced was not admissible under the allegations of the complaint. The goods having been sold upon the market, a subsequent advance in price, and a consequent loss of profits, were not results which necessarily followed from the unauthorized sale.

"It is said that such loss of profits is the natural and proximate result of the wrongful act complained of. That is true of all damages, whether general or special, which may be recovered in an action of this character; the difference between them being that the former are such damages as follow as a matter of course from the wrongful act complained of, while the latter include those injuries and losses which are not the necessary results of such a wrongful act, 'but in fact follow it as a natural and proximate consequence.' Bristol Mfg. Co. v. Gridley, 28 Conn. 201–211. Proof of the fact that the price of the stock advanced after the sale, and before the plaintiff had a reasonable opportunity to replace it, was necessary to enable the paintiff to recover damages in excess of the market price at the time of the wrongful sale. As such advance did not necessarily follow from the sale, the damages which resulted therefrom to the plaintiff were special, and should have been specially alleged in the complaint. Crug v. Gorham, 74 Conn. 541–544, 51 Atl. 519; Taylor v. Town of Monroe, 43 Conn. 36.

"Error, and new trial granted. The other judges concurred."

50 Atl. 698.

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MARSH, MERWIN & LEMMON v. WHEELER et ux.

(Supreme Court of Errors of Connecticut. Dec. 16, 1904.)

59 Atl. 410.

TRADING PARTNERSHIPS — AUTHORITY OF PARTNERS — COMMERCIAL PAPER — ISSUANCE — DISSOLUTION — NOTICE — AUTHORITY OF AGENT.

* * * * * * * *

"The copartnership of C. B. Wheeler & Co. was organized in 1896, and dissolved May 31, 1900. Its members were Charles B. Wheeler, Charles B. Marsh, and Edward H. Marsh. The two latter comprised another copartnership, known as Marsh Bros., engaged in the building trade. The purpose of the partnership of C. B. Wheeler & Co. was described in the partnership articles as 'carrying on the plumbing business.' It 'conducted a business of taking plumbing contracts, and used a shop in Bridgeport for its work, while its bookkeeping and the financial part of the business was done in the office of Marsh Bros. It had no store, and purchased only goods as it needed to fulfill its plumbing contracts. It did not buy and resell plumbing goods or any goods.' The partnership articles made it the duty of Marsh Bros. 'to attend to the general business of the concern, such as making all purchases, collecting bills, and any work in connection with the office work.' Marsh Bros. were also required to give the new firm all their plumbing work, if market prices thereon were net, and to give the use of their office free of rent for the office work of the business. It was made the duty of Wheeler to superintend the practical work of the firm. The articles contain no express provisions as to the utterance or indorsement of commercial paper. September 8, 1898, Charles B. Marsh signed the name of Wheeler & Co. to a negotiable note for $650, payable to Marsh Bros. one month after date at the plaintiff's banking house. He indorsed said note in the name of Marsh Bros., and took it to the plaintiffs, who are bankers, for discount to the credit of Marsh Bros. The plaintiffs discounted the note, and placed the proceeds to the credit of Marsh Bros. on their account. This note was thereafter renewed monthly until October 24, 1900, save that the amount was from time to time reduced by payments made by Charles B. Marsh, leaving the amount due thereon at that date $230. On November 10, 1899, another note of like tenor, but for $350, was similarly executed, indorsed, presented, and discounted. This note was renewed monthly, like the former until said October 24, 1900, when, partial payments having been made by Marsh, $190 was due thereon. On October 24, 1900, Marsh paid $10 on the notes, and renewed both by one note for $410, being the amount then due on said two notes. This note was on Nov. 26, 1900, renewed for $400, $10 being then paid. This last note is the one in suit. All the

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notes in these series were of similar tenor, except as to the amount, and the the amount in the case of each renewal was the amount of the note taken up, less the amount of payments thereon. All were executed, indorsed, brought to the plaintiff's bank, discounted, and the proceeds applied in precisely the same way; and all payments thereon were made by Charles B. Marsh, who alone came in contact with the plaintiffs in the matter. At the time each note was given and discounted, Wheeler & Co. owed Marsh Bros. on book account sums in excess of the amount of the notes, and that indebtedness still continues. No credit was given on this account for the sums received from the discount of said notes. Wheeler was ignorant of the existence of the notes and the transactions relating to them until shortly before suit was brought. He gave Marsh no express authority to execute the notes, beyond such as might be claimed from the partnership agreement; neither did he ratify Marsh's acts in relation thereto. No course of business on the part of the partnership was proven, from which authority to Marsh to sign the notes could be implied. May 31, 1900, the firm of C. B. Wheeler & Co. was dissolved by mutual consent. No formal notice of the dissolution was sent to the plaintiffs, and the plaintiffs had no knowledge or notice of such dissolution, except such as can be inferred from the fact that on August 1, 1900, Wheeler having formed another partnership relation for the conduct of the plumbing business, called at the plaintiff's banking house, and having stated to an employee that he wished to open an account, one Judson, an employee of the plaintiffs, met and made certain inquiries of him. Wheeler told him that he wished to open an account in the name of Wheeler & Ball. Judson asked if he was the same Wheeler who was with Marsh Bros. as C. B. Wheeler & Co., to which Wheeler replied affirmatively, and added that they had dissolved partnership, and he was going into business with Ball. Thereupon an account was opened in the name of the new firm of Wheeler & Ball, which account continued for ten months."

* * * * * * * *

PRENTICE, J. (after stating the facts). The question which naturally first presents itself in this case is as to whether or not the two notes bearing the name of C. B. Wheeler & Co., which the plaintiffs held at the time of the dissolution of said partnership, May 31, 1900, were in the plaintiffs' hands, paper upon which it was obligated. It is conceded by both parties that any such obligation is, under the facts found, solely dependent upon authority in Charles B. Marsh to make and utter negotiable promissory notes in the name of the firm. The plaintiffs contend that the articles of copartnership gave him express authority to that end. This the defendants deny. This claim, which rests upon a very slender foundation, may be disregarded. Upon the question of implied authority, the defendants rely upon the distinction recognized in Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, between commercial or trading and non-trading partnerships, and the further distinction, also recognized in that case, between the two classes of partnerships, in that

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$ 390 Bridgeport, Conn. Nov 16th 1906

Three months AFTER DATE we PROMISE TO PAY TO

THE ORDER OF Marsh Bros

Three Hundred and Ninety —— DOLLARS

AT Banking House of Marsh, Mellvin & Common

VALUE RECEIVED

NO. E DUE Nov 26/1 C. B. Wheeler and Company

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

B 27. Partnership Note: Liability of Partner on Note Renewed After Dissolution: What Is Legal Notice of Dissolution?

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C. B. Wheeler & Co., a partnership, described in its articles of partnership as formed for the purpose of "carrying on the plumbing business" was composed of C. B. Wheeler, who had charge of the execution of any contracts, and of C. B. & E. H. Marsh — ("Marsh Bros." — engaged in the building trade), who were to keep the accounts and do the general business of C. B. Wheeler & Co. Notes, of which this was the renewal, were signed in the name of C. B. Wheeler & Co., by C. B. Marsh, and discounted at the bank of M. M. & W. during the life of the partnership. Wheeler had no knowledge of any of these notes. After the original notes were given, but before this renewal was executed, Wheeler was in the bank of M. M. & W., on business of his own, and incidentally mentioned to a clerk there that the firm of C. B. Wheeler & Co. was dissolved. This, it was held, was not notice to the bank of that fact, and the bank had no other notice. [It may be stated, outside of this case, that publication of a notice of dissolution of partnership is not notice to customers of the firm unless they see it — they are entitled to actual notice, in no other way can retiring members protect themselves].

Wheeler was sued on this note. He set up the defense of the above notice of dissolution, and, further, that the partnership was a non-trading one, and, therefore, one in which no member of the firm had implied authority to bind the other members by signing or endorsing commercial paper. This last defense has been held good as to members of firms of lawyers, firms of insurance agents firms of publishers, real estate agents. 57 Ill. 538, 55 Conn. 53, 78 Mo. 128, 105 Ind. 415. But it was held here that this was a trading partnership, and Wheeler was liable. The court said in part. "A trading partnership is one which buys and sells . . . But buying and selling need not be the sole purpose" . . . "If the partnership contemplates payment or periodical purchases . . . for the purpose of selling again . . . either in its original or manufactured shape, it is a trading or commercial partnership. 63 U. S. 256.

"Wheeler & Co. conducted no store . . . whatever buying and selling it did was that incident to the execution of contracts" . . . "The value of the labor necessary to the adaption of the purchased articles . . . became a factor" "But that makes no difference." "The sale is not required to be in the same form as when purchased" . . . The firm carried on a business which contemplated frequent purchases . . . for the purpose of selling again in adapted . . . shape. Its business brought it in contact with the commercial world in transactions involving the use of credit and the usual instrumentalities of trade . . . it was a commercial or trading partnership, within the meaning of that term as used in this connection."

McMasters Com. Cases, Vol. 1905, 59 At. 410.

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the power of one partner to pledge the credit of the partnership in the emission of commercial paper is presumed with respect to trading, and not presumed, under ordinary conditions, with respect to non-trading partnerships. So far, there is no difference between the parties as to the law, and, as respects the legal consequences of the facts found, there is such a concurrence of views that the question of implied power resolves itself into the narrow one as to the class of partnerships to which that of Wheeler & Co. belonged, to wit, whether it was a trading or non-trading one. A trading partnership is one which buys and sells. But buying and selling need not be its sole purpose, nor even its most characteristic feature. A partnership for the conduct of a manufacturing or mechanical business is none the less a trading one for the reason that buying and selling in the market is only one of its incidents. George on Partnership, 92. In Kimbro v. Bullitt, 63 U. S. (22 How.) 256, 16 L. Ed. 313, the rule is stated as follows: "Wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership." Another statement of the principle is found in several authorities, to wit: "If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership." Bates on Partnership, 327; Baxter v. Rollins, 48 Am. St. Rep. 432, 439, note; Randall v. Merideth, 76 Tex. 669, 13 S. W. 576. But in whatever language the distinction between the two classes of partnerships is expressed, it is not to be forgotten that it is not a purely arbitrary one, but has an underlying reason and purpose, which should not be overlooked when an application to any given situation is attempted. This reason and purpose have their origin in a need on the part of certain partnerships, arising out of the kind and manner of their business, and the absence of such need on the part of others, and in the interest of the commercial world, into contact with which the business of the one class brings it into constant contact, and that of the other does not. Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; Kimbro v. Bullitt, 63 U. S. (22 How.) 256, 16 L. Ed. 313; Holt v. Simmons, 16 Mo. App. 97; Story on Partnership, § 102a. So it is with respect to those partnerships, the nature of whose business naturally comprehends certain courses of dealing, that the law says that they belong to the class denominated commercial or trading. These are those whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which, in their character and incidents, are like those of traders generally.

If we turn now to the case of Wheeler & Co., we find a partnership whose business was the taking and execution of plumbing contracts. It conducted no store, over whose counter articles it had bought were sold. Whatever buying and selling it did was that incident to the execution of plumbing contracts, as a stated business. It is common knowledge, however, that the execution of plumbing contracts in these modern days involves extensive purchases in the market of fixtures and fittings, of large cost. These are not bought for use by the buyer, but to be disposed of for money. The value of that which is bought enters as a large

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factor into the receipts of the contractor. The value of labor necessary to the adaptation of the purchased articles to their intended uses will also become a factor. But that makes no difference. The sale is not required to be of the articles in the same form as when purchased. It thus appears that the firm carried on a business which contemplated frequent and extensive purchases, not as incidental to an occupation or for use, but for the distinct purpose of selling again in an adapted or applied, if not the original shape, and that its business, therefore, carried it frequently into the market, and brought it into contact with the commercial world in transactions naturally involving the use of credit and the usual instrumentalities of trade. Its business being of such a character, it was a commercial or trading partnership, within the meaning of that term as used in this connection.

In view of these conclusions, the plaintiff's objection to the admissibility of testimony requires no consideration.

We have next to consider the validity in the plaintiff's hands of the note sued upon, which is neither of those hereinbefore determined to have been valid, but the last of a series of renewals thereof. Marsh, at the time that this note was made and discounted, was not a partner of Wheeler's. The firm of Wheeler & Co. had been dissolved some six months before its date, and before several of its predecessors in the line of renewal had been given. The plaintiffs, however, had no notice of the dissolution, unless the same was inferable from the circumstance that, upon an occasion prior to the date of the note, Wheeler went to the plaintiffs' banking house for the purpose of opening an account for a new partnership into which he had entered, and there met an employee of the plaintiffs, named Judson, who made certain inquiries of him, and that in response thereto he told Judson that he was the same Wheeler who had been a member of Wheeler & Co., that that firm had been dissolved, and that he had formed another partnership, for which the new account was desired to be opened. The finding was evidently intended to express the idea, and counsel have so treated it, that the plaintiffs had no knowledge of the dissolution, and dealt with Marsh in the matter of the renewals thereafter in good faith, in the belief that the firm still continued, and in reliance upon its assets and responsibility, unless the contrary should be inferred from the facts recited. "Notice to an agent must be within the scope of the agent's employment, and notice to him of any fact outside the scope of his agency will not affect his principal." Trentor v. Pothen, 24 Am. St. Rep., note, 233; Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Smith v. Board of Water Commissioners, 38 Conn. 208; Farrel Foundry Co. v. Dart, 26 Conn. 376; Willard v. Buckingham, 36 Conn. 395; Platt v. Birmingham Axle Co., 41 Conn. 255; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; Ward v. Metropolitan Life Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80; Bank v. Schaumburg, 38 Mo. 228; McCormick v. Wheeler, Mellick & Co., 36 Ill. 115, 85 Am. Dec. 388; New York Central Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468; Bank of Va. v. Craig, 6 Leigh, 399; Story on Agency, § 160.

It will be noticed that the statement made to Judson was incidentally made, and was not intended as a notice of dissolution. All that the finding discloses of this man who thus casually acquired the information imparted by Wheeler is that he was an employee of the plaintiffs. That

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he was not a janitor or errand boy is perhaps to be implied from the circumstances of the meeting, and the character and apparent purpose of his inquiries. It would appear that his duties brought him into connection with depositors and their accounts. Perhaps he was a teller. However this may have been, there is absolutely nothing in the finding to indicate even presumptively that his employment related to the bank's discounts, or comprehended within its scope anything which had to do with the Wheeler & Co. notes or obligation, or which gave him any knowledge that there were such notes or obligation. Whether his principal's responsibility be determined upon the theory of the legal identity of the principal and agent, or as arising from the duty which the agent's relation and the circumstances imposed upon him to communicate his information to his principal, the law, under these circumstances, does not impute Judson's knowledge of the dissolution of Wheeler & Co. to the plaintiffs. His information is not shown to be of a fact within the scope of his agency.

The Superior Court is advised to render judgment for the plaintiffs to recover the amount due upon the note in suit. The costs in this court will be taxed in favor of the plaintiffs. All concur.

NIXA CANNING CO. v. LEHMANN-HIGGINSON GROCER CO.

79 Pac. 141.

(Supreme Court of Kansas. Jan. 7, 1905.)

SALE — WARRANTY — MANUFACTURER — DEFECTS.

1. Where goods are sold by sample, and the seller is also the manufacturer, there is an implied warranty on his part that they are free from any latent defects that could not be discovered upon ordinary examination.

2. One engaged in putting up apples in cans for sale is a manufacturer within the meaning of the rule stated.

3. Where one sells to a merchant canned apples of his own packing, the sale being made by sample, and by reason of a defect, due to the method employed in their preparation, which could not be discovered upon an inspection of the opened sample cans, the goods sold become worthless before they can be resold in the ordinary course of trade, the seller is liable to the buyer for a breach of an implied warranty against such defect.

(Syllabus by the Court.)

MASON, J. The Lehmann-Higginson Grocer Company sued the Nixa Canning Company upon a claim that a quantity of canned apples purchased by the former from the latter under an implied warranty of merchantability had proved worthless. Plaintiff recovered a judgment, which defendant seeks by this proceeding to reverse. The trial court made detailed findings of fact, which generally tended to support the plaintiff's claim, and held the defendant liable for a breach of warranty. The principal question presented on review is whether under the findings the law implied a warranty that the goods sold were suitable for food. So far as necessary to the determination of this question, the facts found were as follows: The apples were put up in cans by the defendant for the purpose of selling them to merchants, and were bought by plaintiff,

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as defendant knew, to be resold to its customers. The sale was made by sample, the sample cans being opened and examined by the plaintiff before the purchase. The samples were apparently sound and fit, and were not in fact subject to any defect that could have been discovered by any reasonable examination. The goods sold were in all respects like the sample, but by reason of the character of certain substances that had been employed in the canning process they spoiled and became unmerchantable within a few months, and before they could have been disposed of in the usual course of trade.

Plaintiff in error contends that where goods are sold by sample there is, in effect, an express warranty of conformity to the sample, and no other warranty as to quality can be implied. This may be granted to be the ordinary rule as to transactions between merchants, but where the seller is also the manufacturer there is an implied warranty that the sample and goods sold are alike free from latent defects not discoverable upon ordinary examination. 15 Am. & Eng. Encyc. of Law (2d Ed.), 1227; Mechem on Sales, §§ 1329, 1331, 1346; Price v. Kohn, 99 Ill. App. 115. This exception to the general rule is not denied, but it is argued that the defendant was not a manufacturer; that the business of putting up apples in cans for sale is not one of manufacturing anything. There is a lack of harmony in the judicial decisions as to just what constitutes "manufacturing." This is abundantly demonstrated by the note to Williams v. Warren (N. H.) as republished in 64 L. R. A. 33, in which the cases are collected and reviewed. But it is wholly unnecessary to consider whether the term "manufacturing" could be aptly applied to the business of defendant in any other connection than that here presented. The only pertinent inquiry is whether defendant was a manufacturer within the reason and meaning of the doctrine holding the sellers of goods of their own making to a higher degree of accountability than other merchants. The reasons for such distinction are clearly stated in Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86, in these words: "In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. . . . But when the seller is the maker or manufacturer of the thing sold the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture." These reasons apply with as much force to one who undertakes to prepare fruits or other natural products, so as to render them suitable articles of merchandise, as to one who is a manufacturer within the strictest meaning of the term. He alone knows the details of the process employed; he alone controls it; and he must be deemed to represent that it is reasonably adapted to the end sought, and

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results in a product free from hidden defects. The buyer has no means of information as to such matters and of necessity must rely upon the seller's judgment. In Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690, it is said: "The sale of hams or bacon, which is the curing of pork in a particular manner, involves . . . the same principles of law which are applicable to manufactured articles, involving knowledge, skill, and fitness on the part of the manufacturer, who is also the seller, where he manufactures and sells his own goods." In Leggett v. Young, 29 N. B. 675, it was held that in a sale of canned lobster to a merchant by sample there is an implied warranty that it is merchantable and fit for food. We but follow the line marked out by the authorities, and certainly do no injustice in holding that in selling to plaintiff by sample canned apples of its own packing, both the samples and the goods sold being apparently sound and wholesome, the defendant, by implication, warranted that the process it employed did not involve the use of any deleterious substance the presence of which could not be detected by any reasonable examination, but which would in a short time render the fruit unfit for food, unmerchantable, and worthless. The court having found that there was a breach of such warranty, the plaintiff was entitled to judgment.

* * * * * * * * * *

The judgment is affirmed. All the Justices concurring.

Irregular Indorser: Liability: Negotiable Instruments Law: Protest.

In pursuance of an agreement with the makers and the payee of the note shown in accompanying illustration, John McCann indorsed the note before it was fully delivered to the payee, Michael R. Downey.

The note was not paid nor was it protested, nor did McCann have notice of its non-payment. His executor resisted payment, but McCann was held liable as a joint maker, the transaction having taken place before the adoption of the Negotiable Instruments Law in Rhode Island.

That law, which is in force there now, says: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

The court said in part:

"It was shown in evidence that the note was signed by the makers and delivered to one Hart, the agent of the plaintiff, who took it to McCann and procured his indorsement. The executor, McCann, resists the suit, and prays for a new trial on the ground that his testator was a mere accommodation indorser and did not sign until after the delivery of the instrument.

"The surviving parties do not seem to have a very clear recollection of the circumstances of this transaction. One of the defendants says that this note was given in renewal of a previous one on which McCann was indorser. If so, there can be no question that the surrender of the

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former note was sufficient consideration for the signatures upon this one. If it were an original transaction, however, which seems to accord best with the recollection of the other parties, it is well established by the circumstances, as well as by the weight of the testimony, that McCann's signature was appended in pursuance of an agreement between the parties, and was a condition of the credit given by the plaintiff. Therefore, although his agent took the paper in its incomplete form, he cannot be said to have accepted it until McCann's indorsement was affixed. Until then, the delivery was conditional.

"It has been uniformly held in Rhode Island until the passage of the Negotiable Instruments Act (Pub. Laws 1898–99, p. 222, c. 674), which does not apply to instruments made before July 1, 1899, that one who indorses a note payable to another before its issue is liable to the payee as a joint maker. Mathewson v. Sprague, 1 R. I. 8; Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Sawyer v. Brownell, 13 R. I. 141, 43 Am. Rep. 19.

"It makes no difference whether the signature is actually indorsed upon the note before or after it comes to the possession of the payee, if it is part of the agreement that the note shall be so indorsed to be acceptable. Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179; Hawkes v. Phillips, 7 Gray, 284; Leonard v. Wildes, 36 Me. 265; Samson v. Thornton, 3 Metc. (Mass.) 275, 37 Am. Dec. 135.

"The petition for a new trial is denied, and the case will be remanded to the common pleas division for judgment upon the verdict."

59 Atl. 929.

Gift: Savings Bank Account Payable to Either of Two: Payment After Death of One.

De Witt Ames had $584.72 on deposit in the Elmira Savings Bank. Being ill and apprehending that he would not recover, and desiring, as he said, that if anything happened to him he wanted Margaret Peckham to have this money, he delivered her the bank pass book and this writing: "Elmira, N. Y., April 7, 1902. The Elmira Savings Bank, Elmira, N. Y. — Gentlemen: Please let Mrs. Margaret Peckham sign the signature book and change my account so that she or myself can draw the money on deposit in your bank. Yours very truly,

"DE WITT AMES."

Mrs. Peckham presented this order to the bank, and it changed the account and the pass book so that the account run to "De Witt Ames or Mrs. Margaret Peckham."

From the effect of his then illness Ames died. Soon thereafter Mrs. Peckham presented the pass book to the bank, and it, with knowledge of the death of Ames, paid her the money. The executor of Ames's estate sued the bank for the money. The court held that the bank would not be protected in the payment to Mrs. Peckham, after the death of Ames, simply by the change in the form of the account. But it did hold that the delivery of the pass book, with the appropriate words of gift accom-

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B. 28. Irregular Indorser—Liability Changed By Negotiable Instruments Law: Protest.

$275.00 Detroit, Mich. 10th 1899

Six months after date I promise to pay to the order of Michael R. Devany

Two hundred seventy five Dollars

at the office of Duncan Building

Value received

No. Due Sept 10

Attest J. O'Connell Jacob O. Kuhn.

It appears that it was agreed between the makers of this note and the payee, Michael Downey, that if Downey would take the note John McCann would indorse it. The makers signed the note and delivered it to an agent of Downey who took it to McCann who wrote his name on the back of it. This was done before the Negotiable Instruments Law went into effect in Rhode Island, and, under the rule then existing in that State, McCann was liable as a joint maker, and he would not be released from such liability if the note was not protested, and it would seem that this note was not protested. Under the Negotiable Instruments Law, which is now in force in Rhode Island, McCann would be deemed to be governed solely by the liability of a regular indorser of commercial paper, and would, therefore, be released if the paper was not protested. The Negotiable Instruments Law says as to the liability of such irregular indorsers:

> "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity" . . .
>
> "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules" . . .

The Court, here, said in part: "The surviving parties do not seem to have a very clear recollection of the circumstances of this transaction. One of the defendants says that this note was given in renewal of a previous one on which McCann was indorser. If so, there can be no question that the surrender of the former note was a sufficient consideration for the signatures upon this one. If it were an original transaction, however, which seems to accord with the best recollection of the other parties, it is well established by the circumstances, as well as by the weight of the testimony, that McCann's signature was appended in pursuance of an agreement between the parties, and was a condition of the credit given by the plaintiff. Therefore, although his agent took the paper in its incomplete form, he cannot be said to have accepted it until McCann's indorsement was affixed. Until then the delivery was conditional. It has been uniformly held in Rhode Island until the passage of the Negotiable Instrument Act . . . which does not apply (in Rhode Island) to instruments made before July 1, 1899, that one who indorses a note payable to another before the issue is liable to the payee as joint maker . . . It makes no difference whether the signature is actually indorsed upon the note before or after it comes to the possession of the payee, if it is part of the agreement that the note shall be so indorsed to be acceptable."

McMasters Com. Cases, Vol. 1905, 59 At. 929.

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panying it, constituted a gift causa mortis, and as the donor did not recover from the sickness from which he apprehended death, the title and ownership to the money was in Mrs. Peckham.

The court said:

"The legality of the judgment appealed from depends upon the correctness of the decision of the trial court that Ames made a valid gift causa mortis to Mrs. Peckham of the moneys in question. She is not a party to the action, and the defendant bank has paid the money to her upon her production and presentation to it of the pass book in accordance with its rule requiring such production, and providing that 'all payments made to persons producing a pass book shall be deemed a good and valid payment to the depositors, respectively, and shall discharge the bank from any further liability.' If the money, however, in fact, belonged to the estate of Ames, and not to Mrs. Peckham, who produced the book and drew the money after his death, the bank having knowledge of such death when it paid the money to her, would not be protected by its rule. If, on the other hand, there was a valid gift causa mortis made by Ames to Mrs. Peckham, the money did not belong to the estate of Ames, and the judgment dismissing the complaint of his administrator suing therefor was correct. The essential elements to constitute such a gift are that it must have been made in contemplation of the donor's impending death by a clearly expressed intention to give in præsenti. The subject-matter of the gift must have been delivered and the donor must have died from the existing ailment or peril without revocation of the gift. Champney v. Blanchard, 39 N. Y. 111; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. There is no question in the case that Ames died from an ailment with which he was affected when it is alleged he made the gift. He had typhoid fever at the time. He feared he would not recover therefrom, and he died of that disease ten days thereafter. An examination of the evidence satisfies me that it is sufficient to clearly show not only that Ames intended to give the moneys to Mrs. Peckham, but to show the delivery of the pass book to her. The defendant had the evidence of Daniel F. Murphy and his wife, who were disinterested persons, and who, at his request, signed the paper executed by Ames on April 7th, as witnesses. Their testimony shows that they were sent for by Ames for the purpose of witnessing the instrument; that he inquired whether it was necessary to have a notary public, and was assured that two witnesses were sufficient. Murphy testified:

"'When we went in, my wife spoke to Mr. Ames, and asked what he wanted of her, and he said he had some money in the bank, and he wanted to let Maggie [Mrs. Peckham] have it if anything happened to him; and then he got up — he sat up in the bed — and the paper was put down there, . . . and he sat up like that and signed it. . . . He said he would have to have a run of typhoid fever, and he said he was afraid that he wouldn't get up again.'

"Mrs. Murphy corroborated this testimony. She testified that Ames said at the time: 'I have a little money over in the bank, . . . and I want her [Mrs. Peckham] to have it in case anything should happen to me;' that he then signed the paper in question, and, 'after signing it, he handed it back to Maggie.' The evidence in this respect was also

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corroborated to some extent by that of the mother and the sister of Mrs. Peckham. All this evidence clearly shows that Ames intended to give the money to Mrs. Peckham in case he died from the dangerous disease from which he was then suffering, and that his purpose in signing the request to the bank which he did was to effectuate such intent.

"The evidence also shows that the paper signed by Ames and the pass book were delivered to Mrs. Peckham, who on the same day took them to the defendant bank, where she signed its signature book, and where the defendant changed its ledger account and the pass book to read 'The Elmira Savings Bank, Dr., to De Witt Ames or Mrs. Margaret Peckham, Cr.' The message that Mrs. Peckham took to the bank from Ames, as testified to by the cashier, was that 'Ames wanted to know how to fix it so she could draw the money in case he should die.' The cashier further testified: 'I drew that instrument [the request referred to] in accordance with instructions received by me. I drew it to comply with those instructions as I understood them.' It is thus evident that the purpose of the bank was to so change the account and pass book as to give effect to the intent of Ames to let Mrs. Peckham have the money in case he died.

"All this repels the idea that the object of Ames in doing what he did and in having the changes made in the account was to create an agency in Mrs. Peckham to draw the money for his benefit during his life. Where the intent to make a gift appears so clearly as it does here, it is needless to examine the numerous authorities where no such intent appears as to the effect of a joint credit such as was shown in this account after it was changed. The evidence shows also that the pass book was delivered by Ames to Mrs. Peckham, who took it to the bank to procure the changes to be made, and that on her return from the bank she put it in the drawer of a desk belonging to her, where it remained until after he died. The fact that he kept his papers in this drawer, and had a key and access thereto, is not of much moment in view of the facts that she also had a key and access thereto, and that he had delivered the book to her when she took it to the bank for the purpose of making effectual his intention of giving her the money. It is apparent that the book was under her control by his assent all the time after it was given to her by him. Such a delivery, accompanied by the changes he had authorized to be made in the account, was a good symbolical delivery of the moneys represented by the book. 14 Am. & Eng. Encyc. of Law (2d Ed.), 1059, 1060. When, in addition to the facts already mentioned, which, in my opinion, are quite sufficient to sustain the judgment, it also appears that Ames and Mrs. Peckham were engaged to be married; that he lived with her in the family of her mother; that she nursed him in his last sickness; that the time for their marriage had been fixed, and was near at hand; and that they had rented a house, and fixed the date upon which they were to take possession — the judgment appears to me to be clearly founded upon strong and satisfactory evidence, and such evidence as, under the authorities, is required to support a gift causa mortis. Depuy v. Stevens, 37 App. Div. 289, 55 N. Y. Supp. 810.

"The judgment should be affirmed with costs."

91 N. Y. Supp. 394.

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VAN DEN BOSCH v. BOUWMAN.

101 N. W. 832.

(Supreme Court of Michigan. Dec. 30, 1904.)

SALES — CONTRACT — CONSTRUCTION — RETAKING POSSESSION — BALANCE DUE.

1. A note given for the price of chattels gave the seller right to take possession at any time before or after maturity, and to resell the property, or retain the same without sale, and in such case the amount paid on the note was to be deemed compensation only for use and "wear and tear." Held, not a conditional sale, but that the seller might retake and sell, and, if the price obtained did not equal the amount due, he might collect the balance from the maker of the note.

Error to Circuit Court, Ottawa county; Philip Padgham, Judge.

Action by Peter Van Den Bosch against Tom Bouwman on a note given for the purchase price of personal property. Judgment for plaintiff, and defendant brings error. Affirmed.

Leonard Y. Devries (Diekema & Kollen, of counsel), for appellant. Sooy & Heck, for appellee.

MONTGOMERY, J. Defendant, on receiving of plaintiff possession of the property described therein, executed and delivered to plaintiff the following note: "$160.00. Noordeloos, Ottawa Co., Mich., May 27, 1901. After date I promise to pay to Peter Van Den Bosch, or bearer, one hundred sixty dollars, payable at the residence of Peter Van Den Bosch, Noordeloos, Mich., for value received, by monthly payments of $10.00 per month or more; said first payment to be made June 10th, A. D. 1901. The express condition of the sale and purchase of a sorrel horse, harness, and top buggy, for which this note is given, is such that the title, ownership, or possession does not pass from the said payee until this note and interest is paid in full, and that the said payee has full power to declare this note due and take possession of said above described property at any time he may deem himself insecure, even before the maturity of the note, and upon taking possession, either before or after the maturity of the note, said payee may sell the same either at public or private sale, without notice; or said payee may retain the same without sale, and in such case the amounts paid on this note shall be deemed to be compensation only for the use, wear, and tear of said property. [Signed] Tom Bouwman." After certain payments had been made plaintiff took possession of the property, sold the same for a sum less than the amount remaining due, sued for the balance and recovered. From this judgment defendant brings error.

The contention is that this was a conditional sale, and that, on the plaintiff reclaiming the property, the consideration for the defendant's engagement to pay ceased, and that under the holding in Perkins v. Grobben, 116 Mich. 172, 74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512, and McBryan v. Elevator Co. (Mich.) 89 N. W. 683, the vendor is not entitled to recover the contract price. The question is, what does the contract fairly import? Courts have no right to refine definitions in a manner to override the expressed intent of the parties. This contract

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gave the seller two options: (1) He could retake the property and treat the amount paid as payment for its use and "wear and tear." (2) He was authorized to seize and sell the same at public or private sale. He chose the latter. The question is upon whose account that sale was made under the terms of this contract. The purpose of the sale provided for by the contract is plain. It is to satisfy, so far as the amount realized will do so, the amount remaining unpaid. Can it be said that the intention of the parties as expressed was that whatever remained due should be paid by the maker of this note? We think this question should be answered in the affirmative. There is an express promise to pay, and it is not abrogated nor satisfied by the authority given to sell and apply the proceeds of the sale in part payment. There is no reason why contracts of this nature should not be construed and enforced according to the plainly expressed purpose of the parties. Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277.

The judgment is affirmed. The other Justices concurred.

HICKEY et al. v. KIAM.

(Court of Civil Appeals of Texas. Oct. 26, 1904.)

83 S. W. 716.

MASTER AND SERVANT — CONTRACT OF EMPLOYMENT — INDEFINITE TERM — RIGHT TO TERMINATE.

1. A contract to give an employee permanent employment as long as he desires to retain the employment, and his services are satisfactory, is not enforceable unless the employee fixes the period of his services at the time he presents himself for work.

2. Where by contract of employment the period of services is left to depend on the mere volition of the employer, he may discharge the employee without giving him the right to exercise the option to fix the term of employment.

3. An employee accepted the employer's offer that, if the services of the employee were satisfactory, he could have a position as long as he wished to keep it; that the position was premanent; that the employer wished the employee to "understand that we are not trying to get you here until the season is over, and then let you out." Held, that the quoted phrase simply emphasized the intended permanency of the employment, and the employer was authorized to discontinue the services of the employee at any time.

JAMES, C. J. The plaintiffs, by their first-amended original petition, alleged, in substance, that on October 2, 1902, they resided in Ft. Worth, Tex., and were engaged in making, fitting, and altering garments for women, and that at said time the defendant, Ed Kiam, wrote them the following letter:

"Ed Kiam, Mammoth Clothier, 214 to 320 Main Street, Cor. Preston Avenue, Houston, Texas, Oct. 2nd, '02. Mrs. Kate Hickey, c/o G. Y. Smith, Fort Worth, Texas — Dear Madam: Referring to your letter of September the 30th, we have an opening in our women's altering department and want a good forewoman. If you think that you are capable of holding a position of this sort, we will start you on a salary of $15.00 per week, and if your services are satisfactory you will have a position with us as long as you wish to keep it. The position is

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$160 ##

Noordeloos, Mich. May 27 1901

_____ after date I promise to pay to

the order of Peter Van Den Bosch

One hundred and Sixty _____ _____ Dollars.

Payable at the residence of Peter Van Den Bosch, Noordeloos, Mich., for value received, by monthly payments of $10.00 per month or more; said first payment to be made June 10th, A. D. 1901. The express condition of the sale and purchase of one Sorrel horse, harness, and top buggy for which this note is given is such that the title, ownership or possession does not pass from the said payee until this note and interest is paid in full, and that the said payee has full power to declare this note due and take possession of said described property at any time he may deem himself insecure, even before the maturity of the note, and upon taking possession, either before or after the maturity of the note, said payee may sell the same either at public or private sale, without notice; or said payee may retain the same without sale, and in such case the amounts paid on this note shall be deemed to be compensation only for the use, wear and tear of said property.

John O Zoetewman

B. 29. Conditional Sale Note: Form.

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The maker of this note being in default in some of the payments provided on its face, the payee applied, as for "wear and tear," the payments already made, and sold the property at private sale, and, there yet appearing to be a balance due on the note, after endorsing the amount realized at the sale, he sued the maker for the amount of such balance. Under almost all of the forms of so called conditional sale notes, if the holder takes possession of the property he thereby releases the maker from personal liability on the note, while if the holder sues the maker on the note he thereby loses his lien on the property, thus reversing the "shirt tail" taking properties which such notes are thought to contain.

The form here used has the endorsement of the Supreme Court of Michigan as containing the before mentioned properties in their pristine vigor, that court having sustained a judgment for the balance due on the note — or at least for the balance that the holder said he had not yet received on it. This form, therefore, has high recommendation for the use of those who want, at least, there own The Court said in part. The contention is that this was a conditional sale, and that, on the plaintiff reclaiming the property, the consideration for the defendant's engagement to pay ceased, and that under the holding in Perkins v. Grobben, 116 Mich. 172 . . . the vendor is not entitled to recover the contract price. The question is what does the contract fairly import? . . . This contract gave the seller two options; (1) He could retake the property and treat the amount paid as payment for its use and 'wear and tear.' (2) He was authorized to seize and sell the same at public or private sale. He chose the latter. The question is upon whose account that sale was made under the terms of this contract. The purpose of the sale provided for by the contract is plain. It is to satisfy, so far as the amount realized will do so, the amount remaining unpaid. Can it be said that the intention of the parties as expressed was that whatever remained due should be paid by the maker of this note? We think this question should be answered in the affirmative. There is an express promise to pay, and it is not abrogated nor satisfied by authority given to sell and apply the proceeds of the note in part payment. There is no reason why contracts of this nature should not be construed and enforced according to the plainly expressed purpose of the parties.

McMasters Commercial Cases, Vol. 1905, 101 S. W. 832.

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permanent and your chances for advancement are good, as we wish to pay our people well, when they show that they are working to our interest.

"We will make an opening for your daughter in our alteration department, and we will pay her a reasonable salary. We do not know what her salary is now, but we will pay her $1.00 more than she is getting where she is at.

"We wish you and your daughter to both understand that we are not trying to get you down here just to keep you here until the season is over and then let you both out. We want you to be a fixture with us in this town and you will have a good and satisfactory position with us as long as you wish to keep it.

"The ladies' ready-to-wear business we have just gone into, and it is entirely a new business with us. We have been handling heretofore clothing and furnishings for men and boys of this city for the past 25 years, and the women's business we opened on the 22nd of September.

"We have done a very good business since we opened, and have every reason to believe that the department is going to be a success.

"You must understand if you accept this position you will have to come with us at once, as we want some one in the workrooms immediately, and if you know of some other good woman in Fort Worth that is a good fitter you can also bring her with you, and we will start her on $12.00 per week, with a permanent position.

"Kindly wire me immediately upon receipt of this letter whether or not you will accept, and if you do accept, state when you can be here and state at the same time if your daughter will be with you, and if you are successful in getting another woman, also mention that fact. Yours very truly, ED. KIAM."

— And thereby offered them employment for as long a period of time as they should desire to retain such employment, and which was permanent, and that plaintiffs accepted said offer, as made in said letter, by telegram, and entered into the employment of defendant by virtue thereof, when they were summarily discharged, without notice and without cause. Then plaintiffs allege the amounts they were to be paid for their services, as agreed upon between plaintiffs and defendant, and the amounts they had earned since they were discharged up to a period amounting to a year from the date of their employment, and that the services rendered by them were satisfactory and accepted by defendant. To this the court sustained a general demurrer and dismissed the cause. The petition contained an allegation that by said letter defendant offered them employment for as long a period of time as they should desire to retain such employment, and fixing the said period of time at a period not less than one season, and by a "season" is meant a period of one year.

Appellants' propositions are:

(1) A contract to give an employee permanent employment for as long as the employee shall desire to retain such employment, and the services of such employee are satisfactory, is such a contract as the law will enforce.

The case of Ry. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758, is a decision against this view, unless the employee fixes the period of his service at the time he presents himself for work. There was no such allegation. See, also, Ry. v. Smith, 81 S. W. 22, 10 Tex. Ct. Rep. 302.

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(2) That by the expression in said letter, "We wish you and your daughter to both understand that we are not trying to get you down here just to keep you here until the season is over and then let you out," the period of employment was fixed at a period of not less than one season, which plaintiff alleged meant one year, or twelve months; and plaintiffs having further alleged that they accepted this offer for one season, and entered into employment of the defendant thereunder, and having alleged that the defendant, without cause, violated his contract by discharging plaintiffs, and having alleged their damages, this constituted a cause of action.

(3) When by contract of employment the period of service is left to depend upon the mere volition or will of the employer, he cannot, by abruptly breaking the contract, deprive the employee of the right to exercise the option to fix the term of employment, and even after the discharge the employee would have a reasonable time to fix said term of employment.

There is no soundness in the third proposition. The only matter which raises a question meriting discussion is what is stated in the second. Had the letter expressed an offer of permanent employment, to last not less than a season, such offer would have been accepted in its terms by plaintiffs entering upon the employment, and the contract, we think, would have been definite for that period. But the letter will not bear that construction. The offer was for permanent employment, as long as plaintiff wished to keep it. The expression, "We wish you and your daughter to both understand that we are not trying to get you down here just to keep you here until the season is over and then let you both out," simply emphasized the intended permanency of the engagement. And it was manifestly not the purpose thereof to fix a definite or minimum term. The offer made was of permanent employment, which runs throughout the letter, and the expression quoted was for the purpose of assuring plaintiff of its permanency. Suppose the offer had been of employment so long as plaintiff wished to keep it (without the feature of satisfactory service), and the same expression had been used. It seems to us clear that plaintiff, in order to have had a contract for a term, would have been under the necessity of fixing that or some other definite term at the time of entering the employment, under the rule announced in Ry. v. Scott. The expression itself did not have the effect of fixing any term short of permanency, or for a less time than plaintiff desired to hold the place. This being so, there was nothing to prevent defendant from discontinuing the services of plaintiff and her daughter at any time.

The judgment is affirmed.

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BANK OF LE ROY v. PURDY et al.

(Supreme Court, Appellate Division, Fourth Department. Jan. 4, 1905.)

91 N. Y. Supp. 310.

BILLS AND NOTES — CONSIDERATION — AGREEMENT NOT TO SUE — CORPORATIONS — ACTS OF AGENT — CONFLICTING INTERESTS.

1. Where the president of a bank agreed with the maker of a note, indorsed to the bank for discount for the benefit of a corporation, of which both the president of the bank and the maker of the note were officers, without knowledge on the part of the directors of the bank, that the maker should not be required to pay the note, such agreement was no defense to the maker's liability thereon; the latter knowing that the interest of the president of the bank in the corporation was in conflict with his duties to the bank.

* * * * * * * *

McLENNAN, P. J. The material facts are not in dispute. One Butler Ward was president of the plaintiff bank, and was also a stockholder, director, vice-president, and treasurer of the defendant the Le Roy Gas & Electric Company. The defendant Purdy was also a stockholder and director of said electric company, and its president. On the 26th day of February, 1901, Purdy made his promissory note, as follows:

"On or before three month after date, for value received, I promise to pay to the order of myself, two thousand eight hundred and fifty dollars, at the Bank of Le Roy, with interest. S. D. Purdy." Indorsed: "Pay to Le Roy Gas & Electric Co. or order. S. D. Purdy. R. L. Kinsey, Secretary."

The defendant Purdy also made his other promissory note, which reads as follows:

"Le Roy, March 4th, 1901. On or before three months after date, for value received, I promise to pay to the order of myself, one thousand fifty dollars, at the Bank of Le Roy, with interest. S. D. Purdy." Indorsed: "Pay Le Roy Gas & Electric Co. or order. S. D. Purdy. Le Roy Gas & Electric Company, B. Ward, Treas."

These are the notes in suit, and were given in renewal of other similar notes held by the plaintiff (the bank) were discounted by it, the proceeds placed to the credit of the electric company, and by it used in the regular course of its business. The original and renewal notes were made and delivered for the accommodation of the electric company, which at the time was in need of funds. Neither Ward nor Purdy received any individual benefit therefrom. Such notes were all made and delivered by the defendant Purdy upon the express promise and assurance of Ward, plaintiff's (the bank's) president, that if he (Purdy) would sign said notes the plaintiff would discount them for the benefit of the said Le Roy Gas & Electric Company, and that he (said Purdy) would never be called upon to pay said notes; that the plaintiff (the bank) would take care of them and hold him harmless on account thereof. The notes were made and delivered by Purdy in pursuance of such agreement and promise. When such agreement was made, Ward was in the office of the electric company, engaged in and about its business, and was engaged with Purdy in devising means to raise money for the electric company, of which they both were stockholders, directors, and officers. The direct-

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ors and officers of tne plaintiff (the bank) other than its president, Ward, had no knowledge of the agreement or promise which he had made. So far as they were concerned, the notes were discounted in the ordinary and usual course of business.

We think the agreement which was made by Ward, plaintiff's (the bank's) president, and the knowledge which he had in respect to the notes in suit, did not constitute a defense to Purdy's liability as maker of such notes. It has been repeatedly held by the courts of this State that an agreement made by an officer of a bank, who is authorized to discount or purchase commercial paper, that the maker or indorser of such paper will not be required to pay or be held liable as maker or indorser of the same, is a valid agreement, binding upon the bank, and relieves the obligor from all liability in respect to such paper. Persons v. Hawkins, 41 App. Div. 171, 58 N. Y. Supp. 831; Simmons v. Thompson, 29 App. Div. 559, 51 N. Y. Supp. 1018; Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32.

In the last case cited the rule is stated in the headnote as follows:

"It is a defense to the enforcement of a promissory note against the maker by the party to whom he delivered it that the note was without consideration, and was delivered upon the condition that the maker should not be liable thereon."

Such rule, however, cannot be invoked by the appellant (Purdy), for the reason that the agreement in question was made by Ward when he was acting in the interest of the electric company, and the agreement inured to its benefit, and was in no manner beneficial to the bank. This was known to the defendant Purdy. He also knew that the plaintiff's (the bank's) president was jointly interested in the electric company, in raising funds for it, and that their interests were antagonistic to the plaintiff (the bank); and he knew, or ought to have known, that while thus acting for himself and for his own benefit, or for their joint benefit, Ward could not act as agent for the bank and adversely to it. Such is the law. In Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293, the court said:

"It is a well-settled rule of the law of agency, to which I apprehend there is no exception, that no person can act as the agent of both parties to a contract, nor can act as agent in regard to a contract in which he has any interest, or to which he is a party, on the side opposite his principal."

See also Manhattan Life Ins. Co. v. Forty-second St. Ferry, 139 N. Y. 146, 34 N. E. 776; Bank of New York v. American Dock & Trust Co., 143 N. Y. 559, 38 N. E. 713.

We think the rule may be stated to be: An officer of a bank cannot bind the bank by an agreement adverse to its interests made with another party, when such party and officer are, at the time such agreement was made, engaged in serving their own interests, or the interests of another corporation in which they are jointly interested, and where the sole purpose of the agreement is to benefit themselves, or the corporation or company in which they are interested. Neither can the knowledge obtained by such officer under such circumstances, and while so acting, be imputed to the bank for the purpose of establishing a defense to an obligation assumed by the other party to such agreement.

The facts in the case of Allen v. First National Bank, 127 Pa. 51, 17 Atl. 886, 14 Am. St. Rep. 829, are very similar to those in the case at

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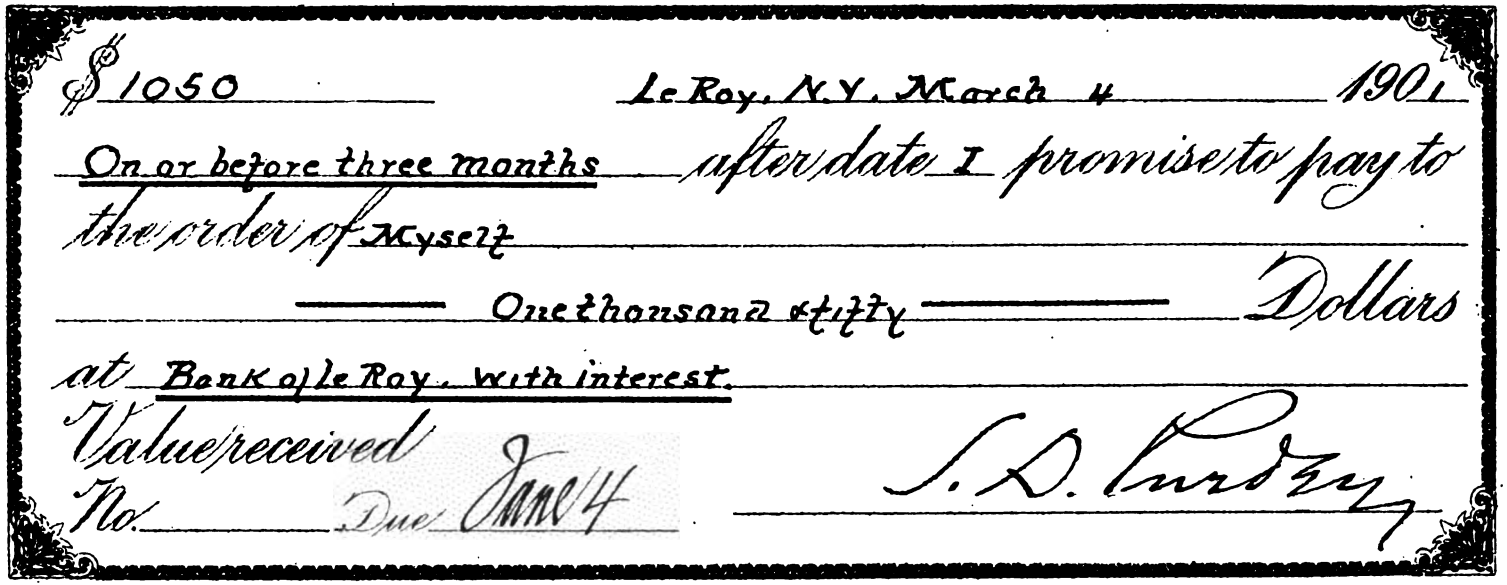

$1050 Le Roy, N.Y. March 4 1901

On or before three months after date I promise to pay to the order of Myself

One thousand fifty Dollars

at Bank of le Roy. With interest.

Value received

No. Due June 4

S. D. Purdy

B. 30. Indorser: Power of Bank Officer to Stipulate in Advance That Indorser Shall Not Be Liable.

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Pay to Le Roy Gas & Electric Co, or order
L. D. Purdy
LeRoy Gas & Electric Co
B Warde. Pres

B. Warde, who endorsed this note for the Le Roy Gas & Electric Co., was president of the Bank of Le Roy — the bank that discounted it for the gas and electric company. Warde was also a director of the company. Purdy, the maker of the note, was president of the company. The company needed money, and Warde told Purdy that if he, Purdy, would execute this note individually the bank would discount it for the company, and would agree that Purdy should not be liable on the note.

The note was discounted by the bank and on its non-payment the bank sued Purdy on it. Purdy was held liable on the ground of Warde's dual capacity and interest in both corporations when the promise not to hold Purdy was made. "It is a defense to the enforcement of a promissory note against the maker by a party to whom he delivered it that the note was without consideration, and was delivered upon the condition that the maker should not be liable thereon. Such rule, however, cannot be invoked by the appellant (Purdy) for the reason that the agreement in question was made by Warde when he was acting in the interest of the electric company, and the agreement inured to its benefit, and was in no manner beneficial to the bank. This was known to the defendant Purdy. He also knew that the plaintiff's (bank's) president was jointly interested in the electric company, in raising funds for it, and that their interests were antagonistic to the plaintiff (bank) . . . An officer of a bank cannot bind the bank by an agreement adverse to its interests made with another party, when such party and officer are, at the time such agreement was made, engaged in serving their own interests, or the interests of another cnrporation in which they are jointly interested, and where the sole purpose of the agreement is to benefit themselves, or the corporation or company in which they are interested. Neither can the knowledge of such officer under such circumstances, and while so acting, be imputed to the bank for the purpose of establishing a defense to an obligation assumed by the other party to such agreement."

If Warde had in no way been connected with the electric company, and Purdy had been ignorant of any personal benefit that was to accrue to Warde by reason of the note, the following rule would have applied: "It has been repeatedly held by the Courts of this State (New York) that an agreement made by an officer of a bank, who is authorized to discount or purchase commercial paper, that the maker or indorser of such paper will not be required to pay or be held liable as maker or indorser of the same, is a valid agreement binding on the bank, and relieves the obligor from all liability in respect to such paper. 453 N. Y. 130."

McMasters Com. Cases, Vol. 1905, 61 N. Y. Supp. 310.

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bar, and it was held that an agreement like the one being considered was not available as a defense to the indorser of a note. It was said in substance in that case that as the cashier, the officer who assumed to make the agreement for the bank, was a member of the firm whose note was delivered, he could not act in the double capacity of agent for the bank and for the firm of which he was a member, respecting a transaction where their respective interests were adverse.

In the case of Innerarity v. Merchants' National Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, the court said:

"The proposition that the director of a corporation, acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well established by authority."

The doctrine contended for by the appellant (Purdy) would be an inducement to fraud and breach of trust. If a president or other officer of a bank may loan its funds to a corporation in which he and another are interested, receive the obligation of such other party to secure such loan, and then make a valid agreement that such obligation will never be enforced, the way is clear for the perpetration of greater or at least a different kind of fraud by bank officers than has yet been sanctioned by the courts. The maker or indorser of a promissory note, who delivers it to a bank for the purpose of having it discounted, and the proceeds placed to the credit of a corporation or company of which he and the president of the bank are stockholders, directors, and officers, should understand that any agreement, no matter what its form or language, made by the president of the bank, which assumes to relieve him from liability as maker or indorser, is void, and constitutes no defense to such obligation.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed, with costs. All concur; HISCOCK, J., in result only.

Sale of Machinery — Title Reserved Until Paid For: Mortgage: Subsequent Sales — Title — Right of Removal.

W. H. Shults held a lease for 91 years of a certain building in Ozark, Ark., which he desired to equip as a roller flouring mill. The Great Western Manufacturing Company sold him the necessary engine, boiler, machinery, and fixtures therefor, entering into a written contract with him by which the company retained title thereto until the full purchase price was paid, the machinery thus remaining personal property. The machinery was placed in the building and the establishment was run as a flouring mill. Soon after this the company took a mortgage on the machinery, and the leasehold interest and other outside property, thus relinquishing its title to the machinery. This mortgage was foreclosed, and one Adams bid off the property — the leasehold interest and the machinery — as an entirety, and subsequently sought to remove some or all of the machinery. To this the owners of the land — the grantors of the leasehold interest — objected, claiming that the machinery had become a part of the real estate. The appellate court sustained this

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contention, holding that the machinery lost its character as personal property, and thus its right of removal, and became affixed to the realty when Adams bid it off with the leasehold interest as an entirety. The court said in part:

* * * * * * * *

"The rules for ascertaining whether an article is a chattel or an irremovable fixture are thus summarized in Choate v. Kimball, 56 Ark. 55, 19 S. W. 108: '(1) Real or constructive annexation of the article in question to the realty. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made.' This rule has been followed and applied in these cases: Bemis v. Bank, 63 Ark. 625, 40 S. W. 127; Bank v. Sweet, 64 Ark. 502, 43 S. W. 500; Markle v. Stackhouse, 65 Ark. 23, 44 S. W. 808; Tenniswood v. Smith (Ark.), 82 S. W. 834. Before the aforesaid rules can be applied, the primary question is 'the relation of the parties.' The machinery in question was bought with the title reserved to the manufacturing company to secure balance of the unpaid purchase money. This form of security gave way to a mortgage on the machinery, the leasehold, and other property situate without the county. The giving of a chattel mortgage, reservation of title, conditional sale, or other form of security, is usually equivalent to an express agreement between the parties thereto that the machinery shall be personalty. 13 Am. & Eng. Encyc. of Law (2d Ed.), pp. 624, 626, and authorities in notes. This effect is necessary to secure the debt. Had this mortgage — or, as it originally stood, reserved title — been foreclosed as to the machinery alone, and it alone bought, there could be no question but that Adams could detach it from the realty; succeeding to the rights of both parties, who had contracted that it was a chattel, not real estate. But such was not the case. It was sold with the leasehould as part of the assets covered by the mortgage, bought in by the plaintiff, and sold to Adams as bought — an entirety. There is high authority for holding that, where a chattel annexed to the soil is sold to the owner of the realty, that fact change its prior personal character into an irremovable fixture. Curtis v. Riddle, 7 Allen (Mass.), 185. Passing that and going to the question broadly, the purchaser at the foreclosure sale, to whose rights Adams succeeded, acquired the rights of all parties to the suit — those of the manufacturing company and of the lessees. Sand. & H. Dig. § 5943; 2 Jones on Mort. § 1654; Wiltsie on Mort. Foreclosures, § 577. The sale under foreclosure necessarily wiped out the debt against the machinery, and the right to treat it as personalty by virtue of the original character between the parties ended with the accomplishment of the purpose thereof; and, of course, a merging of interests of those contracting parties into the same person ended that contract. The effect of the purchase of the leasehold was an assignment thereof to the purchaser. Wiltsie, Mort. Foreclosure, § 577. Adams succeeded to the rights and limitations of Shults, the original lessee, and was the owner of his leasehold, and the machinery thereupon annexed, freed of the mortgage lien,

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and freed of the contract in that mortgage treating the machinery as personal property. Therefore the relation of Adams to the town was that of the original lessee, Shults, and his rights and liabilities are to be measured as if he were Shults instead of Adams, for he stands in Shults' shoes. Adams ran the mill in conformity to the Shults lease for over two years, and then attempted to remove the machinery as a trade fixture not annexed to the realty. Viewing the facts from the standpoint of the original lessee, and applying the rules aforesaid, the solution is plain. The value of the first two rules it evidentiary, to ascertain the intention of the annexation from the manner thereof, and purpose of the article used. In regard to the machinery, there are well-defined rules to determine the character of the annexation, which are thus summarized by Mr. Wiltsie: 'Where the chattel, as attached to the realty, is useful and necessary to its enjoyment, and adds value thereto, and when detached loses its character and usefulness, the chattel becomes a fixture, and passes with the freehold.' Wiltsie, Mort. Fore. § 428. The ponderous character of the machinery, its special construction for the purpose for which the lease was given, the difficulty of detachment, and necessity of reconstruction and readaptation when refitted to another mill, are all indicia of the intention to become permanent.

"Passing to the most important, the third, rule — the intention. The lease was for a period of 91 years, and the sole consideration therefor was that a mill be run thereon 'reasonably regular,' of a certain daily capacity. A building was indirectly donated, and a bonus given by the publi-spirited citizens to found this enterprise, which it was thought would be of benefit to the community and profit to the miller. The enterprise came into being impressed with the intention to be run 'reasonably regular' in return for these public gifts; and the machinery was installed into the house reconstructed and adapted to suit it and the business, on a leasehold, the term of which ran for a period beyond the life of any machinery — totally unlike sawmills which are placed to cut lumber for a season, and then be moved onto another stand, and totally unlike a tenant putting in machinery to be run during a year or a few years (periods much shorter than the life of the machinery), and who is compensating with rent the owner for the use of the leasehold. These are indicia of intention to remove after a season. The facts here show a clear intention to respond in good faith to the generosity extended, and establish a mill as permanent as such things can be, and to run it 'reasonably regular' — not for a day nor a year, but continuously. Without such intention having been manifested to the satisfaction of this municipality and these donors, the mill would never have been established. This intention of permanency in the installation of the machinery is what fixes its character as irremovable fixture. The subsequent failure of the enterprise cannot change the status fixed at the time the machinery became part of the realty. Therefore the trial court erred in the second declaration of law, to the effect that the machinery was a trade fixture and removable."

Reversed and remanded.

83 S. W. 920.

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FIRST NAT. BANK OF MONTGOMERY v. TAYLOR.

37 So. 695.

(Supreme Court of Alabama. Nov. 17, 1904.)

GIFTS — DEPOSITS IN BANK — PRESUMPTIONS.

1. One who had money in his possession before and at the time he deposited it in bank in the name of his wife was presumptively the owner of the money.

2. In order to constitute a gift, it is essential that there be a delivery, actual or constructive, of the thing given, with the intent on the part of the donor to divest himself of ownership; and the principle is applicable to deposits in bank made by one to the account of another.

3. The act of a husband in depositing money in bank in the name of his wife did not constitute a gift of the money to his wife, where at the time of the deposit he delivered to the bank a signature card, purporting to have been written by his wife, directing the bank to pay funds on the signature of the wife per the husband.

SHARPE, J. On June 17, 1903, Charles E. Taylor, who was plaintiff's husband, deposited with the defendant, which is an incorporated national bank, $650, in the name of "Mrs. D. E. Taylor," and received from the bank teller an account book having on its back the words and figures: "First National Bank, Montgomery, Ala. In account with Mrs. D. E. Taylor" — and having inside of it these words and figures: "Dr..... In account with Mrs. D. E. Taylor. Cr. June 17, 1903 ..... $650.00." At the same time Charles E. Taylor delivered to defendant a signature card, which has ever since been in defendant's possession, having on it the words and figures: "Mrs. D. E. Taylor to the First National Bank of Montgomery. Below please find duly authorized signatures which you will recognize in payment of funds or the transaction of other business on our account. Mrs. D. E. Taylor per C. E. Taylor." On June 22, 1903, Charles E. Taylor drew two checks upon the deposit — one for $4, and the other for $5 — to each of which checks he attached the signature, "Mrs. D. E. Taylor per C. E. Taylor," and each of which checks were on that day paid by defendant. Charles E. Taylor died on or about June 22, 1903, and some days thereafter plaintiff drew a check on defendant for the balance of the fund, signed, "Mrs. D. E. Taylor," and defendant refused to pay it, and also refused to pay on a demand made by plaintiff's attorney.

On facts undisputed and substantially as above stated, without more, this cause was tried without a jury. The main question presented by the record is whether those facts show a liability on the part of defendant to the plaintiff, rather than to the estate of Charles E. Taylor, deceased. In considering the question, it is proper to begin by presuming that the money, before and up to the time of its deposit, was the property of Charles E. Taylor. Possession of personal property is prima facie evidence of title in the possessor. This presumption made, plaintiff's claim is left to rest upon the theory that a gift to her was effected by the transaction wherein the money was deposited. To the making of a gift it is essential that there be a delivery, actual or constructive, of the thing, with intent on the part of the donor to divest himself of ownership, and this principle is applicable to deposits in banks made by one to the account of another. Anniston National Bank v. Howell, 116 Ala. 375, 22

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B. 31. Deposit in Name of Another: Right to Draw Money: Gift.

No. _____ MONTGOMERY ALA. June 30 1903.

FIRST NATIONAL BANK

PAY TO THE ORDER OF Myself

Six Hundred & Forty One DOLLARS

$ 641 00/100

D. E. Taylor

EDWARD V. BROHAW & BRO., 54 BROAD ST., N.Y.

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D. E. Tayler

Charles E. Tayler, the husband of the drawer of this check, deposited $650 in the bank on which this check is drawn, in the name of "Mrs. D. E. Tayler," and received a pass book in that name. The signature card in connection with the account read "Mrs. D. E. Tayler to the First National Bank of Montgomery. Below please find duly authorized signatures which you will recognize in payment of funds or the transaction of other business on our account. Mrs. D. E. Tayler per C. E. Tayler." Tayler drew two checks against this account aggregating $9, which he signed Mrs. D. E. Tayler per C. E. Tayler. Shortly after this he died, and subsequently the widow D. E. Tayler, drew this check which this bank refused to pay, and it also refused to pay over the money on a demand by her attorney. She then sued the bank for the amount relying on substantially the above facts to prove ownership of the money. She won in the trial court but was beaten on appeal. The court said in part: In considering the question it is proper to begin by presuming that the money before and up to the time of the deposit, was the property of Charles E. Tayler. Possession of personal property is prima facie evidence of title in the possessor. This presumption made, plaintiff's (D. E. Tayler's) claim is left to rest upon the theory that a gift to her was effected by the transaction wherein the money was deposited. To the making of a gift it is essential that there be a delivery, actual or constructive, of the thing, with the intent on the part of the donor to divest himself of ownership, and this principal is applicable to deposits in bank made by one to the account of another. 136 N. Y. 177, 72 Me. 140, 53 Mich. 163, 109 Mass. 140. The evidence in this case is not inconsistent with an intention on the part of Charles E. Tayler to make the deposit in plaintiff's (D. E. Tayler's) name for his own purposes or convenience, and, we think is, insufficient to show a gift. The signature card amounted to a direction to the bank, and negatived any right of the plaintiff to draw on the fund in question, except on checks signed by Charles E. Tayler in her name, and such direction is inconsistent with an intention on his part to invest the plaintiff (D. E. Tayler) with that control over the fund which is necessarily incident to ownership" . . .
If at the time of making the deposit Charles E. Tayler had provided, at the bank, that it should also pay checks signed by his wife, it can be doubted if the bank would have been protected in paying her check after Charles E. Tayler's death. If the money was his own, and the court said it presumably was, his retaining the right to draw it out was keeping such control over it as, standing alone, negatives a gift; and his death terminated any right he may have given her to draw his money.

McMasters Commercial Cases, Vol. 1905, 37 So. 696.

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South. 471; Matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Robinson v. Ring, Adm'r, 72 Me. 140, 39 Am. Rep. 308; Broderick v. Waltham Sav. Bank, 109 Mass. 149; Davis v. Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629; Greene v. Bank (Idaho), 64 Pac. 888; 14 Am. & Eng. Encyc. of Law, 1037, 1039.

The evidence in this case is not inconsistent with an intention on the part of Charles E. Taylor to make the deposit in plaintiff's name for his own purposes or convenience, and, we think, is insufficient to show a gift. The signature card amounted to a direction to the bank, and negatived any right of the plaintiff to draw on the fund in question, except on checks signed by Charles E. Taylor in her name, and such direction is inconsistent with an intention on his part to invest the plaintiff with that control over the fund which is necessarily incident to ownership. Such signing of checks on a fund belonging to plaintiff would apparently have been the act of her agent, but this consideration does not weigh in determining whether she became the owner.

The judgment must be reversed, and one here rendered in favor of the defendant.

O'BRIEN v. WILLIAMSBURG SAV. BANK et al.

91 N. Y. Supp. 908.

(Supreme Court, Appellate Division, Second Department. Jan. 27, 1905.)

TRUSTS — BANK DEPOSIT.

1. Where, before opening a bank deposit in her own name, "In trust for" B., deceased declared her intention that the deposit should be for the benefit of B., and stated that she wanted B., instead of deceased's husband, to get the money, such declaration, coupled with the form of the deposit, created an irrevocable trust for B.'s use.

HOOKER, J. A reargument was granted in the case after the Court of Appeals reversed our decision in Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 89 App. Div. 368, 85 N. Y. Supp. 928. We affirmed without opinion on the first argument. Coote v. Williamsburg Savings Bank, 92 App Div. 613, 86 N. Y. Supp. 1133. It was supposed that the rule the Court of Appeals laid down in Matter of Totten, supra, might affect the questions in this case. In my opinion, it did not. In that case (p. 125, 179 N. Y., p. 752, 71 N. E.) the court says:

"After much reflection upon the subject, guided by the principles established by our former decisions, we announce the following as our conclusion: A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

The point in the case at bar is that the deposit by the deceased, Mrs.

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Coote, of the moneys in the defendant savings bank, did not "stand alone." The court has found, on evidence which, though slight, is sufficient, that, "before opening such account and making such deposit, said Ann Coote declared it to be her intention that the account and money should be for the benefit of Margaret Brown." The appellant's contention that the purpose of the depositor must be clear and unequivocal is the law; but Mrs. Coote's statement that she wanted Margaret Brown to have the money, and did not want her husband (Coote) to get it, does not leave much room for doubt as to her meaning, especially when accompanied with the deposit, "In trust for Margaret Brown." Her intention, expressed without equivocation, coupled with the deposit in the form in which it appears, created an irrevocable trust, and I advise affirmance, with costs. All concur.

HUTCHINSON v. NAY.

72 N. E. 974.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1905.)

GOOD WILL — SALE BY SURVIVING PARTNER — ACCOUNTING.

1. Where, for nearly two years after the death of his partner, defendant carried on the teaming business at the old stand, with customers of the old firm, and then sold the good will of the business, with a covenant to continue in the employ of the purchaser for six months, and to do all in his power to hold the customers for the purchaser, and not to engage in the business for five years within the district covered by the old business, the good will sold was not the good will of the firm, but that of the defendant, and he was not obliged to account to the administratrix of his deceased partner for even a nominal sum because of such sale.

LORING, J. In the previous bill (Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601) the plaintiff sought to charge the defendant with the value of the good will of the former firm of Ira A. Nay & Co., which was dissolved by the death of Hutchinson, on two grounds, namely, that the defendant, the surviving partner, had agreed with the administratrix of Hutchinson's estate, the plaintiff, to buy the good will of the firm; and, secondly, that he had appropriated it to himself, and so was bound to account for its value. The present bill is founded on the fact that while the first bill was pending the defendant sold the good will for $5,000. We are inclined to think that the plaintiff is barred by the former suit from raising the question which is the subject of the present bill. See Foye v. Patch, 132 Mass. 105. But the effect of the sale of good will which has been made by the defendant has not been, in fact, considered by the court; and as the plaintiff, in the opinion of the court, is not entitled to maintain the present bill, even if the question is still open to her, we have thought it more satisfactory to dispose of the case on the merits of the question.

We are of opinion that on the dissolution of a firm, caused by the death of one of the partners, the good will of the firm's business is a part of the assets of the partnership, and, in the absence of an agreement between the partners dealing with the matter, the administrator of a deceased partner has a right to have it sold as part of the liquidation of

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the assets of the firm. But we are also of opinion that a sale thus forced upon the surviving partner does not stand on the same footing as a voluntary sale by a sole trader of the good will of his business. The law of good will is of recent growth. One hundred years ago it was the law of England that the good will of a partnership survived for the benefit of the living partner. Hammond v. Douglas, 5 Ves. 539. That is not so to-day. To-day, on the contrary, on the death of a partner the executor or administrator of the deceased partner can have the good will sold as one of the assets of the firm. Johnson v. Helleley, 2 D. J. & S. 446; Hall v. Barrows, 4 D. J. & S. 150; In re David, [1889] 1 Ch. 378, 382; Lindley, Partnership (6th Ed.), 445. In the growth of the law of good will in England an anomaly has crept in, which has not obtained here; that is, that one who has voluntarily sold the good will of his business can set up a competing business, but cannot otherwise derogate from his grant. It is undoubted law in England to-day. Trego v. Hunt, [1896] A. C. 7. It was held in Labouchere v. Dawson, L. R. 13 Eq. 322, that the result of working out the conflicting rights of the vendor and the purchaser of the good will of a business was this: The vendor can set up a competing business, but he cannot solicit business from customers of the old firm. In Ginesi v. Cooper, 14 Ch. D. 596, Jessel, M. R., felt the anomaly which was involved in a rule which said to the vendor of his good will, "You shall not derogate from your grant, and so are forbidden to solicit business from customers of the old firm, but you may deal with them if they voluntarily come to you;" and in Leggott v. Barrett, 15 Ch. D. 306, he enjoined such a vendor from dealing with the customers of the old firm. This gave rise to a variety of opinions (See Pearson v. Pearson, 27 Ch. D. 145), which were finally set at rest by the decision in the House of Lords in Trego v. Hunt, [1896] A. C. 7; and the line was finally drawn as it was drawn in Labouchere v. Dawson, L. R. 13 Eq. 322. But in delivering his opinion in Trego v. Hunt, [1896] A. C. 7, 19, Lord Herschell said (speaking of the result in Labouchere v. Dawson): "These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by 'good will,' and the effect of a sale of it, differed from the popular conception. Where the good will of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale, and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that, whenever the good will of a business is sold, the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business." To a similar effect, see Lord Macnaghten in Trego v. Hunt, [1893] A. C. 7, 23, 24; and Lord Davey, Id. 27, 29. What Lord Herschell there suggests might have been held has been held to be the law in Massachusetts. In Massachusetts the vendor of the good will of his business cannot set up a competing business at all, if by so doing he would derogate from his grant. Webster v. Webster, 180 Mass. 310, 62 N. E. 383. But where a sale of partnership assets is forced upon the

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survivor by the administrator of a deceased partner, the surviving partner is not in the position of a sole trader who has voluntarily parted with the good will of his business. He is not bound to retire from business, as a sole trader impliedly elects to do by voluntarily selling his good will. A sale of good will forced upon the surviving partner is like the sale of the good will of a sole trader by his trustee or assignee in bankruptcy. In that case it has been held in England that the bankrupt cannot only set up a competing business (a thing which may be done in England where a sole trader voluntarily sells the good will of his business, as has been shown), but he may solicit business from his old customers (a thing which in England cannot be done in case of a voluntary sale). Walker v. Mottram, 19 Ch. D. 355; Trego v. Hunt, [1896] A. C. 7, 19, 23. No injustice is done to the estate of a deceased partner by this rule. If the estate gets all that the creditors of a sole trader can get, full justice is done to it, while to put the surviving partner in the position assumed by a sole trader who has vountarily elected to sell his good will would be an act of great injustice. The law in England in this connection seems to be otherwise. In re David, [1899] 1 Ch. 378, it was stated by Romer, J., in a case where there was an agreement for the sale of the good will on the death of one partner, that independently of that agreement the personal representative of the deceased partner had a right to have the good will sold, and, if sold, the sale would be conducted on the basis on which the sale is conducted in case of a voluntary sale by a sole trader. And this had been assumed to be the law in the earlier cases of Johnson v. Helleley, 2 D. J. & S. 446, and Hall v. Barrows, 4 D. J. & S. 150, and has since been assumed to be the law in Dixon v. Dixon, [1904] 1 Ch. 161, and in Curl Bros., Limited v. Webster, [1904] 1 Ch. 685. But the practical result of holding the surviving partner to be in the position of a sole trader who has voluntarily conveyed the good will of his business is so different in England from what it is here that the authority of these cases is not of great weight in this commonwealth.

For these reasons, we are of opinion that, if a sale of the firm's good will had been asked for and ordered in the case at bar, it would have been directed to be conducted on the footing that the surviving partner was at liberty to enter on a competing business, and to solicit trade from the customers of the old firm. Where, therefore, the defendant in the case at bar, for a year and eleven months after the death of Hutchinson, carried on business at the old stand, with customers of the old firm, with only slight changes in the personnel of the customers, and then sold the good will of his business, with a covenant to continue in the employ of the purchaser for six months, and to do all in his power to hold the customers for the purchaser, and with another covenant not to engage in the teaming business for five years within the district covered by the old business, the good will sold was not the good will of the old firm, but the good will of the defendant, and there is no obligation to account for even a nominal sum.

The entry must be: Bill dismissed, with costs.

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Deposit of Check: Check Lost In Mail: Duplicate: Liability of Indorser.

September 21, 1901, Albert Aebi, the payee of the original check described in accompanying illustration, indorsed it and deposited it to his credit in the Bank of Evansville, which was located in Evansville, seventeen miles from Brodhead, where the Brodhead Bank was located. The Bank of Evansville mailed the check to the Brodhead Bank for payment. The check appears to have been lost in the mail. Ten days after mailing the check, the bank of Evansville having heard nothing from it, for the first time started an inquiry about it, and during several days thereafter it corresponded and telephoned with the Brodhead Bank in relation to it. On the 19th day of October, 1901, Aebi was for the first time informed that the check was not paid, and on the 21st he, at the request of the Bank of Evansville, obtained from Speich, the maker, a duplicate of this check, which was marked "Duplicate: Original not payable," which Aebi mailed to the Bank of Evansville, and on a receipt of a letter from the bank he called October 25th and wrote his name on the back thereof. The duplicate was forwarded to the Brodhead Bank, where it arrived the day after the drawer had absconded and the day after that bank had appropriated his balance in payment of his obligations due them. The probabilities were all in favor of the supposition that if the original check had not been lost it would have been paid.

The Bank of Evansville charged the amount of the check to the account of Aebi, and he brought an action against it for the amount and obtained judgment.

When, in the ordinary course of the mails, the Bank of Evansville did not hear from the original check it had sent for payment, it should have made prompt inquiry about it, and, on ascertaining that it was lost, it could have had presentment made by copy or description, and protest made and the indorser charged.

The indorsement of the duplicate check by Aebi created no liability.

The court said in part:

"In order to charge indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes to his possession. Section 1684–2. Such reasonable time is not fixed by statute, but by concensus of authority, in absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment. Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130.

"The check in question was never presented for payment until October 25th or 26th, and clearly, by such delay, the indorser was discharged, unless such delay was excused. The only excuse suggested is the loss of the check. If it be conceded that the defendant was guilty of no

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negligence in adopting the United States mails as a method of transmission, nor in sending the check direct to the bank upon which it was drawn, thus taking chances of acquiring prompt knowledge whether it was honored or dishonored when it reached the payee, nevertheless it is excused from making presentment and demand only so long as, consistently with reasonable diligence, it was prevented by the loss of the check. Section 1678–11, Negotiable Instruments Law. It would seem extremely doubtful whether defendant could claim, in the exercise of due care, to have been so prevented even during the ten days which it waited after mailing the check before making any inquiry about it and before learning of its loss. By ordinary course of mail the check should have reached the Brodhead Bank as early as the 23d, and, unless there was some difficulty, plaintiff should have been notified of its payment or refusal at least as early as the 24th of September. We shall not deem it necessary to decide whether it was not the duty of the defendant to make inquiry immediately upon failure to receive such notification in such ordinary course of mail. Even if that were not so, it did receive notice of the failure of the check to reach its destination some time about the 1st of October. Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of immediate presentment, defendant had the opportunity and owed the duty to at once make substitution, presentment, and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser. 1 Parsons on Bills, pp. 368, 448, 530; 2 Id. 260, 261; 2 Edwards, Bills & Notes, §§ 672, 697; Smith v. Rockwell, 2 Hill, 482; Hinsdale v. Miles, 5 Conn. 331; Negotiable Instruments Law, supra, § 1681–17. Surely reasonable diligence would have enabled presentation long before October 19th. While the effect of the failure to present for payment and to give notice of dishonor within a reasonable time absolutely discharges the indorser without proof of damage or injury to him, it may be pointed out that in this case damage is quite obvious. The defendant having affirmatively learned of the loss of the check somewhere about October 1st, it appears that on the 1st, the morning of the 2d, and on the 3d of October Speich had a bank balance more than sufficient to meet this check; hence, a prompt presentment at any one of those times would in all probability have secured its payment. But, if that were not so, Speich was in active business, and in apparent credit to an amount more than sufficient to satisfy such demand up to about October 23d, and, had plaintiff been promptly notified on or about October 1st of either the loss or the dishonor of the check, he would have had opportunity to make demand, and probably to secure payment from the maker. See Shipsey v. Bank, 59 N. Y. 485.

"From the foregoing no conclusion is possible save that long prior to October 19th, when defendant informed him of the loss of the check, plaintiff had been discharged from liability thereon as indorser. But it is urged that by co-operating at the request of the defendant in obtaining a duplicate in order that the same might be used in lieu of the original he waived the previous omissions on the part of the defendant, and renewed his liability. Having been entirely discharged, any renewal of his liability must be by new contract. Tebbetts v. Dowd, 23 Wend. 379; Knapp v. Runals, 37 Wis. 135. The question therefore arises whether the transaction detailed in the evidence, about which there is no substantial dispute, amounted to a contract on the part of the plaintiff

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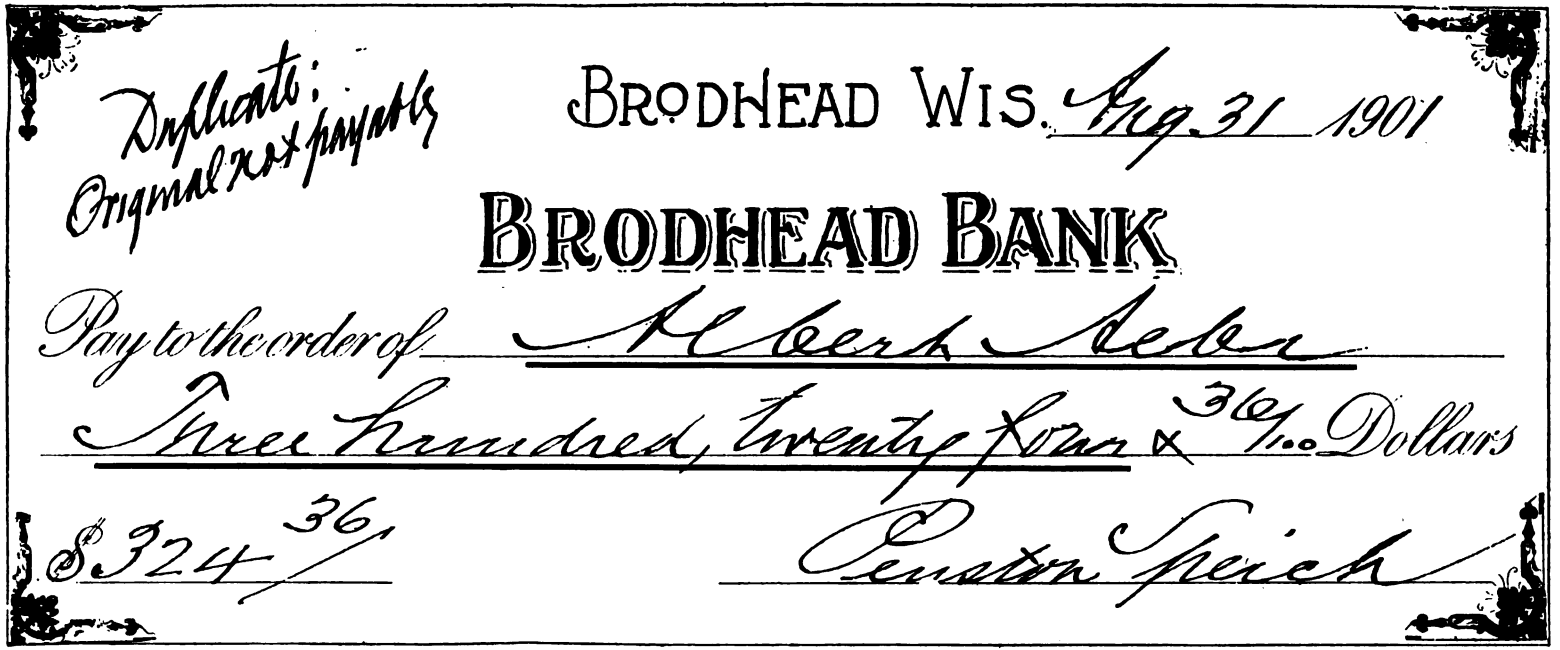
B. 32. Deposit of Check: Check Lost in Mail: Duplicate Check: Liability of Indorser.



Duplicate:
Original not payable

BRODHEAD WIS. Aug 31 1901

BRODHEAD BANK

Pay to the order of Albert Seber

Three hundred, twenty four & 36/100 Dollars

$324 36/100

Preston Speich

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Albert Aebi

September 21, 1901, Albert Aebi indorsed the original check of which this check is a duplicate and deposited it to his credit in the Bank of Evansville, and the bank credited it to his account in the same manner as it would if it had been cash. On the same day the Evansville bank enclosed it by mail to the Brodhead bank for payment and remittance. Hearing nothing from the Brodhead bank, the Evansville bank, about ten days later, sent a card of inquiry to which no reply was received. Several days later the Evansville bank telephoned the Brodhead bank and ascertained that the check had not been received by the latter bank. Waiting several days longer like information was received over the telephone with the suggestion that a duplicate check be obtained from the drawer. On October 19th Aebi was first informed that the check was lost, and on October 21st, at the request of the Evansville bank, he obtained from the drawer a duplicate check which he mailed to the Evansville bank. This duplicate check was marked "Duplicate; original not payable." October 25, at the request of the Evansville bank, Aebi called and indorsed the duplicate check, and the bank then forwarded it to the Brodhead bank where payment was refused, Speich, the drawer having absconded, and the Brodhead bank having applied the balance to his credit to notes held by that bank.

Between September 22 and October 17 there were several days when the balance to Speich's credit in the bank was more than the amount of the last check. The Evansville bank after the return of the duplicate check, charged the amount to the account of Aebi, and on the bank's refusal to receive the charge so made, Aebi sued the bank for the amount and recovered it.

The court said in part: . . . "By the general indorsement of the check in question, its acceptance by the bank, and the credit of the amount as cash to the plaintiff in his general account to be checked out as he saw fit, with nothing to qualify the effect of such acts, the bank became the owner of the check, as distinguished from a mere agent to collect the same" . . . "Upon learning that its attempted presentment by mail had failed and that the check was lost, at least for the purpose of immediate presentment, defendant (the Brodhead bank) had the opportunity and owed the duty to act at once make, substitution, presentment and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser."

That Aebi's indorsement of the duplicate check created no liability on his part is inferred by the court, and that such indorsement of a duplicate does not create new liability is directly held in Lewis v. C. N. Bank, 83 S. W. 432, citing 40 N. Y. 345, where it is said that the payee's indorsement of a duplicate check, issued under these circumstances, created no liability.

McMasters Com. Cases, Vol. 1905, 102 N. W. 332.

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to assume a new liability as indorser on Speich's new check. Doubtless, when a check has been lost or destroyed, so that the payee or his assigns has not received the money thereby ordered paid, the drawer may give a new and independent check, treating the old transaction as canceled, and in that case the rights and liabilities of all parties may be as if the new check were given upon any other consideration. Equally, however, the parties may proceed on the purpose of merely supplying written evidence of the former transaction, to take the place of that lost, simply to facilitate proceedings or perfect records. In that case no new contract is made. All rights grow out of the original transaction or contract, and are exactly the same as if such transaction were proved orally, instead of by the new or duplicate written evidence which the parties have supplied. In the latter case the equitable assignment worked by a check under Wisconsin decisions prior to the new statute would be complete from the original date — just as in the case of a lost deed the making of a duplicate would not change the time of transfer of title nor make any new covenants of warranty. Hence the giving of a new check after loss or destruction of a former one is of itself alone ambiguous, and may evince intent to enter into new relations, or merely supply evidence of those already existing, according to the surrounding circumstances. The dating back of the new check to correspond with the lost one and marking it 'Duplicate' tend to indicate the latter purpose, for they are wholly immaterial to the mere purpose of enabling the holder to obtain the money which he failed to get on the first check, and, being unusual, are significant. In Benton v. Martin, 31 N. Y. 382, it was held that the extrinsic facts accompanying the giving of a duplicate draft indicated an intent to assume new liabilities. Later, in the same case, other extrinsic facts were shown, and held to establish the contrary intent, and the drawer was held discharged by omission to seasonably present the original. 40 N. Y. 345; 52 N. Y. 570."

See Decision No. —

FOUR OIL CO. v. UNITED OIL PRODUCERS et al. (S. F. 3,102.)

79 Pac. 366.

(Supreme Court of California. Dec. 31, 1904.)

CONTRACT FOR PURCHASER — CONDITIONAL ACCEPTANCE OF OFFER.

1. There is no contract for purchase where plaintiff in its letter offers to sell oil of a guaranteed gravity of 15 degrees, and defendant in its letter, in which it states it accepts the proposition, says that it wishes to be distinctly understood that the 15 degrees gravity is to be at a temperature of 60 degrees.

HENSHAW, J. Plaintiff sued defendant corporation and its stockholders, seeking a recovery for alleged breach of contract for the purchase of oil. Upon trial plaintiff sought to prove the contract by the introduction in evidence of the following letters:

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"San Francisco, Cal., Dec. 19, 1900.

"United Oil Producers, Phelan Building. — Gentlemen: We beg to offer you crude petroleum of a guaranteed gravity of not less than 15 at the rate of 2 cars per day, as a minimum, to 3 cars, as a maximum, for one year from February 1st, 1901, to February 1st, 1902, at the price of 52½c, f. o. b., Bakersfield. In case this offer meets with your acceptance and you desire to include January next within the contract, we shall be pleased to supply you during that month at the same rate and at the same terms. Yours truly.

"FOUR OIL COMPANY,
"Charles Musaus, Secretary."

"San Francisco, Dec. 20, 1900.

"Number Four Oil Company, Mills Building, City. — Gentlemen: Replying to your favor of the 19th inst., would say that we accept your proposition therein contained for fuel oil for one year at 52½ cents, f. o. b., Bakersfield, on 2 cars per day minimum, and 3 cars per day maximum. The gravity of the oil to be 15 degrees Beaume, as you state, but we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit. We presume that all oil will be of this grade, as it has been thus far, but we do not wish any oil below that gravity at that temperature. Yours truly,

"UNITED OIL PRODUCERS,
"By Shafter Howard, Secretary."

It accompanied its offer with an additional offer to prove the meaning of certain technical terms and abbreviations understood by the parties. The court sustained defendants' objection to the introduction in evidence of the letters, and judgment followed for the defendants, from which plaintiff appeals.

The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: "To constitute a binding contract made in this form [letters] there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. 1 Wharton on Contracts, § 4. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. National Bank v. Hall, 101 U. S. 51, 25 L. Ed. 822. An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. Tilley v. County of Cook, 103 U. S. 161, 26 L. Ed. 374. An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. Civil Code, § 1585." Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; and see, also, Yore v. Bankers' Mut. Life Ass'n, 88 Cal. 609, 26 Pac. 514. Under these principles of law it is clear that the court's ruling was correct, and that the minds of the parties had not met in the creation of a legal obligation, and this for the reason that the acceptance of the defendant was conditional and imported into the contract a term not found in the original proposal, and one requiring the assent of the plaintiff before either could be bound. This term is found in the following sentence: "But we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit." The original proposition contained no limitation upon the temperature at which gravity was to be determined. That the matter of temperature was regarded as of importance is not only shown by the condition expressed in re-

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spondent's answer, but is further shown by a copy of another contract made by plaintiff, where it is specified that the gravity shall be determined at a temperature of 70 degrees Fahrenheit. Plaintiff having failed to prove its acceptance of the new condition imposed by defendant's letter, it follows that the acceptance was not absolute and unqualified, but was conditional, amounting to a new proposal upon the part of the defendants to which the plaintiff never assented. There was thus no completed contract between the parties, and the judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

Guaranty: Release of Surety.

"In July, 1900, W. C. Sims entered into a contract with W. J. Lawhon to build a storehouse for Lawhon. The contract, which was in writing, contained, among others, the following provision, to wit: 'It is hereby mutually agreed by and between the parties hereto, that the sum to be paid by the owner to the contractor for said work and materials shall be $5,835.00 (fifty-eight hundred and thirty-five dollars), subject to additions and deductions as hereinbefore provided; and that such sum shall be paid in current funds by the owner to the contractor in installments as follows: $3,890.00 to be paid out for materials and labor on the work when the bills for the same have been O. K.'d by the contractor and approved by the architect. The owner to advance labor pay roll on each pay day, same to be signed by each subcontractor and principal contractor and approved by the architect. Only the two-thirds of contract price to be used as specified above, and then only when approved by the architect. $1,945.00, the final payment, shall be made within fifteen days after this contract is fulfilled.' To secure the performance of his contract, Sims executed a bond to Lawhon, with A. T. Toors as security. The condition of the bond was that: 'If W. C. Sims contractor, shall duly perform said contract and pay all obligations incurred by him for labor and materials furnished in the construction of said building, then this obligation is to be void, but if otherwise, the same shall remain in full force and virtue.' Toors, the surety on the bond, was a dealer in lumber and building material, and he furnished to Sims, the contractor, material for the construction of the building. After the building was completed, he brought an action against Sims and Lawhon, in which he asked judgment against Sims for the sum of $339.47, balance due for material for the construction of the house, and further asked that the same be declared a lien upon the building of Lawhon. Lawhon filed an answer, by which he denied any liability under the contract, and further set up a counterclaim that Sims had not performed his contract, by paying all obligations incurred in the erection of the building, but had allowed liens to be filed against the building by the

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plaintiff, Toors. Wherefore he alleged that Toors was liable to him on his bond for the sum of $110.09, for which amount he asked judgment. Toors filed a reply to the counterclaim, in which he alleged that Lawhon had failed to carry out the provision of the contract which required him to retain one-third of the amount to be paid the contractor for the building until after the completion thereof, and that by reason of such failure he was discharged from liability as surety on the bond. On the trial the case was submitted to the court without a jury, who found, among other matters, that Lawhon, prior to the completion of the work, had paid out to Sims, the contractor, for work and materials furnished in the erection of the building, $5,355, and that this was done without notice to Toors, the surety on the bond, and without his consent. The court held that this failure to comply with the contract on the part of Lawhon operated to discharge Toors from any liability on the bond. The court therefore gave judgment in favor of Toors for his debt, and declared the same should be a lien on the building of Lawhon. Lawhon appealed."

RIDDICK, J. (after stating the facts). "The only question presented by this appeal is whether Toors has been discharged from liability on the bond executed by Sims to Lawhon for the performance of a building contract, and upon which bond Toors was surety. Lawhon agreed to pay Sims $5,835 for the erection of the building, but the contract for the performance of which the bond was given stipulated that only two-thirds of this amount should be paid during the progress of the work. The contract provided that the remaining one-third, amounting to $1,945, should be paid within 'fifteen days after this contract is fulfilled.' Now, the contract required that Sims should pay off all obligations incurred by him for labor and materials in constructing the building, and it was not fulfilled until he did so. The court found — and his finding is not disputed — that instead of reserving the $1,945 until the contract was fulfilled, Lawhon paid out all the fund except $480 before the building was completed, and that he paid out the remainder of the price within fifteen days thereafter. But at that time there were obligations incurred by Sims for material used in the construction of the building still unpaid and outstanding. So the whole amount of the consideration was paid out by Lawhon before Sims had fulfilled his contract, although, as before stated, the contract expressly stipulated that one-third of the consideration should not be paid until after that time. But if they treat the contract as fulfilled by the completion of the building, there was still a breach of this provision of the contract, for, as before stated, the contract required that $1,945 should be reserved, while less than one-fourth of that amount was reserved until the building was completed.

"Counsel for Lawhon contends with much earnestness that this provision of the contract in reference to the reservation of a portion of the contract price until after the performance of the contract was intended solely for the protection of the owner, and that the failure to retain it did not affect the liability of the surety. If this was a new question, it might be worthy of some consideration; but it is now well settled that, if a stipulation of that kind in a building contract be waived without the consent of the surety, it operates to discharge him from liability on his bond for

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the performance of the contract. Calvert v. London Dock Co., 2 Keen (Eng. Chan.), 644; Evans v. Graden, 125 Mo. 72, 28 S. W. 439; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Bragg v. Shain, 49 Cal. 131; Board of Com'rs v. Branham (C. C.), 57 Fed. 179; Stearn's Law of Suretyship, p. 112. To quote the language of Lord Langsdale in Calvert v. London Dock Co., cited above, the payment of the money before the completion of the contract was calculated to make it easier for the contractor 'to complete the work if he acted with prudence and good faith, but it also took away that peculiar sort of pressure which by the contract was intended to be applied to him.'

"Under the facts of this case, the surety was directly interested in the retention of the portion of the consideration required by the contract, and the decision of the Circuit Court that the waiver of that provision without his consent operated to discharge him from further liability on his bond was, in our opinion, correct.

"There are other matters discussed by counsel, but it is unnecessary to consider them, for it follows from what we have previously said that the judgment must be affirmed, and it is so ordered."

Sale — Delivery to Be Made Later: Payment and Identification of Goods Held to Be Sufficient Delivery to Pass Title: Goods Burned Before Actual Delivery.

In January, 1902, George A. La Vie agreed to buy and J. R. Kaser agreed to sell Kaser's hop crop for that year at 10½ cents per pound.

The buyer advanced $80 at the time, and agreed to make other advances during the season, which he did. The seller was to deliver the crop at the Silverton depot.

In October, 1902, the buyer's agent went to Kaser's farm, and the crop was weighed and the agent gave the seller a check for the balance due, the seller agreeing, as per contract, to deliver the hops at the depot. The seller sold the hops to W. L. Tooze and offered to return to La Vie his check and the money he had advanced. La Vie declined this offer and sued Tooze for the hops. La Vie was beaten in the lower court, but won on appeal.

The court said in part:

"The contract between Kaser and the plaintiff made in January, 1902, was executory, and no title passed to the property therein mentioned until the hops were delivered and accepted (Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342); but the plaintiff was not obliged to wait until the hops had been delivered at the place mentioned in the contract before receiving and accepting them (La Vie v. Tooze, 43 Or. 590, 74 Pac. 210). He could receive them elsewhere; and, if they were in fact delivered to and paid for by him at the Allen farm, in pursuance of the contract, the transaction constituted a completed sale, and the title vested in him, although it was understood that the defendant, was afterwards to transport the property to Silverton. The hops were ready for delivery. Nothing whatever remained to be done by Kaser to put them in a deliverable condition. They were inspected, weighed, branded, and paid for by the purchaser. All that remained for the seller to do was to take

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them to the depot or cars, and ship them to the plaintiff at New York. By the terms of the contract the plaintiff could have insisted upon the delivery at the place specified before he received or accepted the hops, but, as he waived that right, and paid the balance due thereon at the Allen farm, the transaction is governed by the same rules as those which control the sale of specific articles of personal property. The law is that, where there is no manifestation of an intention to the contrary, the contract as between the parties is an actual sale if the specific thing is identified, agreed upon, delivered, and paid for, although it may be left in the actual custody of the seller under an agreement to deliver it in the future at some particular place. Thus, in Scott v. King, 12 Ind. 203, the defendant agreed to sell and deliver to plaintiff on board a canal boat 4,000 bushels of corn, payment to be made upon delivery. Two thousand bushels were delivered as agreed upon. The remainder was not delivered at the time specified, but the defendant informed the plaintiff that the corn was in the warehouse ready for delivery whenever he would send a boat, and requested payment therefor, which was made accordingly. Before the corn was called for by the plaintiff, and while it remained in the defendant's warehouse, it was destroyed by fire. The plaintiff thereupon brought an action against the defendant to recover damages for the failure to deliver the corn, but the court held that, as the corn was set apart so that it could be identified, and had been paid for, the sale was complete, and the transfer of the corn from the warehouse to the boat, although necessary to a full performance of the contract of sale as actually made, was waived by payment before delivery. So, in this case, the provision in the contract between Kaser and the plaintiff that the hops should be delivered at a certain place was for the benefit of the plaintiff, and he waived the performance of such stipulation by receiving, accepting, and paying for them at the Allen farm. By such acts the title passed to him, and the subsequent possession of the property by Kaser was as his agent or bailee, and not as owner. The rule, so often stated in the books, that, if anything remains to be done by the seller of personal property, the title does not pass, generally applies to things that are required to be done before delivering — such as ascertaining the identity, quality, or quantity of the article sold, or putting it in a condition which the contract required; but, as said by Mr. Justice Selden in discussing this question in Terry v. Wheeler, 25 N. Y. 520: 'No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price of it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee, and not as owner. The questions which arise in such cases as to sales are questions of intention, such as arise in all other cases of the interpretation of contracts; but when the facts are ascertained either by the written agreement of the parties or by the findings of a court, as they are here, they are qustions of law.' Now, in the case at bar, the facts are not disputed, and therefore the effect of

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them was not for the jury, but purely a question of law. That the title to the hops passed to the plaintiff at the time they were inspected, branded, and paid for at the Allen farm appears to us very clear. No other reasonable interpretation can be put upon the acts of the parties. Krebs went to the farm, as all agree, to 'take in' the hops. With this understanding, and without objection from Kaser, he inspected, branded, received, and paid for them. No conditions were attached to the transaction, or to the delivery of the check. The latter was accepted by Kaser in payment of the hops, and he could thereafter have cashed it at any time. There was no understanding or agreement, as the position of defendant assumes, that he could not cash the check unless the shipping receipt, properly signed, accompanied it, when presented for payment. The acts of the parties amounted to more than a mere inspection and identification of the hops, leaving the delivery to be made as provided for under the original contract. They constituted a completed sale, and, if the hops had been thereafter destroyed by fire, the loss would clearly have fallen on plaintiff; or, if Kaser had become bankrupt, and made an assignment, they would not have passed to his assignee. Martz v. Putnam, 117 Ind. 392, 20 N. E. 270. We are of the opinion, therefore, that under the law as applied to the undisputed facts of the case the plaintiff was entitled to a recovery, and the court should have so instructed the jury."

79 Pac. 413.

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ROCK ISLAND PLOW CO. v. PETERSON.

101 N. W. 616.

(Supreme Court of Minnesota. Dec. 2, 1904.)

FOREIGN CORPORATIONS — BUSINESS IN THE STATE — CONDITIONS.

1. Plaintiff, a corporation of the State of Illinois, engaged in the business of manufacturing and dealing in farm machinery in that and other States, maintained an agency in this State for the purpose of receiving, storing, and delivering goods to purchasers in this State, to whom sales were made by orders taken by traveling salesmen, subject to the approval of plaintiff at its home office, in the State of Illinois. The agent in this State had no authority to make sales of property stored with it, or to take or receive orders therefor. Its authority was limited exclusively to delivering goods previously sold by plaintiff through its traveling salesmen. It is held that plaintiff was not doing business within this State, in violation of chapter 69, p. 68, or chapter 70, p. 71, Gen. Laws 1899; that its business, transacted in the manner stated in the opinion, constituted interstate commerce.

(Syllabus by the Court.)

Protest: Certain Waiver Held to Be Insufficient: Waiver as Provided by Negotiable Instruments Law.

O. F. Thomas, an indorser on the note shown by accompanying illustration, made an agreement in writing by which he waived "all notice of presentment, dishonor and protest" of the note. The note was not presented for payment at its maturity, nor were any further steps taken to charge the indorser. The note not being paid, the holder brought an action on it against the maker, and against Thomas as indorser.

The court dismissed the complaint against Thomas, giving as a reason the fact that no demand of payment had been timely made; and saying: "The indorser, Thomas, by the written agreement, merely waived notice of presentment, dishonor, and protest. He did not waive presentment and demand of payment . . . There was therefore a failure to charge the indorser."

It may be that this waiver, quoted in a complaint, would be, as a matter of pleading, an insufficient statement that all of the steps necessary to charge an indorser had been waived, but in the light of decisions of the Court of Appeals of New York it would seem to be sufficient as between the holder of a note and the indorser. Judge O'Brien, writing in 138 N. Y. 494, said: "The presentation of a check or draft at the bank on which it is drawn is a demand." And that a note payable at a bank is, on the day of its maturity, equivalent to the maker's check on the bank, and the bank is bound to so interpret it and charge it, as a check, to the maker's account, if the account is good for it, is a well-known proposition.

A waiver may be made either verbally or in writing; it need not be

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direct or positive, if it is of a character to satisfy the mind that a waiver is intended. 116 N. Y. 186. In 1 N. Y. 186, the following words used by an indorser, in a letter to the holder of the note, were held to waive "all those acts which by law are necessary to charge an indorser": "Please not protest T. B Coddington's note due . . . for ten thousand dollars, and I will waive the necessity of the protest thereof."

The word protest, as used among business men, includes all the steps necessary to charge an indorser, and in waiving protest an indorser is supposed to use it in that sense. 94 Cal. 141; 1 N. Y. 186

Presumably to cover this point, the Negotiable Instruments Law provides: "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of formal protest, but also of presentment and notice of dishonor." Attention is called to the fact that in this remedial provision (sec. 182 of the New York Statute) the word "demand" is omitted, as is the case in the waiver under discussion. This decision is by an intermediate appellate court of high standing, but it hardly seems probable that a higher court would hold this waiver insufficient as between the parties. If it does, then, seemingly, the Negotiable Instruments Law has not, by the section quoted, covered the ground it presumes to cover, and a waiver to be effective should be as full, at least, as this: "Presentment, demand, notice of dishonor, and protest waived."

The decision in full follows:

HAYWARD et al. v. EMPIRE STATE SUGAR CO. et al.

93 N. Y Supp. 449.

(Supreme Court, Appellate Division, Fourth Department. May 3, 1905.)

NOTES — PRESENTMENT FOR PAYMENT — WAIVER — JUDGMENTS — PAYMENT — DISCHARGE OF INDORSER.

1. Where an indorser of a note, executed by a corporation of which he was president, waived "all notice of presentment, dishonor, and protest," he did not thereby waive presentment and demand of payment.

2. Where a note executed by a corporation and indorsed by its president was given in satisfaction of the balance due on a judgment, and such note was renewed at maturity, the transaction operated merely as an extension of time of payment, and neither the original nor the renewal note operated as an extinguishment of the original indebtedness.

3. Where a renewal note, executed by a corporation and indorsed by its president, was not presented to the corporation for payment at maturity, and there was no evidence that the note, if presented, would not have been paid by the corporation, it would be presumed that it would have been so paid, and that the indorser was therefore damaged to the full extent of the note and was thereby discharged.

Appeal from Special Term, Wayne County.

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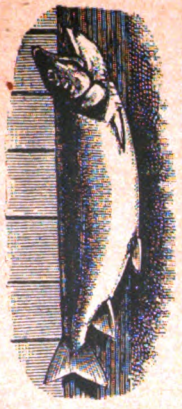

$5633 87/100 Lyons, N. Y Sep. 17th 1907

Six months AFTER DATE we PROMISE TO PAY TO

THE ORDER OF Thomas J. Hayward

Fifty six hundred thirty three 87/100 DOLLARS

AT Bank of Wayne, Lyons, N Y

VALUE RECEIVED

NO. DUE Mar. 17/3-

Empire State Gear Co.

By Richard Allen Treas.

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

B. 33. Protest: Certain Waiver of Protest Insufficient: Waiver in Negotiable Instruments Law.

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O. F. Thomas

By an agreement in writing, made at a proper time, the indorser of this note waived "all notice of presentment, dishonor and protest." No presentment, demand, notice of dishonor, or protest was made at a time proper to charge the indorser. It will be noticed that the waiver made by the indorser did not waive demand; and for that reason the court dismissed the complaint against the indorser, in an action against him on the note. The court said in part: "The indorser, Thomas, by the written agreement of September 17, 1902, merely waived notice of presentment, dishonor, and protest. . . . He did not waive presentment and demand of payment. There was therefore a failure to charge the indorser." Possibly under the rules of pleading there were defects that warranted the dismissal of the complaint against the indorser, but that the decision can be sustained on appeal on the ground seemingly stated by the court can be doubted, *i. e.* that the waiver "didn't waive," as between the indorser and the holder of the note, for the reason that it did not specifically use the word "demand." Judge O'Brien, writing in 138 N. Y. 494, says: "The presentation of a check or draft at the bank on which it is drawn is a demand." And a note payable at a bank is, on the day of its maturity, equivalent to the maker's check, and the bank is bound to so interpret it.

A waiver may be made either verbally or in writing; it need not be direct or positive, if it is of a character to satisfy the mind that a waiver is intended. 116 N. Y. 188. In 1 N. Y. 186, the following words used by an indoser, in a letter to the holder of a note, were held to waive "all those acts which by law are necessary to charge an indorser": "Please not protest I. B. Coddington's note due . . . for ten thousand dollars, and I will waive the necessity of the protest thereof." The word protest, as used among business men, includes all the steps necessary to charge an indorser; and in waiving protest an indorser is supposed to use it in that sense. 94 Cal. 141; 1 N. Y. 186. Presumably to cover this point, the Negotiable Instruments Law provides: "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument is deemed to be a waiver not only of formal protest, but also of presentment and notice of dishonor."

Attention is called to the fact that in this remedial provision (section 182 of the New York Statute) the word "demand" is omitted as it is in the waiver under discussion. Will it be said, under the decision in this case, that a waiver of "protest," as provided in this section, will be bad as not including a waiver of demand, although it does waive presentment? The court seems to so hold; and if it correctly states the law a waiver to be effective, even in the face of the Negotiable Instruments Law, should, at least, be as full as this: "Presentment, demand, notice of dishonor, and protest waived."

McMaster's Com. Cases, Vol. 1905, 93 N. Y. Supp. 449.

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Action by Thomas J. Hayward and another against Empire State Sugar Company and another. From a judgment dismissing the complaint as against defendant Orlando F. Thomas, plaintiffs appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, HISCOCK, and STOVER, JJ.

Hamn & Knapp, for appellants.
Charles T. Ennis, for respondents.

WILLIAMS, J. The Judgment should be affirmed, with costs. The action was upon a promissory note made by the defendant sugar company and indorsed by the defendant Thomas. The defense was that Thomas had been released from liability by failure to present and demand payment from the maker of a note given in renewal of the note in suit. The facts were all conceded, and were, briefly, as follows: The note in suit was given March 17, 1902, for $5,469.73, payable at six months to plaintiff's order at the Bank of Wayne, Lyons, N. Y., with interest. The consideration of the note was the balance remaining unpaid upon a judgment in favor of the plaintiffs and against the defendant sugar company, which was discharged upon the giving of the note. Thomas, the indorser, was then the president of the sugar company. An agreement in writing was made at the time the note was given that the note might be renewed at maturity for a further six months, Thomas indorsing the renewal note, and Thomas in such written agreement waived "all notice of presentment, dishonor and protest" of the original and renewal notes. When the original note became due September 17, 1902, it was duly protested for nonpayment, and notice given Thomas, the indorser. The renewal note was thereupon given for $5,633.82, payable at six months to plaintiffs or order at the same bank, with interest, and was indorsed by Thomas. The original note was then surrendered to the defendant sugar company, and has ever since been in its possession. The renewal note was not presented March 17, 1903, and payment demanded, but it was presented March 18, 1903, and payment demanded and refused. The action is brought on the original note, and plaintiffs offered to surrender the renewal note upon recovering on the original note. These facts being agreed on, the trial court dismissed the complaint as to the indorser Thomas. From the judgment entered upon such decision this appeal is taken.

The indorser, Thomas, by the written agreement of September 17, 1902 merely waived notice of presentment, dishonor, and protest of the two notes. He did not waive presentment and demand of payment of the notes. Cook v. Warren, 88 N. Y. 37, 41. There was therefore a failure to charge the indorser upon the renewal note. The original indebtedness, however, was not extinguished by the giving of the notes therefore. The effect was merely to extend the time of payment until the notes respectively became due. The original note did not pay the debt, and the renewal note did not redeem the promise of the original note, nor itself pay the original debt. If the renewal note had been duly presented to the maker at maturity and payment demanded, this action could be maintained upon the original note against the maker and indorser, the plaintiffs

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Austria the liability of Rogers, Brown & Co. would not be affected by the course of the holders in regard to demand of payment and protest.

It is a well established rule that the liability of the indorser for value of a promissory note is governed by the law of the State where he indorses and negotiates the instrument, and if he indorses in one State and negotiates in another State, the law of the latter State will govern, but in case the indorsement is made before the inception of the instrument, for the accommodation of the maker, it is said that the indorser's liability will be governed by the jurisdiction where the instrument is payable. 69 N. E. 613.

In deciding that the drawers' liability in this and similar cases was governed by the laws of New York State the court was apparently in error. However this may be in the jurisdictions named in the authority cited by the court.—Am. & Eng. Encyc. of Law, vol. 22, p. 1346 (and the State courts there cited are overwhelming), such does not seem to be the rule in New York State. In establishing a contrary rule in that State the Court of Appeals say in 84 N. Y. 367:

"In this court it has been declared 'too well established to require reference to books.' (Everett v. Vendryes, 19 N. Y. 436). It was there distinctly presented. The action was (on) a bill of exchange drawn in New Granada upon a corporation in New York city. The indorsee sued the drawer of the draft. The drawer defended. The decision of the court shows the difference between the rules applicable to the contract of the drawer and that of the indorser. Holding that the contract of the former was to be governed by the law of the place where it was to be performed, saying: 'By drawing the bill the defendant undertook that the drawee in New York would pay it to the payee or his order, and if the drawee did not so pay it, he himself would make such payment.' What payment? Why, the payment called for by the draft — a payment in New York. And such is the construction to be given the defendants' (drawers) contract here. The case also illustrates the principle above adverted to, that more than one law will apply to the same bill of exchange. Holding, . . . that the contract of the indorser would be governed by the law of New Granada, where it was made." 84 N. Y. 367-381.

And to the same effect is 138 N. Y. 494:

"The plaintiffs brought this action against the drawers of the draft and have recovered. The defense, in substance, is that the amount of the draft was lost to the defendants in consequence of the neglect and failure of the plaintiffs to present the same to the drawee for payment in due time. The draft, though made in another State by parties residing there, was payable here, where the drawee resided, and the legal questions involved are to be determined by the law of this State."

This conflict of law, — or taking either side of the statement as true law — should have the attention of those who handle commercial paper which may be either drawn or indorsed in other States. Especially is this so in States which provide by statute that the

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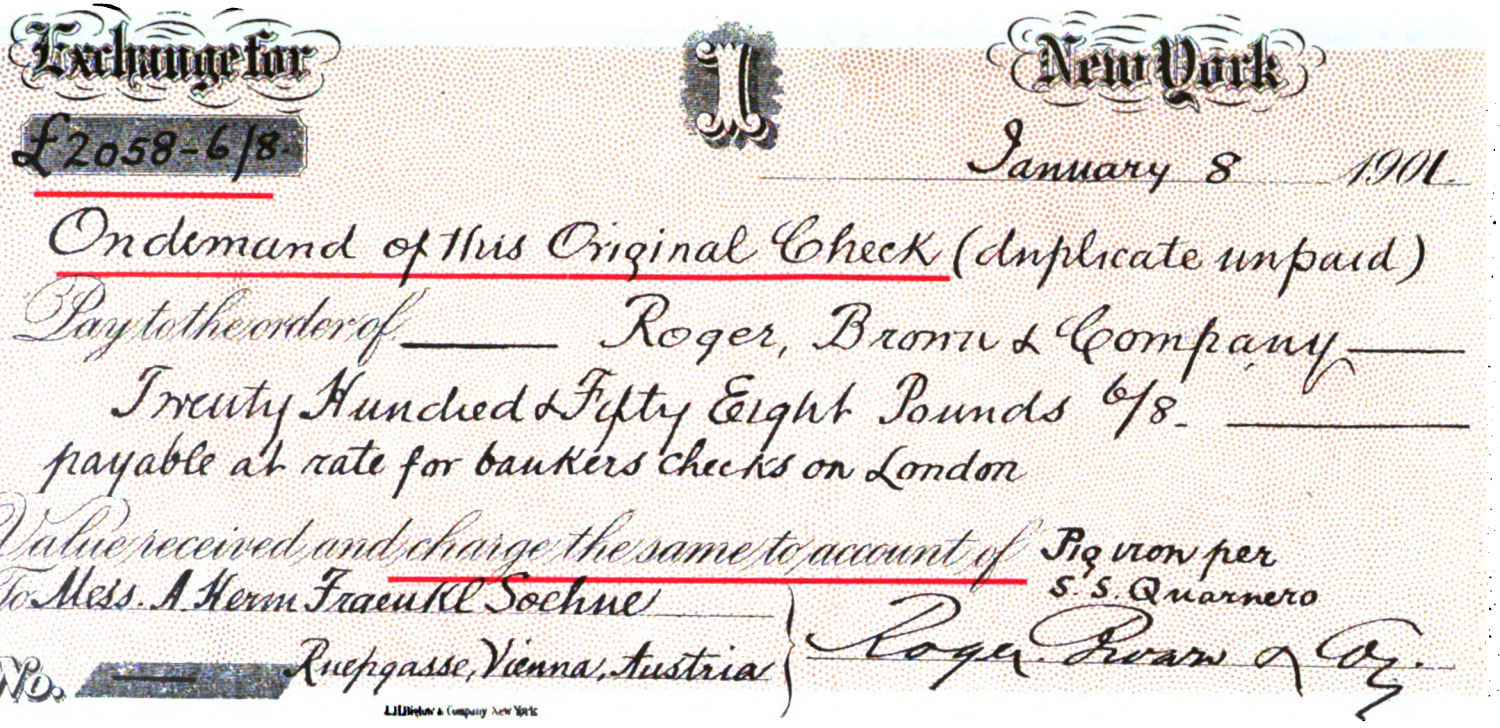

Exchange for £2058-6/8

New York

January 8 1901

On demand of this Original Check (duplicate unpaid)

Pay to the order of Roger, Brown & Company

Twenty Hundred & Fifty Eight Pounds 6/8

payable at rate for bankers checks on London

Value received and charge the same to account of Pig iron per S.S. Quarnero

To Mess. A. Herm Fraenkl Soehne

No. Ruepgasse, Vienna, Austria

Roger, Brown & Co.

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Pay to Messers G. Amsinck & Co
or order. Value received. Jan 8. 01
Rogers, Brown & Co

In pursuance of an order for pig iron, Rogers, Brown & Co., of New York, shipped the iron, and attaching a bill of lading for it to this instrument, indorsed the instrument and sold it to G. Amsink Co. of New York. It was in due course of business forwarded for collection and presented for payment January 22, 1901. The drawees in Vienna requested that presentment be delayed pending an adjustment with the drawers as to price. Such differences not being adjusted, the draft was not paid on re-presentation January 28, 1901, and on February 12, 1901, it was formally protested and returned to Amsink & Co. in New York, who sued Rogers, Brown & Co. for the amount.

The instrument is, on its face, termed a check, but the court held that it was a bill of exchange — one of the requisites of a check being that it be drawn on a bank or banker. This decision was of importance, as the liability of the drawer of a check, that has not been duly protested, differs from that of the drawer of a bill of exchange that has not been so protested.

It was also held that the liability of the drawers was goverened by the Laws of New York, where the bill was drawn and negotiated. This point was contested, as seemingly, by the laws of Austria the liability of the drawers of a bill of exchange is retained if the bill is not promptly protested as required by the Laws of New York. This ruling on this point seems to be in direct conflict with the decisions of the Court of Appeals of New York, in which State the action was tried (84 N. Y. 367; 138 N. Y. 494), although the cases cited by the court in other jurisdictions are overwhelmingly with it (Am. & Eng. Enc. of Law, Vol. 22, p. 1346).

In 84 N. Y. 367, the drawer of a draft, drawn in New Granada on a party in New York, was sued on the draft. Judge Danforth, writing for the court, referred to Everett *v.* Vendryes, 19 N. Y. 436, and said in part: "The decision (there) shows the difference between . . . the contract of the drawer and that of the indorser. Holding that the contract of the (drawer) former was to be governed by the law of the place where it was to be performed, saying: 'By drawing the bill the (drawer) defendant undertook that the drawee would pay it, and if the drawee did not so pay it, he himself would make such payment.' What payment? Why, the payment called for by the draft — a payment in New York. . . . The case also illustrates the principle above adverted to, that more than one law may apply to the same bill of exchange. Holding that the contract of the *indorser* would be governed by the law of New Granada where it was made." See also 138 N. Y. 494. Under the decisions 81 N. Y. 454, 75 N. Y. 370, 25 N. Y. 239, 54 N. Y. 14, it could be argued that the words on the face of the instrument "and charge same to account of pig iron," etc., made this a non-negotiable draft on a particular fund, and that it was not a bill of exchange subject to the rules of protest applicable to bills of exchange.

McMaster's Com. Cases, Vol. 1905, 93 N. Y. Supp. 87.

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drawers of bills of exchange and the indorsers of promissory notes may be held without protest. It would seem that the holders of paper drawn or indorsed in other States would show prudence in protesting it as many times, or in as many names as Burke used in impeaching Warren Hastings.

The court quoted from the Negotiable Instruments Law as to the definition of a bill of exchange and as to the liability of the drawers thereof, and decided that in accordance therewith Rogers, Brown & Co. were released from all liability on the instrument by reason of failure to properly protest it.

The decision in full follows this article. Another point decided here may be of interest generally, even though the question discussed may not bear directly on this instrument:

In regard to this instrument being a negotiable instrument — governed by the Negotiable Instruments Law — requiring protest to hold the drawers thereof in case of nonpayment, attention is called to these words in the instrument: "Value received and charge the same to account of pig iron per S. S. Quarnero." There are several decisions of the Court of Appeals of New York that seemingly hold that the words quoted would take this instrument out of the realm of negotiable paper governed by the Negotiable Instruments Law, and the law merchant, and class it with non-negotiable drafts, the liability of the drawers of which is not affected by failure to protest. This question was not discussed by the court.

In 61 N. Y. 251 it is said: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely at all events." Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer . . . "The difficulty is in determining whether the bill is to be paid out of the fund or not."

The following described instruments were decided by the Court of Appeals of New York to be orders on particular funds, and hence non-negotiable instruments, — instruments which it would not be necessary to protest in order to retain the liability of the drawer:

"MOHAWK, AUG. 31, 1876.

JEROME TUTTLE.

Pay BRILL & RUSSELL THREE HUNDRED DOLLARS and charge the same to our account for labor and materials performed and furnished in the repairs and alterations in the house in which you reside in the village of Mohawk.

J. P. ACKERMAN & SON."

81 N. Y. 454.

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BROOKLYN, N. Y., APRIL 23, 1874.

MR. RICHARD DEMILL.

Please pay to F. EHRICH $400, and charge the same to my account of grading and paving Lexington avenue, between Patchen and Broadway, as per contract.

$400. JAMES P. HOWARD.

Judge Hand, writing for the court, said of this instrument:

"It must be conceded that the question is a very close one whether the order of Howard upon defendant was a draft payable at all events, or a mere appropriation of so much of the contract price for paving, to become due Howard, and only payable out of that fund. In this case, however, the order should, I think, be construed as a direction to pay the $400 only 'as per contract' and hence only out of moneys to become due thereunder.

"It would not, therefore, be a direction to pay the sum at all events."

75 N. Y. 370.

"$500. COLUMBUS, MARCH 1, 1853

MESSRS. JOHN STEWART, JR., & CO.

Please pay to the order of ARCHIBALD H. LOWERY the sum of FIVE HUNDRED DOLLARS on account of 24 bales of cotton shipped to you as per bill of lading by Steamer Colorado, inclosed to you in letter.

STRIPPLEMAN & BOYCE."

"The draft was not a bill of exchange requiring acceptance. . . but a specific draft or order upon a particular fund."

25 N. Y. 239.

AUG. 16, 1866.

SAMUEL H. SCOTT & CO.,

GENTLMEN:

Please pay MR. JOHN R. GLOVER $346.69, and charge same to me, account of rent of house No. 13 Cheever Place.

SARAH ALGER.

54 N. Y. 14.

It is said in 46 N. Y. 660, where one of these ambiguous orders was before the court: "The money was payable out of a particular fund. It was not therefore a draft within the law merchant."

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Again, it is said in 52 N. Y. 422: "It is held that the indorser of a a non-negotiable note is not entitled to require that immediate demand be made for payment and notice of non-payment given. 8 Wend. 403. And as the position of a drawer of a bill and of the indorser of a note are in certain respects alike . . . it is claimed that these decisions are authority for a rule that neither can the drawer of a non-negotiable bill require presentment, demand and notice."

"But though there be not that absolute duty upon the payee, and though he be not held to the strict rule applicable to a holder of negotiable paper, still he is subject to a duty, if he would in all cases preserve his right to call upon the drawer. He must not be guilty of positive laches, to the detriment of the drawer or other party to the instrument, upon whom he would retain a liability."

And, in 40 N. Y. 491: "One who writes his name on the back of a non-negotiable note, may be held by the holder as maker or guarantor, and he is not entitled to notice of demand or nonpayment."

In describing the requisites of a negotiable instrument the Negotiable Instruments Law says it "must contain an unconditional promise or order."

* * * * * * * *

> "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:
>
> (1) "An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
>
> (2) . . . "But an order to pay or promises to pay out of a particular fund is not unconditional."

The statement "(1)" has not changed the law in New York as it existed when the foregoing illustrated orders were decided to be drafts on particular funds, and for that reason, non-negotiable instruments, as Judge Rapallo, in writing for the court in the "J. P. Ackerman & Son" order, said:

> "The designation by the drawer of a particular fund out of which the drawer is subsequently to reimburse himself, or a particular account to which it is to be charged will not convert the draft into an assignment of the fund" (or make it a draft on a particular fund).

And yet, in using this language, the court held the "J. P. Ackerman & Son" order "an order to pay out of a particular fund," and hence non-negotiable, and, consequently, an instrument which did not require protest to charge the drawer.

This Rogers, Brown & Co. instrument, with its bill of lading attached, can hardly be read without carrying the conviction that the order was drawn against the iron — and the iron alone. The

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history of the instrument and of the security attached to it strengthens the theory that it was a draft drawn on a particular fund, and not a bill of exchange governed by the Negotiable Instruments Law or by the law merchant

The decision of the court (an intermediate appellate court) follows:

AMSINCK et al. v. ROGERS et al.

93 N. Y. Supp. 87.

(Supreme Court, Appellate Division, First Department. April 14, 1905.)

FOREIGN BILLS — INDORSEMENT — PRESENTMENT FOR PAYMENT — PROTEST — LIABILITY OF DRAWER — WHAT LAW GOVERNS — NEGOTIABLE INSTRUMENT LAW — CHARACTER OF PAPER — FAILURE TO PROTEST — DISCHARGE OF DRAWER.

1. Where a foreign bill of exchange, with bill of lading attached, was indorsed by the drawer to plaintiffs for discount, and by them forwarded to their agents for presentment to the drawees, the drawer's liability on his indorsement, on payment being refused, was governed by the law of the place where the indorsement was made, and not of the foreign country where the bill was presented for payment.

2. Where an instrument for the payment of the price of a shipment of iron was drawn by the seller on the buyer, who resided in a foreign country, and, with the bill of lading attached, was indorsed for discount, it was a foreign bill of exchange, and not a check, under Negotiable Instrument Law, §§ 210, 321 (Laws 1897, pp. 745, 756, c. 612), defining a bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the addressee to pay on demand, or at a fixed or determinable time, a certain sum of money to order or to bearer, and defining a check as a bill of exchange, drawn on a bank, payable on demand.

3. Where a foreign bill of exchange was presented for payment by the agent of the indorsee, and payment was formally demanded and refused, but the bill was not duly protested for nonpayment, the drawer was discharged from liability to the indorsee under the express provisions of Negotiable Instrument Law, § 260 (Laws 1897, p. 750, c. 612).

Appeal from judgment on report of referee.

Action by Gustave Amsinck and another against William C Rogers and others. From a judgment on referee's report in favor of defendants, plaintiffs appeal. Affirmed.

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, INGRAHAM, and LAUGHLIN, JJ.

Charles Oakes, for appellants.
Martin Conboy, for respondents.

INGRAHAM, J. This action was tried before a referee, and the facts found were fully sustained by the evidence. The question presented depends entirely upon the legal conclusion to be drawn from the facts found by the referee. The plaintiffs were copartners, doing a commission and banking business in the city of New York; the defendants were copartners, doing a wholesale iron business in New York and various other cities in the United States. On the 3d of

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September, 1900, the defendants sold 1,000 tons of iron to a firm of iron merchants doing business in Vienna, in the empire of Austria, at a net purchase price of £2,058 6s. 8d. sterling. In compliance with this contract, the defendants caused to be shipped, on the 12th of December, 1900, from Birmingham, Ala., 1,000 tons of pig iron, consigned to the defendants at Trieste, Austria, taking from the railroad company an export bill of lading therefore. On December 26, 1900, the railroad company caused the iron to be loaded on a steamship at New Orleans, La., which vessel was expecting to sale forthwith for Trieste, Austria, and received from said steamer a bill of lading, which was by the railroad company forwarded to the defendants in the city of New York. Whereupon the defendants notified the purchasers by cable that the said iron had been shipped on December 26, 1900. On the 8th of January, 1901, the defendants drew an instrument in writing, as follows:

"Exchange for £2058 6/8 New York, January 8, 1901.

"On demand of this original check (duplicate unpaid), pay to the order of Rogers, Brown & Company, twenty hundred and fifty-eight pounds 6/8, payable at rate for bankers checks on London value received and charge the same to account of pig iron per S. S. 'Quarnero.' Rogers, Brown & Co.

"To Mess. A. Herm Fraenkl Soehne,
"Ruepgasse, Vienna, Austria."

Upon this instrument there was indorsed:

"Pay to Messrs. G. Amsinck & Co.
or order Value received.
Jan. 8, 1901.
(2 one cent U. S. Internal Revenue
stamps, cancelled.)
"Rogers, Brown & Co."

This instrument, thus indorsed, was delivered by the defendants to the plaintiffs, with the bill of lading covering the iron, which was also indorsed to the plaintiffs and attached to the draft. Upon the delivery of this check or draft to the plaintiffs, the plaintiffs paid to the defendant the equivalent in American money of the amount called for by the draft. The referee found that the plaintiffs purchased the check or bill in due course of business, were bona fide purchasers for value, without knowledge or notice of equities or defenses, if any such existed; that on the 9th of January, 1901, the day after this check or draft was sold, the defendants were advised by cable from the purchasers that, on account of a claim of delay in shipment of said iron, they would not accept the same, except at a reduction of five shillings per ton; that on the same day the defendants consented by cable to this reduction, and advised the purchasers to pay the draft or check, and to draw upon the defendants for the difference of five shillings per ton, amounting to £300 sterling, to cover this difference; that, on the receipt of said cable, the purchasers, on January 10, 1901, drew upon the defendants a draft in the said sum of £300 sterling to cover this difference, which was presented on January 25, 1901, to the defendants in New York, and paid by them in full, and the sum so paid was remitted to and received by the purchasers on or about

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February 12, 1901; that the steamer upon which this iron was shipped did not sail until January 19, 1901, and arrived at Trieste, Austria, on the 5th of March, 1901; that during the months of January, February, and March, 1901, there was a fair market for pig iron at Genoa, Italy, where the steamer first stopped, arriving at Genoa on February 20, 1901; that on the 20th of February, 1901, the said 1,000 tons of pig iron could have been sold by the defendants at Genoa, Italy, at the same price at which the same had been sold to the purchasers in Vienna; that upon the arrival of the ship in Trieste, Austria, the purchasers refused to accept the iron, upon the ground that the same had not been forwarder and delivered within the time specified in their agreement with the defendants; that on January 8, 1901, this check or bill drawn by the defendants upon the purchasers was forwarded by the plaintiffs to Vienna for collection, and was received by mail by the collecting agents in Vienna on the 22d day of January, 1901; that this check or bill was presented by the agents to the purchasers of the iron at the latter's address at Vienna on January 22, 1901; that the agent presenting this check or bill to the purchasers was requested by the purchasers not to present it at that time, because there were certain differences then existing between the drawer of the draft and the defendants concerning the iron in question, which would probably be adjusted in a short time; that the messenger thereupon withdrew the presentment, the check or bill was not paid and was not protested, nor were the defendants notified of the presentment and nonpayment; that on January 28, 1901, the check or bill was again presented by the agent in Vienna for collection, and payment again demanded of the purchasers of the iron; that the same request was again made that the check or bill should not be presented at that time, for the same reason given on the occasion of the first presentment on January 22, 1901, and it was again withdrawn, was not then paid and was not protested, nor were the defendants notified of such presentment and nonpayment; that on February 12, 1901, this check or bill was again presented by the collecting agents; payment was then formally demanded, which was refused, but no formal protest was made, and no notice given to the defendants; that on February 13, 1901, the collecting agents forwarded through the regular mails a letter to the plaintiffs' agent in London, inclosing this check or bill, and informing them that the same had been duly presented on February 12, 1901, and payment had been demanded and refused; that this letter was received by the plaintiffs' agent in London on February 12, 1901, and on the same day the plaintiffs' agent mailed a letter to the plaintiffs in New York, notifying them that the check had been presented for payment on February 12, 1901, and payment refused; that on February 18, 1901, the plaintiffs' London agent received a cable from the plaintiffs in New York inquiring what had been done concerning the check, and on the same day the plaintiffs' agent in London cabled to the plaintiffs' agent in New York stating that the check or bill had been presented for payment to the drawees, and that payment thereof had been refused; that on the same day the plaintiffs cabled their agent in London to have the check or bill protested, and on that day the plaintiffs' agent in London returned the check or bill by mail to their Vienna correspondents, instructing them to present it once

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more and have the same protested; that it was received in Vienna by mail on February 21, 1901, and on that day was presented to the drawees, payment demanded and refused, and it was thereupon on the same day protested, and on February 22, 1901, was, with the protest, returned by mail to the plaintiffs' agent in London; this letter was received in London on Monday, February 25, 1901, and was mailed by the plaintiffs' agent in London to the plaintiffs in New York, with the protest, on the first mail leaving England for New York; that this letter, with inclosure, was received by the plaintiffs in New York on March 11, 1901; that on February 18, 1901, when the plaintiffs first received word by cable that the check or bill had been presented and payment refused, the plaintiffs notified the defendants that they had received a cable from London stating that the drawees would not pay the check or bill, owing to differences between the sellers and buyers not yet settled; that this letter was delivered to the defendants at their office in the city of New York by a messenger of the plaintiffs on February 18, 1901; that on February 25, 1901, the plaintiffs received from their London correspondents a letter informing the plaintiffs in detail of the presentment and nonpayment of the check, and on the same day the plaintiffs wrote a letter to the defendants stating the substance of the communication that they had received from their London agents, which letter was received by the defendants on the same day, but no answer appears to have been given by the defendants; that the check or bill, with the certificate of protest, was received by the plaintiffs on March 11, 1901, and on the same day the protest, with a memorandum of the expenses, was sent to the defendants; that in reply to this the defendants wrote to the plaintiffs saying that the unauthorized action of the plaintiffs' Vienna representative "in neither collecting nor protesting the draft in proper time, nor giving any advice concerning it, has placed the entire transaction in such a position that we cannot properly allow any further responsibility to rest upon us in the matter"; that the plaintiffs thereupon demanded of the defendants the repayment of £2,072 7s. 6d. sterling, equivalent to $10,102.83, being the amount of the check, with the protest and other charges, which payment was refused; that the iron was subsequently sold in Scotland, and realized the sum of $5,738.38, which appears to have been received by the plaintiffs, leaving an amount of the draft unpaid of $4,364.45. The referee further found that under the laws of the Empire of Austria a demand or sight draft or check, whether foreign or domestic, may be presented for payment as frequently as occasion requires within two years after its date, and each such presentment is legally effective; that such laws do not provide for protest of such check, for nonpayment, or for notice to drawer or indorser; and that no agreement was ever made that the instrument set forth in the amended complaint should not be duly presented and protested in case of nonpayment, and notice of such nonpayment and protest given to the defendants, nor waiving any rights of the defendants in these respects; and that the defendants never waived nor made any agreement to waive the effect of the nonprotest of the instrument set forth in the amended complaint, or that due notice of the nonpayment thereof had not been given to them; and that the defendants never made any agreement to pay

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the plaintiffs the amount called for by the instrument set forth in the amended complaint, or any part thereof, notwithstanding the failure to protest the same for nonpayment; and, as a conclusion of law, the referee directed a dismissal of the complaint.

It is claimed by the plaintiffs that the law regulating the protest of instruments of this character and the notice necessary to hold the defendants as the drawer of the instrument was the law of the Empire of Austria; while on the other hand, it is claimed by the defendants that the law regulating the liability of the drawer of the instrument, applicable, was the law of the State of New York. The learned referee held, and we think quite correctly, that the liability of the defendants was to be determined by the law of the State of New York. The sale of this check or draft was made in the city of New York. Upon the completion of that transaction the title of the check or bill vested in plaintiffs. They then became its owner, and, as security therefor, held the title to the iron upon the steamer, the bill of lading of which was indorsed over to the plaintiffs at the time of the delivery of the check or bill to the plaintiffs. The defendants thereafter had no interest in or control over either the check or bill, or the iron which had been shipped and which was represented by the bill of lading. No liability of the defendants to the plaintiffs then existed. The only obligation of the defendants was to the holder of the bill or check if it was dishonored, and the obligation that then arose was an obligation to pay the amount of the bill in the State of New York, where it had been originally negotiated. The obligation of the defendants, therefore, if it arose at all, was to be performed in the State of New York, and is to be governed by the laws of that State. This rule is stated in Am. & Eng. Encyc. of Law (2d Ed.), vol. 22, p. 1346. See, also, Carroll v. Upton, 2 Sandf. 171; Allen v. Merchants' Bank of New York, 22 Wend. 215, 34 Am. Dec. 289, and cases there cited.

As to whether or not the defendants were discharged by a failure to protest this instrument for nonpayment depends upon the nature of the instrument — whether it is a check or bill of exchange; but that question is now settled by the Negotiable Instruments Law (chap. 612, p. 719, of the Laws of 1897). Section 321 of that act defines a check as a bill of exchange, drawn on a bank, payable on demand; and section 210 defines a bill of exchange as an unconditional order, in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer. As the instrument in question was not drawn on a bank, and was not therefore a check, it came within the definition of a bill of exchange contained in section 210 of the act. Section 213, p. 746, of the Negotiable Instruments Law provides that an inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Under this section this instrument was a foreign bill of exchange. It is also provided by the Negotiable Instruments Law that a failure to protest this bill upon its dishonor discharged the defendant. Section 260 provides that, where a foreign bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment; that, if

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it is not so protested, the drawer and indorser are discharged. Section 261 provides how such protest must be made, and section 263 provides that such protest must be made on the day of dishonor.

Upon the undisputed facts in this case, I think the bill was dishonored upon the day when first presented for payment. It called for payment on demand. The bill was presented to the drawee for payment. It was not paid, and was therefore dishonored. If, however, there can be any doubt about the dishonor of the bill when first presented, based upon a withdrawal of the presentment by the agent who had it in charge, there can be no doubt but that the bill was dishonored when it was presented on February 12,1901, and payment formally demanded and refused; and consequently, under section 260 of the Negotiable Instruments Act, to which attention has been called, the drawers were discharged. If it were necessary to show that this failure to give to the defendants notice of the dishonor of this bill caused damage to the defendants, the evidence clearly establishes that, if the bill had been protested for nonpayment when first presented, the defendants could have protected themselves from loss by selling the iron at Genoa, where the steamer with the iron on board arrived some time after the bill was first presented and dishonored. Under the law of this State, however, there is no question but that the failure to protest the bill discharged the defendants.

It follows that the judgment appealed from must be affirmed, with costs. All concur.

TUTTLE v. FIRST NAT. BANK OF GREENFIELD.

73 N. E. 560.

FIRST NAT. BANK OF GREENFIELD v. TUTTLE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1905.)

TRUSTEES — POWERS — NOTES — INDIVIDUAL DEBT — SECURITIES — PLEDGE — NOTICE — INCOME.

1. Where a trustee under a will was required to invest the property and to pay over the income to the beneficiaries, with full power to change investments, he had no authority to pledge any part of the fund as security for the payment of a note made by him as trustee, though the money thus received went into the trust fund and was expended for purposes for which the income could have been lawfully appropriated.

2. Where a trustee executed a note, without authority, as evidence of a loan made for the benefit of the trust estate, the promise was his personal obligation, regardless of the form of execution of the note, enforceable against him alone while living, and after his death against his estate, as provided by St. 1898, p. 496, c. 533, § 20.

3. Where, at the time of the negotiation of certain notes executed by a trustee, the original payees and defendants to whom the notes were indorsed had notice by the form of stock certificates pledged therefor and the accompanying power of attorney that the shares were held in trust, they were bound to take notice that the trustee had no authority to pledge the stock for an obligation that in law was his individual debt.

4. Where a trustee pledged certain trust property to secure a note on which he alone was liable, the fact that the proceeds of the note was used to pay debts for

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which the income of the trust was applicable did not entitle the holders of the note to maintain a bill to compel the application of the income of the trust to the payment of the note.

Appeal from Superior Court, Suffolk county.

Suits by Joseph H. Tuttle, as trustee under the will of Horace S. Stebbins, against the First National Bank of Greenfield and another, and by the first National Bank of Greenfield and another against Tuttle. The Superior Court ordered a decree for Tuttle, and the bank appealed in the first case, and from an order dismissing the bill in the suit by the bank it also appeals. Affirmed.

Francis L. Hayes, for Jos. H. Tuttle. Lamb & Lawlor, for First Nat. Bank.

BRALEY, J. These two bills in equity grow out of the same transaction, and involve the right of a trustee, without having authority under the terms of the trust, to pledge a part of the principal to secure the payment of a promissory note signed by him as trustee, the proceeds of which are used for the benefit of the estate, and whether the bank, as pledgee, which took with notice of the trust, acquired a title that will enable it to retain and apply the collateral in payment of the debt.

By the provisions of the will of Horace S. Stebbins, under which the maker of the note was trustee, he was directed and required to invest the property according to his best judgment and discretion, and to pay over the income from time to time as it accrued to the beneficiaries, with full power in his discretion to change investments. But this power did not clothe him with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee, although the money thus received went into the trust funds and was expended for purposes for which the income could have been lawfully appropriated. Hoyt v. Jaques, 129 Mass. 286, 287. Because of the absence of authority, and notwithstanding the recital in the body of the note, and form of its execution, the promise was his personal obligation, enforceable against him alone while living, and after his death against his estate. St. 1898, p. 496, c. 533, § 20; Fiske v. Eldridge, 12 Gray, 474, 475; Towne v. Rice, 122 Mass. 67; Plimpton v. Goodell, 126 Mass. 119, 120.

At the time of the negotiation of the note the original payees, and subsequently the defendant bank, which held title under their indorsement, had notice by the form of the stock certificate and accompanying power of attorney that the shares were held in trust. They were thus put upon inquiry, and must be held to have known — what it was their duty to ascertain — that the trustee had no authority to pledge them as collateral security for an obligation that in law was his individual debt. O'Herron v. Gray, 168 Mass. 573, 576, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411, and cases cited.

It is the further contention of the bank that, even if it has no title to the stock which it can enforce against the present trustee, because the money hired was used in part to pay taxes on the estate, and the remainder presumably, in the form of income, was paid to the beneficiaries, it should be permitted to maintain its bill to have the income of the trust already accrued, or as it accrues, applied in pay-

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B. 85. Note Made by Trustee: Collateral: Bona Fide Holder.

$ 550 Boston, July 3, 1901

Six months after date, for value received I promise to pay to Loring & Thatcher or order at the office of LORING & THATCHER, Boston, Mass., Five Hundred & Fifty Dollars, and interest, at the rate of ..... per centum per ..... for such further time as said principal sum or any part shall remain unpaid, I having deposited herewith as collateral security 7 Shares Franklin Co. Nat. Bank with authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale, or otherwise, at the option of the holder or holders, on the non-performance of this promise, said holder or holders applying the net proceeds to the payment of this note and accounting to me for the surplus, if any: and it is hereby agreed that such surplus, or any excess of collaterals upon this note shall be applicable to any other note or claim against me held by said holder or holders. Should the market value of any security pledged for this loan, in the judgment of the holder or holders thereof decline, I hereby agree to deposit on demand (which may be made by a notice in writing, sent by mail or otherwise to my residence or place of business) additional security, so that the market value shall always be at least ..... per cent. more than the amount of this note: and failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately reimburse themselves by the sale of the security as aforesaid: and it is hereby agreed that the holder or holders of this note or any person in his or their behalf may purchase at any such sale.

George F. Clark, Trustee.

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George T. Clark, the maker of this note, was trustee of the estate of Horace Stebbins. According to the terms of the will the estate in the hands of the trustee was "to be invested according to his best judgment and discretion, and the net income thereof, as the same may from time to time accrue, be paid over to or expended for the use and benefit" of certain beneficiaries.

The will contained this further provision: "For the better accomplishing the purpose of said trust, I give to my said trustee full power to change any investment at his discretion, and for that purpose to make necessary conveyances and transfers without any order of court." Clark applied to the payees of the note for this loan of $550, stating that the money was to be used for the use of the estate for taxes and income, and the money was so used by Clark, he paying from it a tax bill against the estate of $434.20, the balance being paid to the beneficiary of the income of the trust estate. At the time of the execution of the note Clark assigned as collateral to it seven shares of bank stock standing in his name as trustee.

Clark died before the maturity of the note, and his successor refused to recognize the note as a charge against the estate, and he also asked to have the assignment of the bank stock declared null and void. The court sustained him on both points, holding that the note was the personal obligation of Clark, and said in part: "But this power (given in the will) did not clothe him with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee, although the money thus received went into the trust funds and was expended for purposes for which the income could have been lawfully appropriated. . . . At the time of the negotiation of the note . . . the defendant bank had notice by the form of the stock certificate . . . that the shares were held in trust. They were thus put upon inquiry. . . . It is the further contention of the bank that even if it has no title to the stock which it can enforce against the present trustee, because the money hired was used in part to pay taxes on the estate, and the remainder presumably in the form of income, was paid to the beneficiaries, it should be permitted to maintain its bill to have the income of the trust already accrued, or as it accrues, applied in payment of the note. But as we have said, it had no contract which bound the estate, and for this reason it stands no better in equity than in law."

McMaster's Com. Cases, Vol. 1905, 73 N. E. 560.

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ment of the note. But, as we have said, it had no contract which bound the estate, and for this reason it stands no better in equity than at law. Besides, as the bank must surrender the stock because it has no title, to now require the income to be appropriated to the payment of the note would be to say that, while no part of the principal could be applied, the income might be taken, although the terms of the trust alike forbid the devolution of either for such purpose.

Decree affirmed in each case.

Bond: Surety Released: Form of Bond.

The Ida County Savings Bank, at Ida Grove, Iowa, was organized in 1893. The laws of Iowa provide that the board of directors of a savings bank shall appoint a cashier and require such security from him, for the faithful performance of his duties, as they may deem advisable.

Soon after the organization of the bank C. J. Leidensticker was elected cashier, and he gave a bond in the sum of $10,000 with F. C. Knepper as surety. The material part of the bond read: "The condition of this bond is such that, whereas, the said Chas. J. Leidensticker has been elected cashier of the Ida County Savings Bank, within Ida Grove. Now if he shall well and truly perform the duties of the office of cashier, according to the by-laws of said bank, and the law of the State of Iowa governing savings banks, and exercise all reasonable care and diligence, and the preservation and lawful disposal of all moneys, books, papers and securities belonging to the bank, then the bond to be void, otherwise of force and effect."

At the beginning of each bank year the board of directors re-elected the cashier, and he continued in the position until March, 1897, when he absconded.

The records of the bank show that the first regular meeting of the board of directors was held on May 30, 1893, and that Charles J. Leidensticker was "apponted cashier until the next annual election." The next annual meeting was held May 31, 1894, when a motion was carried that he "be elected cashier for the next year." At the next annual meeting he was "appointed cashier for the ensuing year."

No other bond was ever given and no further reference was made to this bond.

When the cashier absconded there was a shortage of $7,959.41. This amount was made up balances of items taken from time to time during the several years. The total amount taken was considerably more than $7,959.41, but there had been payments made at various times. It was ascertained that the total payments made during all of the years exceeded the amount withdrawn during the first year. Applying these payments, according to the rule, to the oldest items in the account, the money taken during the first year was repaid.

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The court held that the bond covered only the first year of the cashier's service, hence the surety was released.

The following form of bond would have held the surety in this case, and it covers some other points not usually covered in the ordinary form of bond:

Indemnity Bond: Cashier or Other Employee of Bank or Other Corporation.

Know all men by these presents, That we, A. B. of , and C. D. of , and E. F. of , are held and firmly bound unto The Bank of in the penal sum of dollars, lawful money of the United States of America, to be paid to the said The Bank, its successors or assigns: for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals. Dated the day of , one thousand hundred .

Whereas, the above bounden A. B. has been chosen, appointed or elected cashier [or other position, naming it] of the said Bank, and now is in its employ in some capacity, or is about to be employed by the said Bank in some capacity, by reason whereof he will receive or have control or have access to, or be chargeable with money, property, or other things of said bank, and others.

Now, the condition of this obligation is such that if the said A. B., his executors or administrators, shall well and truly serve the said bank as such cashier [or other officer or position, naming it] during his continuance in office, whether by reason of the above appointment or election, or by its continuance, or by a subsequent appointment or election and continuance, and well and truly perform and discharge all his duties as such officer [or employee], and shall when requested by said bank, its agents, successors or assigns, account for and pay over to said bank, its agents, successors and assigns, all money and property with which he is chargeable, as such officer, or with which he is chargeable by reason of having improperly taken or misapplied any of said bank's money or property, or for which it is liable, outside of his acts or duties as cashier [or other officer, or employee]: to the end that this bond and obligation shall also be a security to said bank, its successors and assigns, for any money and property that may come into the hands of the said A. B. or be misapplied by him, notwithstanding the fact that he may be directed or assigned by said bank, its successors or assigns to other duties than those contemplated when this instrument was executed, then this obligation to be null and void, otherwise to remain in full force and effect.

_____. [Seal.]
_____. [Seal.]
_____. [Seal.]

The foregoing form goes further than these usually given by an officer or employee in a financial institution, in that it seeks to cover defalcations that the employee may be guilty of even if he is performing other duties than those which the technical title of his office might indicate, and in that covers his employment even if he is not formally appointed or elected after the expiration of his first term. In the ordinary bank or counting-room the chances of the employee becoming a defaulter are not properly measured by the title of his office or by the duties to which he is assigned. The greatest defalcation in the banks of New York have come from bookkeepers. The principal risk that a bank takes in employing a servant is in taking him behind

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the counter in business hours, and if that risk is to be covered by a bond it should be worded so as to cover the various occupations to which he may be put.

It has been often held that the temporary or permanent changing of the routine work of an employee without the consent of the sureties on his bond, will operate to the discharge of such sureties. The New Jersey courts have decided (44 Atl. 190) that the sureties on the bond of one who is mentioned as bookkeeper and collector in a manufacturing establishment, were not liable for his defalcations where in addition to such duties, or in the fulfillment of them, he handled all of the money coming in and going out of the establishment.

It has been held the sureties of a bookkeeper in a bank were released where his defalcations occurred when he was acting as assistant to the teller, and yet the teller or his assistant might have as wide a field for misapplying funds and less chance of detection while acting as bookkeeper than in the performance of his technical duties as expressed by the title of his office.

(See Decision No. 854.)

Check "In Full of Account:" Payment.

Owen Knapp was secretary, general agent, and manager of the Sugar Loaf Dairy Company. He entered into a contract with James B. Laroe by which the latter was to purchase the dairy company milk for a period of six months, commencing October 1,1901, at what was known as the "New York market price."

After delivery had been made for about six weeks, in accordance with this contract, the president of the company told Laroe that Knapp had no authority to make the contract, and if delivery of milk was continued it must be at a price under which it was delivered the previous year. A day or two thereafter the president served written notice to this effect on Laroe. Laroe answered in writing to the effect that he had a valid contract with the company and that he should continue to deliver under it, and if the company, in its monthly payments, paid less than the contract price he would credit the amount received and sue them for the balance. After this correspondence Laroe delivered milk to the company during the whole of the specified period. Shortly after the end of each month the company sent a check to Laroe for the amount of the month's deliveries, calculated at the price of the previous year. Accompanying the check was a statement giving the amount of milk delivered, and the price therefore, and at the foot of the statement these words: "To check in full." Laroe collected the checks, but gave no receipts therefor. At the close of Laroe's case the trial court directed a verdict for the

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company on the ground that the receipt of the checks constituted a valid accord and satisfaction, but this decision was reversed on appeal.

The appellate court said in part:

"We think this disposition of the case was erroneous. The plaintiffs' evidence, if credited, established a clearly valid contract with the defendant, under the terms of which it was indebted to the plaintiffs in the amount for which the suit was brought. The payment of an amount less than that for which the debtor is liable does not constitute a valid accord and satisfaction unless there is a bona fide dispute as to the debtor's liability, or as to the amount due from him (Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113), or unless the damages are unliquidated. While the defendant's president repudiated the contract made by Knapp, its secretary, still, under the evidence given by the plaintiffs, Knapp's ostensible authority in favor of third persons dealing with him seems clear. Therefore there was a question of fact for the jury to determine as to the bona fides of the defendant in the dispute as to its oblgations under Knapp's contract. But there is a more serious objection to the disposition of the case made by the trial court. It is the general rule, as stated in Fuller v. Kemp, 138 N. Y. 231, 33 N. E 1034, 20 L. R. A. 785, and Nassoiy v. Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 716, 51 Am. St. Rep. 695, that where there is a disputed claim 'the plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full," was not, when accepted, a payment in full. He was bound either to reject the check, or, by accepting it, to accede to the defendant's terms.' The circumstances in this case are, however, peculiar. The plaintiffs claimed to have, and, under the evidence in the case, had, a valid contract with the defendant, by which it was bound to accept their milk at a specified price. The defendant repudiated that contract, and it may very well be that after the repudiation of the contract it was not necessary for the plaintiffs to continue a tender of performance. Nevertheless they were justified in carrying out the contract on their part, if they saw fit, and it does not militate against their claim that they adopted that course. The defendant was notified in writing that the milk was delivered to it solely under the contract made with the secretary, Knapp, and that the plaintiffs would sue the defendant for the price fixed by that contract, regardless of any payments it might choose to make. It must be borne in mind that the dispute between the parties was not as to the terms of the contract, but whether there was any contract between them. The defendant knew that the plaintiffs did not accept the terms proposed by the defendant's president, but made delivery solely under the contract which they claimed to have made with Knapp. It may just as well be argued that under these circumstances it became the duty of the defendant, if it repudiated the authority of Knapp, to refuse to receive the milk, and that by receiving the milk it acquiesced in the plaintiffs' claim, as the other proposition, that by the receipt of the checks the plaintffs acceded to the defendant's claim. However this may be, when the defendant saw fit to remit checks to the plaintiffs after notification that such payments would only be credited on account, it did not thereby establish an accord and satisfaction. If there was an accord and satisfac-

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tion in this case, it arose out of the printed words found at the foot of the statement, 'To check in full.' In the Fuller and Nassoiy cases the check was accompanied by a letter which expressly stated that the payment was tendered in full satisfaction of the claim, and there was nothing in the previous transactions between the parties to limit or qualify that declaration. In this case the defendant was notified in advance that, if it sent a check, it would receive for it nothing but credit on account. After this notification the defendant chose to send the checks, and the only thing which informed the plaintiffs that the defendant intended to impose any condition upon the payment was the printed words mentioned. The case, in principle, falls within that of Eames Vacuum Brake Company v. Prosser, 157 N. Y. 289, 51 N. E. 986, where it was held that the receipt and collection of a check, accompanied by a statement concluding, 'Check to balance,' did not constitute an accord and satisfaction, so as to preclude the creditor from suing for the balance actually due. It is quite apparent that, throughout the whole course of dealings between the parties, each not only understood the claim of the other, but was notified in advance that nothing that might be done in such dealings was to constitute any waiver of the claim of either party. As the parties continued to deal with this understanding, I think their respective rights must be determined solely by the existence and validity of the contract declared on by the plaintiffs. If there was such a valid contract, the plaintiffs are entitled to reover; if not, the defendant should succeed. But if I am wrong n this view, at the most it was a question for the jury to pass upon, whether, under the circumstances and the previous transactions between the parties, the plaintiffs knew, or should have known, that the check was sent to them on the sole condition that by its acceptance they should discharge the defendant.

"The judgment should be reversed and new trial granted; costs to abide the event."

73 N. E. 61.

Check: Duty of Holder: Payment.

Adam Weiss was indebted to Kelly and Read, the payees of the check described in accompanying illustration. He procured this check to be mailed to them at their place of business in a place other than that in which the bank was located on which the check was drawn, and it was sent, as stated in the letter enclosing it, in payment of a balance due the payees from Weiss.

The payees received the check August 4th, and held it until August 9th, before forwarding it for collection. When it arrived at the bank on which it was drawn it was not paid, as the drawers, Lavender & Spannagel, had failed. Had the check been forwarded for payment the day after it had been received it would have arrived for payment at a time when all checks of the drawers were being paid.

The payees, Kelly & Read, had to stand the loss. The following quotation from the opinion states the law in such cases:

"It is contended by the plaintiff and appellant that the court erred,

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in making its conclusions of law, in finding that the receipt of the check by Kelly & Read for $318.50 from the defendant Adam Weiss, and the holding of the same until August 9th, 1890, was such negligence as did in judgment of law convert the provisional payment into an absolute payment of said note and mortgage, and in finding that the note and mortgage were fully paid by defendant before the commencement of the suit. It is further contended by the appellant that the case is governed by section 2256, Civ. Code 1903, which reads as follows: 'If a bill of exchange payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmtted to the proper place for such presentment, the drawer and indorsers are exonerated unless such presentment is excused' — and that the check in question was in law a bill of exchange, and was in fact presented within the time specified in the above-quoted section. It will be observed that the section provides that the drawers and indorsers are exonerated in case the bill shall not be presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment. Lavender & Spannagel were the drawers, and the check was drawn payable to the order of Kelly & Read, and not to the defendant Weiss. We are of the opinion that the respondents are right in their contention, and that the section of the code above quoted has no application to the case, and that it must be controlled by the rule as established by the common law. Under that rule we are of the opinion that the court was right in its conclusions of law, that it was the duty of Kelly & Read to have forwarded the check on the following day after its receipt for presentment and collection. Had they so forwarded it, presumptively it would have been presented to the bank for payment not later than the 10th or 11th of August, when it seems the checks of Lavender & Spannagel were paid in full by the bank. At common law the drawee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. When drawn on a bank in a different place, the drawee has the same time, and in addition thereto such time as will be required to transmit it to the place of payment by due course of mail. Mohawk Bank v. Broderick, 13 Wend. 133, 27 Am. Rep. 690; Simpson v. Pacific Mutual Life Ins. Co., 47 Cal. 585. The drawees of a check, in the absence of an express agreement that the same should be received as payment, may still recover the amount therein specified on the drawers in case the check is duly presented and dishonored (Estey v. Birnbaum, 9 S. D. 174, 68 N. W. 290); but, whenever the failure to collect the check results from the negligence of the drawees, the acceptance of the check constitutes payment, and this doctrine is applicable to checks and notes of third parties taken in payment of a debt not signed or indorsed by the debtor. (Kilpatrick v. Home Building & Loan Association, 119 Pa. St. 30, 12 Atl. 754; Anderson v. Gill, (Md.) 29 Atl. 527, 25 L. R. A. 200, 47 Am. St. Rep. 402.) In the former case the Supreme Court of Pennsylvania, speaking upon this subject, says: 'It cannot, of course, be claimed that the receipt of Beeby's check was per se payment of the association's claim. It is well settled that, in the absence of an agreement to the

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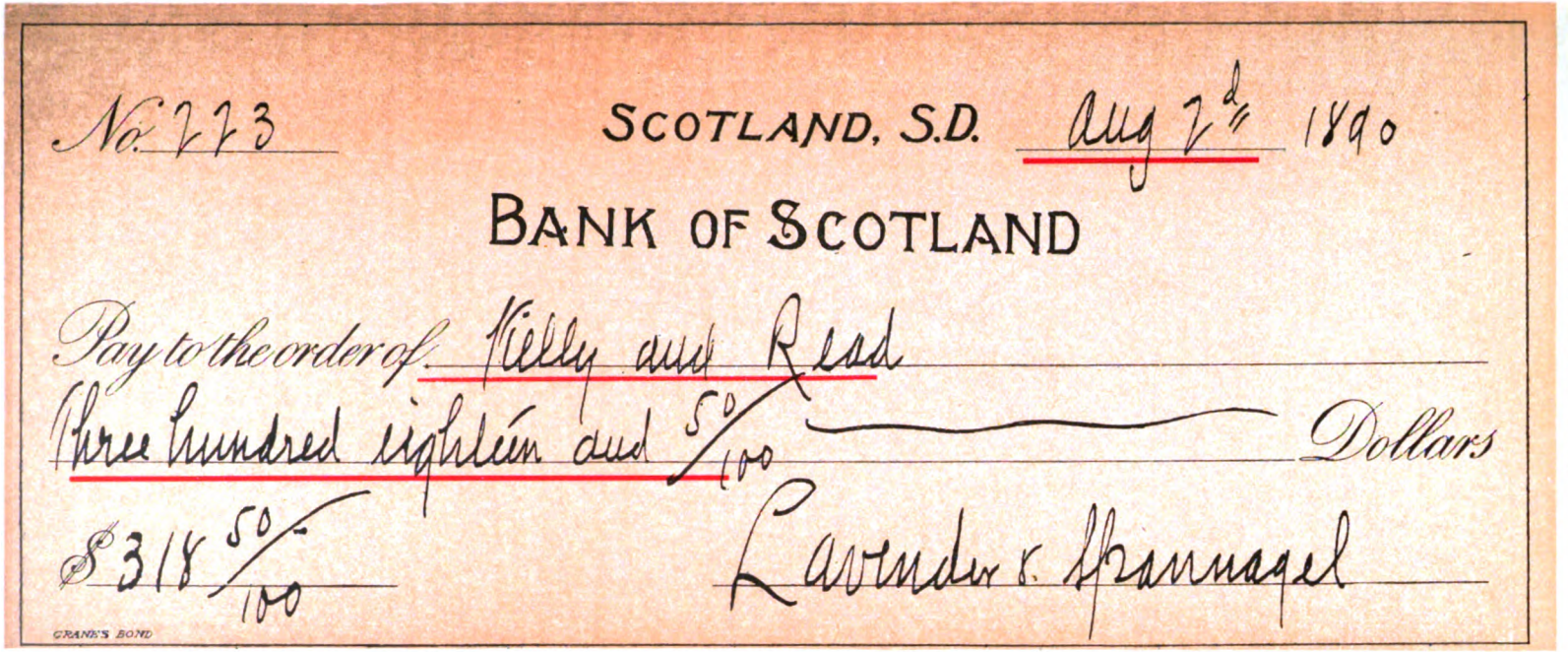

No. 273

SCOTLAND, S.D. Aug 2d 1890

BANK OF SCOTLAND

Pay to the order of Kelly and Read

Three hundred eighteen and 50/100 Dollars

$318 50/100

Lavender & Hammagel

GRANE'S BOND

B. 36. Check as Payment: Duty of Holder: Prompt Presentment: Collection.

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Adam Weiss, of Scotland, S. D., owed Kelly & Read, of Huron, $318.50, a balance due on a note and mortgage. August 2, 1890, he caused this check to be mailed to them in a letter indicating that it was to pay his debt. In due course of the mail the check would have reached Kelly & Read August 4. On the 9th day of August Kelly & Read deposited the check in a bank in Huron, and on that day they wrote Weiss "Your $318.50 pays up in full." The check, sent for collection through intermediary banks, reached the Bank of Scotland August 14 when payment was refused for the reason that the drawer's account was not good. All checks of the drawers on this bank presented between August 2 and August 12, amounting to $3,637.41, were paid. Acceptance of the check by Kelly & Read and their writing to Weiss that "this pays up in full" would not have extinguished the debt if the check had been promptly forwarded for payment as soon as received. The rule is that the payee of such check has until the next business day following its receipt to present it for payment if it is drawn on a bank in the same town, and if it is drawn on an out-of-town bank he must start it for that town not later than the next business day. If the check is received for collection, the collection agent does not have this extra day in which to demand payment — he must act on the day he receives it. 122 Ala. 580; 43 N. Y. 176.

The presentation of the check was delayed two days by reason of its being sent for collection by the Huron bank through a Sioux City bank. If this course of collection had delayed presentation a fatal day's time it would of itself have produced the same fatal result to Kelly & Read.

On the other point the court said in part: "It is well settled that in the absence of an agreement to the contrary, a check or promissory note of either the debtor or a third person received for a debt, is merely conditional payment, that is, satisfaction of the debt when paid; but that acceptance of such check or note implies due diligence in presenting it for payment, etc." 119 Pa. 30. Where a note payable at a future day is taken by the creditor, and the creditor claims that it was taken only as conditional payment of an existing debt, any right of action on the debt is suspended until the maturity of the note. In this case, Kelly & Read apparently held the check five days before taking it as conditional payment or before forwarding it. They had to stand the loss.

McMaster's Com. Cases, Vol. 1905, 101 N. W. 37.

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contrary, a check or promissory note of either the debtor or a third person, received for a debt, is merely conditional payment — that is, satisfaction of the debt if and when paid — but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc. And if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment.' In the latter case the Supreme Court of Maryland used the following language: 'But whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment, if accepted as cash (Woodville v. Reed, 26 Md. 190), still, in the absence of an express agreement, the acceptance of a check of either the debtor or a third party is in fact merely conditional payment — that is, satisfaction of the debt if and when paid (Haines v. Pearce, 41 Md. 221); but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment.' See, also, First National Bank of Meadville v. Fourth Nat'l Bank of N. Y., 77 N. Y. 320, 33 Am. Rep. 618; Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89."

(See Decision No. 853.)

Payment: Surrender of Note to Indorsers: Liability of Indorsers.

A note for $2,800, made by the Eureka Chemical Company and indorsed by A. E. Dewey, A. E. Nettleton, and four others, was owned by the Jefferson County National Bank.

The note was not paid and was duly protested, and the indorsers properly charged.

The bank then sued the makers, the Eureka Chemical Company, and obtained judgment against it September 2, 1892, and the judgment became a lien on certain real estate of the company.

One Mrs. Townley had a judgment against the company, and this judgment stood as a prior lien to that of the bank.

The bank brought an action to have the Townley judgment set aside as fraudulent, and succeeded in the trial court, — that court ordering the property sold and directing the sheriff to turn the proceeds over to the bank, which the sheriff did.

March 21, 1895, the bank indorsed on the note $2,576.41, the amount received on account of the sale.

On December 18, 1895, Dewey and Nettleton, two of the indorsers, paid $253.76 on the note, and the bank indorsed the amount on the note.

On March 7, 1898, the same indorsers paid $430.70, the balance shown to be due on the note, and it was surrendered to Dewey.

In the meantime Mrs. Townley had duly appealed from the decision declaring her judgment fraudulent. She was beaten in the first appellate court, but won on final appeal.

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In August, 1899, the court of last resort directed the bank to pay over to Mrs. Townley the money, $2.576.41, received from the sale of the property of the Eureka Chemical Company, the makers of the note, and which the bank had indorsed on the note.

The bank turned over the money as directed by the court, and then sued the indorsers for the amount, — the note having been long since delivered to the indorsers.

The bank was beaten in the lower courts in its action against the indorsers, but won on appeal.

The question arose as to whether the money paid by the indorsers at the time they took up the note was such a partial payment, acknowledging in a legal sense, a yet unpaid debt, as would save it from the bar of the statute of limitations. The court held that it was.

The court said in part:

"The note in question was discounted by the plaintiff, and after it was dishonored the plaintiff recovered a judgment against the maker on the 2d day of September, 1892, for $2,934.76. After the return of an execution unsatisfied upon this judgment the plaintiff brought an action in the nature of a creditors' bill against one Mrs. Townley and others to set aside certain judgments which she had obtained, and which had become a lien upon the property of the maker of the note. The plaintiff claimed that these judgments, which appeared to be prior liens, were fraudulent. In that action the plaintiff succeeded on the trial, and under a decree of the court it appears that the property was sold, and there was paid to the plaintiff on March 21, 1895, the sum of $2,576.41, being the amount of the proceeds of the property of the maker which had been levied upon and sold by the sheriff, less the expenses of collection. The amount thus received was indorsed by the plaintiff on the note; but after the receipt of the money from the sheriff an appeal was taken by Mrs. Townley in the judgment creditors' action brought by the plaintiff, and, while that appeal was unsuccessful in the Supreme Court, she succeeded in this court, where the judgment was reversed in June, 1899. Jefferson County National Bank v. Townley, 159 N. Y. 490, 54 N. E. 74. In August, 1899, the court made an order directing the plaintiff to make restitution of the money received from the sheriff, and the plaintiff complied with the order and returned the money that had been indorsed on the note. In December, 1895, nearly four years before the reversal of the judgment referred to, the plaintiff demanded of the indorsers of the note payment of the balance due thereon; that is, the sum of $760. That was the amount due, providing the money received from the debtor's property can be treated as a payment. On December 18, 1895, the defendant Dewey paid $126.88 and the defendant Nettleton the same amount, and these payments were indorsed upon the note by the plaintiff. It appears that the other indorsers on the note were irresponsible, and failed to pay their pro rata share, and therefore, on March 1, 1896, the plaintiff demanded of the two defendants in this action the sum of $430.70, as the balance due on the note. On the 7th day of March, 1898, the two defendants in this action paid the balance due on the note of $430.70, with the interest, and it is

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found that they made this payment with the intent and purpose of discharging the debt, and the plaintiff accepted the same and indorsed the same upon the note, and thereupon surrendered the note to Dewey, who continued in possession thereof from said date, and the note was produced uncanceled upon the trial of the action. It is also found that the plaintiff voluntarily surrendered the note with full knowledge of all the facts, and without any fraud or mistake existing at the time. The defendant Dewey died on the 28th day of March, 1902, leaving a last will, and his wife, the defendant, was substituted as a party defendant in this action.

"On this state of the facts the question is whether the note in suit was paid by or collected from the maker. Certain payments were made on it by the two indorsers who were served in this action. It is not claimed that any other payments were made by any of the indorsers. Of course, if it can be said, as matter of law, that under these circumstances the plaintiff collected the note from the maker's property, that conclusion would inure to the benefit of the indorsers. The fact that it surrendered the note when all the parties supposed that the money received from the sheriff would be maintained as a payment is of very little significance. It is very obvious that the reversal of the judgment that the plaintiff recovered in the creditors' suit has a most important bearing on this controversy. It was thereby adjudged that the money received by the sheriff and indorsed upon the note did not belong either to the plaintiff or to the maker of the note, but to Mrs. Townley; and so, although the plaintiff had gone through the form of indorsing the sum so received upon the note, it was compelled by order of the court to restore the money to the party entitled to it by virtue of the prior judgment and levy upon the maker's property. The effect of this judgment of reversal was to undo all the things which had been done looking towards the collection of the note from the maker's property. It placed all of the parties in statu quo. It restored the legal relations of all the parties to the note in question to just what they were before the plaintiff's unsuccessful attempt to collect from the maker. As to all the parties to the note, they were placed in the same position as if the payment of the money received from the sheriff had never been received or indorsed upon the note. So it cannot be asserted that the note in question was ever paid by the maker, or any part collected from its property. It seems to us that this conclusion not only rests safely upon reason and principles of natural justice, but that it has the sanction and support of a very recent decision in this court.

"We have just held that, where an attorney recovers a judgment for his client, and which was paid by the unsuccessful party to the attorney pending an appeal, upon the reversal of the judgment the attorney's client, who had received the benefit of the payment by being credited upon a bill rendered to him by the attorney, was bound to restore or account for the money, and this although the client and the attorney had settled upon the basis that the attorney had received the amount of the judgment, and credited it to his client in the bill rendered, and upon which the settlement was made. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35, 72 N. E. 634. The money was received by the plaintiff from the sheriff with a litigation pending concerning the right of a third party, and so it was received and in-

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dorsed, subject, however, to the ultimate results of the litigation; and when the suit was decided in favor of the third party, and the plaintiff was obliged to restore the money, the situation was in law just the same as if it had never been received or indorsed. So we think that the defense of payment was not, in any legal sense, established.

"In regard to the defense of the statute of limitations, it is proper to observe that the question arising out of that defense does not seem to have been passed upon in the trial court by any direct finding of fact or of law. In the discussion of the case at the appellate division that defense was not referred to at all; but if the decision of the learned trial judge in this case is to be considered as what is known as a short form of decision, then it can be treated as covering all of the questions in the case that are within the scope of the pleadings and the evidence; but the short decision is absolutely essential to this defense, otherwise it cannot be said that it is presented here by any express finding or any exception. If the payments made by the defendants and indorsed upon the note are to be treated as partial payments in the ordinary sense, this action, having been commenced December 17, 1899, was brought in time. The learned counsel for the defendants invokes the principle stated in Crow v. Gleason, 141 N. Y. 489, 36 N. E. 497. It was said by Judge Earl in that case that: 'If there be a mere naked payment of money, without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute. The payment must be made under such circumstances as to show a recognition of a larger debt remaining unpaid.' It will be noticed that the authorities cited by the learned counsel for the defendants on this question deal with cases where payments were evidenced by entries upon books kept by the parties, where a long account was involved, and where the purpose of the payments was obscure or doubtful. We do not think that the principle stated has any application to the case at bar. The partial payments were made by the defendants upon the note in question. There was no dispute about the amount of it or about the payments made. It may be, and probably is, true that the defendants made the payments with the hope and expectation that they would not have to pay any more. It may also be true that the plaintiff's officers received these payments with the same hopes and expectations. But it turned out that they were all mistaken, and that all their calculations had been upset by the success of Mrs. Townley in securing a reversal of the judgment. The first indorsement had been made upon the note of money, the right to which was in dispute, and subject to the result of a pending litigation. It was a conditional payment to the knowledge of all the parties, and under these circumstances it cannot be held that the partial payments made by the defendants were not intended to be payments upon the note in the same sense as if the attempt to collect from the maker had never been made. The defendants made the partial payments, and the plaintiff indorsed them upon the note on the basis only that the money received from the sheriff from the proceeds of the sale of the maker's property would be retained to apply upon the note by the favorable result of the litigation. On this theory the indorsers paid and the plaintiff received certain moneys which represented the balance of the note.

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But there was no agreement that the plaintiff should take upon itself all the risks of the litigation, and there was no accord and satisfaction. The money paid by the indorsers they were bound to pay in any event, and the only protection that they had against further liability would be the successful result of the pending suit, which was to determine whether the large indorsement should inure to their benefit. Hence the payments made by them operated only to extinguish the note pro tanto, and so the action is not barred."

73 N. E. 572.

Bona Fide Holder: Check.

W. R. Harkness, the payee of the check described in accompanying illustration, obtained it from the maker by fraud. Harkness indorsed and transferred it to the Capital Savings Bank and Trust Company, and this institution, claiming to be a bona fide holder, sued the maker of the check for its amount, payment having been stopped. It was held by the trial court that the holder of the check did not bring itself within the rule of a bona fide holder as laid down by the Vermont courts. That rule, which prevails in some States, and which is stated in the opinion of the court, imposes more obligations on the purchaser of commercial paper than does the rule adopted in other States, and which is the one set out in the Negotiable Instruments Law. That rule is stated by the Court of Appeals of New York, 150 N. Y. 59. "The holder's rights cannot be defeated without proof of actual notice of the defect in title, or bad faith, evidenced by circumstances. Though he may have been negligent in taking the paper and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail."

The opinion of the court follows:

START, J. The action is assumptist, declaring on a bank check for $1,000 issued by the defendant to W. R. Harkness, and by him indorsed to the plaintiff. The trial court found and filed its findings as is required by the statute. The check was obtained by Harkness from the defendant by fraud, and was invalid as between Harkness and the defendant. The plaintiff claimed to recover as a bona fide purchaser for value, without notice of the fraud. The court failed to find that the plaintiff, as a careful and prudent concern, had no reason to suspect, when it took the check, that it was invalid as between the original parties thereto, and rendered judgment for the defendant to recover its costs. To the failure to find that the plaintiff had no reason to suspect that the check was invalid between the original parties, and to the rendition of judgment for the defendant, the plaintiff excepted. No other questions are reserved, and these only will be considered.

The check having been obtained by Harkness from the defendant

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through the fraud of Harkness, it was invalid as between the original parties thereto, and the burden was on the plaintiff to show that it took the check in the usual course of business, for a valuable consideration, without knowledge of facts which impeached its validity as between the original parties, and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties. Roth v. Allen, 32 Vt. 125; Gould v. Stevens, 43 Vt. 125, 5 Am. Rep. 265; Savings Bank v. National Bank, 53 Vt. 82; Bank v. Adams, 70 Vt. 132, 40 Atl. 166; Bank v. Baxter, 31 Vt. 101. In Bromley v. Hawley, 60 Vt. 50, 12 Atl. 222, it is said that the purchaser of negotiable paper must exercise reasonable prudence and caution in taking it, if the circumstances are such as ought to excite the suspicion of a prudent and careful man as to the validity of the paper as between the parties to it, or the propriety of the transfer, and the purchaser takes it without inquiry, he does not stand in the position of a bona fide holder, but in the position of the party from whom he takes it, though he may have paid value for it. The question of whether the plaintiff, as a careful and prudent concern, had no reason to suspect, when it took the check, that it was invalid as between the antecedent parties thereto, was a question of fact for the determination of the trial court; and, that court having failed to find this fact in favor of the plaintiff, the plaintiff failed to establish a fact essential to its right of recovery. In the circumstances shown by the findings, it cannot be said as a matter of law that the plaintiff was not put upon inquiry respecting the validity of the check as between the original parties thereto.

"It is found that at the time the plaintiff took the check its officers knew that Harkness was not responsible, and would not loan money upon his credit; that on the 6th day of March, 1903, Harkness procured the check of the defendant, and on the same day transferred it to the plaintiff; that on the 2d day of the same month Harkness had procured a note to be discounted by the plaintiff for $300 on which the name of the surety and the approval of the plaintiff's president were forged; that on the same day Harkness admitted to the plaintiff's president that he forged the approval and the name of the surety, and asked the president what he was going to do about it, and, without telling him, the president asked him what he was going to do about it, and intimated that he had better fix it up, and asked him if he could not pay back the $300 he had received on the note; and when Harkness paid this note on March 6, 1903, out of the check in question, the plaintiff's president said to him, "Go, and do so no more." These and other facts and circumstances, which appear in the findings, were for the consideration of the trial court, and its failure to find that the plaintiff, as a careful and prudent concern, had no reason to suspect, when it took the check, that it was invalid as between the orginal parties thereto, will not be reversed in this court.

"The view we have thus taken of the conclusiveness of the findings and failure to find by the court below is sustained by the holdings of this court upon the facts reported in Roth v. Allen, Bank v. Adams, and Gould v. Stevens, before cited. In Roth v. Allen it is said that the question whether the holder of current negotiable paper has taken it with or without notice of defenses between prior parties, whether he has exercised good faith in the transaction, or has been guilty of

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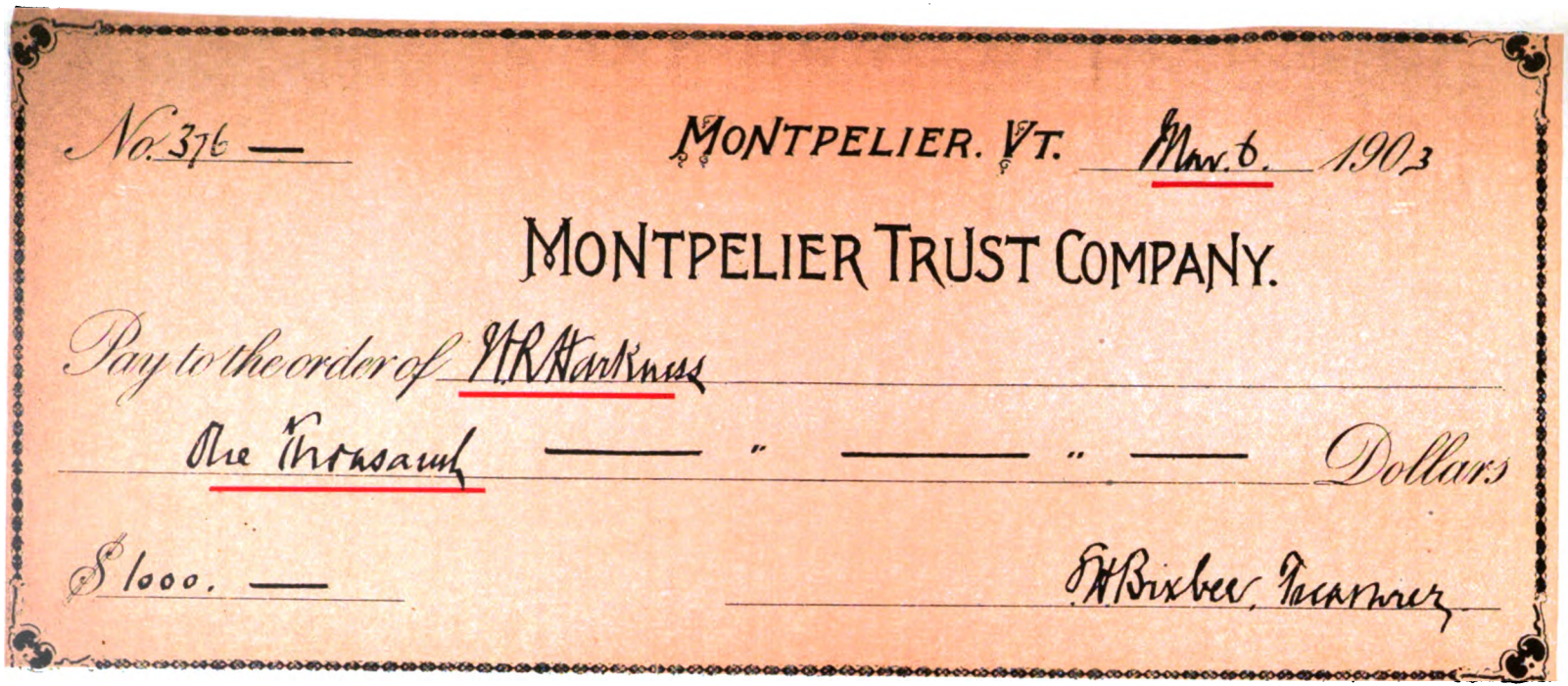

No. 376 —

MONTPELIER. VT. Mar. 6. 1903

MONTPELIER TRUST COMPANY.

Pay to the order of H R Harkness

One Thousand —— " —— " —— Dollars

$1000. —

F H Bixbee Treasurer

B. 37. Check: Notice: Bona Fide Holder.

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W. R. Harkness.

The Capital Savings Bank & Trust Co. took this check from the payee, W. R. Harkness, who procured it from the maker by fraud. As between Harkness and the maker of the check, the maker had a perfect defense to it. The Capital S. B. & T. Co. claimed to be a *bona fide* holder of the check, and payment being refused it sued the maker.

The maker alleged fraud, and this put proof of being a *bona fide* holder on the holder of the check. It seemed that on the 2d day of March Harkness, who was known to be financially irresponsible, had forged a note of $300, and had it discounted by the holder of the check, and on the same day its president, discovering the forgery, told Harkness that he better fix it up. On the day this check was given, this bank took it from Harkness, deducting the forged note from the amount. This knowledge of the character and financial standing of Harkness, and these facts seemed to be the reasons for holding that the bank cashing the check for Harkness was not a *bona fide* holder.

The court (Supreme Court of Vermont) said in part: "The check having been obtained by Harkness from the defendant through the fraud of Harkness . . . the burden was on the holder to show that it took the check in the usual course of business, for a valuable consideration, without knowledge of facts which impeached its validity as between the original parties, and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties . . . it is said that the purchaser of negotiable paper must exercise reasonable prudence and caution in taking it, if the circumstances are such as ought to excite the suspicion of a prudent and careful man as to the validity of the paper as between the parties to it, or the propriety of the transfer." This rule, which prevails in Vermont and in some other States, puts all men who seek to be called *bona fide* holders in the shoes of the "careful and prudent man" whose suspicions would be aroused, and it tells him in effect to follow up his suspicions or else go barefoot. This strict rule does not apply in all States.

The Negotiable Instruments Law says on this point: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." The New York Court of Appeals said, 150 N. Y. 59: "The holder's rights cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide* his title, according to settled doctrine, will prevail."

McMaster's Com. Cases, Vol. 1905, 59 At. 827.

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negligence or want of proper caution, are always questions of fact to be submitted to and determned by the jury. All the circumstances attending the transaction, the condition of the several parties, and all other facts that bear upon such an issue, are only evidence for the jury to weigh in deciding it. In Bank v. Adams this court, in holding that the plaintiff's motion for a verdict was properly denied, quoted with approval the rule given in Roth v. Allen. The plaintiff insists that it is entitled to a judgment on the facts found, and relies upon the cases of Bank v. Goss, 31 Vt. 315, and Bromeley v. Hawley, 60 Vt. 46, 12 Atl. 220. But the facts as reported in those cases are unlike those in the case at bar. In Bank v. Goss the defendant Goss procured the defendant Page to sign the note in suit for the purpose of enabling Goss to obtain a loan at the bank in the usual course of business. At the time the note was signed it was agreed by Goss that he would not use it unless he could also procure the signature of one Brown upon it. Goss, in violation of this agreement, procured the plaintiff to discount the note without the signature of Brown. Neither the bank nor any of its officers had any knowledge or notice of the alleged agreement. In Bromley v. Hawley the trial court rendered judgment for the plaintiff, and this court said that the fact that the note was overdue, that it amounted to $4,000, that it had different numbers on it — one placed there by the maker and the other by the bank — were not sufficient to put the plaintiff upon inquiry, it appearing that he took the note in good faith, and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high; and in so doing quoted with approval the rule, herein referred to, respecting the duty of the purchaser of negotiable paper. In the case at bar the plaintiff, in negotiating for the check, was dealing with a party known to it to be irresponsible, and a forger. Harkness had only four days before perpetrated a fraud upon the plaintiff by procuring it to discount, as genuine, a note for $300, on which he had forged the name of the surety, and the approval of the plaintiff's president. Also the plaintiff, in negotiating for the check, was dealing with a party who had before defrauded the plaintiff by procuring it to discount, as genuine, a note for $1,700, to which the party had forged the name of a surety appearing thereon; and it is found that at the time of the transfer of the check the plaintiff's president had reason to suspect that the name of the surety on this note was forged. In view of these and other facts and circumstances appearing from the findings, a court might well consider that the plaintiff's officers knew of the fradulent and dishonest methods resorted to by Harkness to obtain money and credit, that they had reason to suspect that the check was obtained from the defendant by the same methods, and hestitate to find that the plaintiff had no reason to suspect that Harkness had procured the check from the defendant by fraud. In these circumstances it cannot be said that the equities are with the plaintiff, or that it is entitled to recover the amount of the check notwithstanding the failure of the court to find that it had no reason to suspect, when it took the check, that the same was invalid as between the original parties thereto. The case of Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841, was for the benefit of one Healey, who purchased the note, before due, of one Preston, the payee. The note was given in settlement of a fraudulent

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debt, and was wholly without consideration. The case was tried by the court, and it found that Healey had such knowledge in regard to the way in which orders and notes for wire were obtained by Preston that he might reasonably expect that the note in suit was obtained in the same manner. Notwithstanding this finding, the trial court rendered judgment for the plaintiff to recover on the note, but this court, on the finding, reversed the judgment, and rendered judgment for the defendant to recover his costs.

"Judgment affirmed."

59 Atl. 828.

Payment on Negotiable Note Secured by Mortgage: Non-negotiable Instruments: Conflict of Laws.

The State National Bank was the holder of a note for $7,000 made by Humphrey & Fleming to the order of Tamblyn & Tamblyn, and by the latter indorsed to the bank. The note was secured by a chattel mortgage to Tamblyn & Tamblyn upon 300 head of steers, which mortgage was assigned to the bank.

Before the maturity of the note the makers shipped some of the steers to Tamblyn & Tamblyn, who sold them to the Cudahy Packing Company. The assignment of the mortgtge to the bank was not recorded, and it was not required to be by law.

The bank sued the Cudahy Packing Company for the value of the cattle. The decision in the case turned on the point as to whether or not the note was a negotiable instrument. If it was not a non-negotiable instrument the buyers of the cattle would be protected in accounting for their value to the payees of the note and mortgage, but if the note was negotiable in form the purchasers were bound, at their peril, to deal with the owners of the note, irrespective of what the records showed as to who was the probable owner of the note and mortgage.

The note was in the usual form except that it contained this clause:

> "And in case legal proceedings are instituted to enforce the collection of this note, we agree to pay ten per cent. of the entire amount due as attorney's fees."

The action was tried in the United States Court sitting in Missouri. This provision as attorney's fees, it had been held by the Supreme Court of Missouri, would destroy the negotiability of a note, and while the federal courts follow, as to the interpretation of State statutes, the decisions of the highest court of the State in which they are sitting, the court, here, said that this was a question of general commercial law, there being no State statute on the subject, and it refused to follow the decisions of that court, and held the note negotiable — deciding that the Cudahy Packing Company must again pay for the cattle — and this time to the bank.

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B. 38. Non-Negotiable Note: Partial Payment: Collateral: Attorney's Fees: Conflict of Laws: Negotiable Instruments Law.

$1000

Kansas City Mo June 5 1901

Seven years after date we promise to pay to

the order of Lambeth Lyon & Lambeth Lyon

Seven Thousand _____ Dollars

at Bank of Commerce in Kansas City, with interest

Value received

And in case legal proceedings are instituted to enforce collection of this note, we agree to pay ten per cent. of the entire amount due as attorney's fees.

No. _____ Due _____

Humphreys & Clements

John Fallowsville Printing Company 121 Fulton St N.Y.

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Tamblyn & Tamblyn

This note was secured by a chattel mortgage, on 300 steers, running to Tamblyn & Tamblyn, who indorsed the note and assigned the mortgage to the State National Bank. The bank did not record the assignment of the mortgage, the law not requiring it to be done. Before the maturity of the note, the makers, presumably ignorant of the transfer of the note, and without the knowledge of the bank, sent 78 head of the cattle to Tamblyn & Tamblyn, who sold them to the Cudahy Packing Company, which had no information of the fact that Tamblyn & Tamblyn had assigned the mortgage and sold the note. The note not being paid, the bank sued the Cudahy Packing Company for the conversion of the 78 head of cattle.

If the note was a negotiable one, the makers would pay it at their peril to the payee of the note and mortgage unless he produced the papers — regardless of the fact that the records showed no assignment of the mortgage — while if the note was non-negotiable, a *bona fide* payment to the payee in ignorance of the transfer of the papers, would protect the maker.

The note was executed and was made payable in Missouri. The courts of that State hold that the provision for the payment of attorney's fees as printed on the face of the note render such a note non-negotiable. The action on this note was in the United States Court sitting in Missouri, and that court refused to follow or be bound by the decisions of the State Court on this point, as the question did not involve the interpretation of a statute of the State, but instead, a question of general commercial law in which it was at liberty to interpret the law according to its own light. The note was held to be negotiable, and the Cudahy Packing Company was held liable for the value of the cattle. This does not change the law in Missouri as to whether or not such notes are negotiable, as the law of the State Courts is the higher law, and in its courts this decision has no binding effect.

The court said in part: "It is contended that this language destroyed the negotiability of the note. . . . This is the holding of the Supreme Court of Missouri. . . . The question, however, is one of general commercial law. The federal courts in respect of it are required to exercise an independent judgment. Such has been their uniform practice in regard to all questions affecting negotiable instruments. The Supreme Court of the United States in a case similar to this one, said: "If this decision of the learned (Supreme Court of Pennsylvania) court was founded on the construction of the constitution or statute law of the State, or the peculiar law of Pennsylvania as to title to lands, we would have felt bound to follow, but we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment."

McMaster's Com. Cases, Vol. 1905, 134 Fed. 538.

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This decision does not change the law in Missouri as the decision of its State court on this subject is still the higher law there, and the only law that would be enforced there between citizens of that State or between litigants in its State courts. Such a note as here described is yet non-negotiable in the State courts of California, Missouri, Montana, North Dakota, and such has been declared to be the law in Maryland, Michigan, Minnesota, North Carolina, Pennsylvania, South Carolina and Wisconsin, and also in Oklahoma. Some of these States have adopted the Negotiable Instruments Law since the making of these decisions by their courts, and in such States the rule has been changed, as that law declares that the provision in question does not destroy the negotiability of a note.

This is not the first recent instance where knowledge of the decision of the courts of one's own State was insufficient knowledge, where such decision was against the general rule of commercial law. Illinois is one of the very few States whose courts hold that a check, brought to the notice of a bank on which it is drawn, operates as an assignment to the holder of so much of the drewer's funds as it calls for. Following such decisions, a bank in Chicago recently paid to the holder of checks, whose drawer had failed, several thousand dollars. The drawer's affairs were wound up before a United States court sitting in Illinois, and such court, saying that the decisions of the Illinois courts on the subject were against the general rule of commercial law, held the bank liable for the amounts it had so paid out.

In the twenty-seven States that have adopted the Negotiable Instruments Law this question of the negotiability of a note containing a provision for payments of attorney's fees is settled by statute. But this provision is an abominable excrescence on what a distinguished jurist said should be a "courier without luggage." The several States have always provided, each in its own way, how the costs of litigation should be borne. It is difficult to discern the necessity or the wisdom of selecting the one class of contracts that above all others it has been thought should be kept free from barnacles, and allow the parties to agree that, as to that contract, one party to it should pay a given percentage above the amount already allowed by law as to all other contracts in litigation, if he was beaten in a litigation over it.

The court said, in part, as to its right to ignore the decisions of the Missouri courts:

"The note was payable to the order of Tamblyn & Tamblyn, but it contained the following provision: 'And in case legal proceedings are instituted to enforce the collection of this note, we agree to pay ten per cent. of the entire amount due as attorney's fees.' It is contended that this language destroyed the negotiability of the note, or, more accurately, made the instrument not a promissory note at all, but a mere chose in action. This is the holding of the Supreme Court of Missouri — the State in which this action arose. First

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National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Samstag v. Conley, 64 Mo. 476; First National Bank v. Marlow, 71 Mo. 618 McCoy v. Green, 83 Mo. 626; Creasy v. Gray, 88 Mo. App. 454. The question, however, is one of general commerical law. The federal courts, in respect of it, are required to exercise an independent judgment. Such has been their uniform practice in regard to all questions affecting negotiable instruments. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. The case of Mercer County v. Hackett, 1 Wall. 83, 17 L. Ed. 548, presented a question very similar to the one now under consideration. The instrument in that case was executed by a corporation and bore the corporate seal. The case arose in the State of Pennsylvania. The courts of that State had uniformly decided that the presence of a corporate seal destroyed the negotiability of such instruments. The Supreme Court, however, refused to follow this holding, the court saying:

"'If this decision of the learned court was founded on the construction of the Constitution or Statute Law of the State, or the peculiar law of Pennsylvania as to titles of land, we would have felt bound to follow; but we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment.'

"There is a statute in the State of Missouri which has some bearing on the question. It reads as follows:

"'Every promissory note for the payment of money to the payee therein named or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange.'

"The decisions of the Supreme Court of Missouri referred to are not based upon this statute, but rest upon general considerations of the common law, as defining the essential elements of negotiable paper the statute is affirmative in its language. It declares what elements must be found in a promissory note, but it does not declare what effect the presence of incidental provisions, such as the payment of attorney's fees, shall have. It is conceded that all the elements mentioned in the statute are present in the note in question. It would not be a proper construction of the language which the Legislature has used to hold that every instrument which contained provisions other than those mentioned in the statute should be non-negotiable. It is not correct to say that promissory notes were not negotiable in England at common law. The statute of Anne is declatory simply of the common law. It has never been construed by the English courts as creating any new rule. It was enacted to remove the doubts created by the decisions of Chief Justice Holt. This whole subject is discussed with remarkable clearness and learning in the case of Dunlop v. Silver, a Circuit Court decision, reported in 1 Cranch, 367, Fed. Cas. No. 4, 169. See also Goodwin v. Robarts, L. R. 10 Ex. 337. The statute of Missouri above quoted seems to have been enacted for the same general purpose as the statute of Anne, namely, to remove and doubt as as to the negotiability of promissory notes. We feel at liberty, therefore, to deal with this question as a question of general law, free from statutory restrictions of the State in which the case arose.

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"Treating it thus, the question at the present time presents little difficulty. There has been considerable conflict in the courts of the different States on the subject, but the clear weight of authority at the present time sustains the doctrine that the incorporation of a provision for the payment of attorney's fees in negotiable paper does not destroy its commercial character."

(See Decision No. 852.)

Non-negotiable Note: Attorney's Fees: Negotiable Instruments Law.

The courts in a majority of States have held that a provision in a promissory note to the effect that if it is collected by legal process an attorney's fee shall be added to the amount of the note, renders the note non-negotiable. In some States the courts hold to the contrary. The note, practically described in accompanying illustration, was held to be non-negotiable by reason of the attorney's fees clause.

The Negotiable Instruments Law which is now in force in many States provides that certain provisions for costs of collection or attorney's fees in case of nonpayment does not impair negotiability in an instrument. It says:

"The sum payable is a sum certain within the meaning of this act, although it is to be paid;

* * * * * * * *

"With costs of collection or an attorney's fee in case payment shall not be made at maturity."

The decision follows:

COTTON et ux. v. JOHN DEERE PLOW CO.

78 Pac. 321.

(Supreme Court of Oklahoma. Sept. 3, 1904.)

NON-NEGOTIABLE NOTE — INNOCENT PURCHASER.

1. A promissory note which contains the following stipulation in relation to attorney's fees, to wit: "It is stipulated by the parties to this note, that in event the same is collected by an attorney, or by any proceedings at law, an attorney's fee consisting of $10 and 10 per cent. of the amount so collected shall be paid by the makers hereof to the holder of the same" destroys the negotiable character of the instrument, and thereby makes it non-negotiable.

2. A non-negotiable instrument, although transferred to an innocent purchaser before maturity, and for a valuable consideration, is subject to all the legal defenses which might be interposed against the note in the hands of the original payee.

(Syllabus by the Court.)

HAINER, J. This was an action brought by the John Deere Plow Company against the plaintiffs in error, James F. Cotton and Jennie Cotton, to recover $200, interest, and attorney's fees on a promissory note, executed by James F. Cotton and Jennie Cotton to George B. Wood & Co., and by George B. Wood & Co. sold and transferred,

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before maturity, for a valuable consideration, to George S. Soulsby, and thereafter, and before maturity, for a valuable consideration, sold and transferred by the said Soulsby to the John Deere Plow Company. The defendants' answer consists of a general denial, and that the note sued on was without consideration, and was procured by fraud and false representations. Upon the issues thus joined the cause was tried to the court without a jury, and judgment rendered for the plaintiff in accordance with the prayer of the petition. From this judgment the defendants appeal.

It appears from the record that, after the plaintiff had introduced its evidence and rested its case, the defendants offered to prove by J. F. Cotton, the principal defendant, that the note sued on was without consideration, and was obtained by false and fraudulent representations. To the introduction of this testimony the plaintiff objected upon the ground that the testimony introduced on behalf of the plaintiff showed that the note had been transferred before maturity, and that it was in the hands of innocent purchasers before maturity, and that the note was, in form, a negotiable instrument. This objection was sustained by the court, to which ruling the defendants duly excepted. Thereupon each party rested his case, and judgment was rendered in favor of the plaintiff. Motion for a new trial was duly filed, overruled, and exception reserved; and the defendants bring the case here for review.

The cause was tried on the theory that the note sued on was a negotiable instrument. This was clearly erroneous. The note contained the following stipulation in reference to attorney's fees, to wit: "It is stipulated by the parties to this note, that in event the same is collected by an attorney, or by any proceedings at law, an attorney's fee consisting of ten dollars and ten per cent. of the amount so collected shall be paid by the makers hereof to the holder of the same." This provision clearly destroyed the negotiability of the note, and the case falls within the rule announced by this court in the case of Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946. And also within the rule announced by the Supreme Court of California in the case of Adams v. Seaman (Cal.) 23 Pac. 53, 7 L. R. A. 224, and Findlay v. Potts (Cal.) 63 Pac. 694, in construing the Civil Code of California (section 3088), which provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." Decisions of the Supreme Court of California are peculiarly applicable, for the reason that the statute of that State is identical with our statutes, and these decisions of the California court are constructions placed upon the statute before its adoption by the Legislature of this territory. Manifestly, one of the essential qualities of a negotiable promissory note is absolute certainty as to the sum of money to be paid, a certainty which must appear on the face of the note. Therefore, if any part of the amount is dependent upon any contingency, or where it is necessary to offer proof other than the instrument itself, the negotiable character of the instrument is destroyed. In other words, the instrument must not contain any condition that is not capable of certainty of fulfillment. The note being a non-negotiable instrument, it is subject to all the legal defenses which might be interposed against the note in the hands of the original payee. And hence the court erred in refusing to permit

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the defendants to prove want of consideration, or that the note was procured by false and fradulent representations.

In our opinion, the question is properly raised and presented by the record. The judgment of the court below is therefore reversed, and the cause remanded, with directions to grant a new trial, and proceed in consonance with the views herein expressed. All the Justices concurring.

CITIZENS' STATE BANK v. COWLES.

73 N. E. 33.

(Court of Appeals of New York. Jan. 31, 1905.)

BILLS AND NOTES — CHECK — HOLDER FOR VALUE.

1. Where the holder of a check drawn on another bank deposited it to his account, and the bank of deposit credited it, and the depositor's account remained sufficient to pay the check in case of dishonor, the bank was not a holder of the check in due course of business, within Laws 1897, p. 732, c. 612, § 91, so as to exclude defenses which the drawer of the check might have against the payee.

WERNER, J. The action is upon a check dated June 1, 1900, drawn by the defendant upon the First National Bank of Port Chester, N. Y., to the order of W. W. Miller & Sons, for $600. The check was given in payment for a team of horses purchased by the defendant from the Millers under a written guaranty of soundness and condition, the alleged breach of which is now sought to be interposed as a defense.

The horses were delivered shortly after midnight on the 2d day of June, and later in the morning it was discovered that one of them was ill from pneumonia, as a result of which it died within about nine days. On Monday, the 4th of June, which was the first business day after the giving of the check, the defendant's son notified the bank to stop payment on the check, and then communicated by telephone with one of the payees, advising him of the sickness of one of the horses, and of the fact that payment of the check had been stopped.

The payees indorsed the check to one George M. Hoffman, the president of the plaintiff bank, and mailed it to him at Little River, Kan., but whether it was so mailed before or after the notification as to the illness of the horse does not appear. Hoffman received the check on the 8th day of June, indorsed it, and within two or three hours deposited it with the plaintiff, which credited the amount thereof to Hoffman's account, indorsed the check to the National Bank of Kansas City, Mo., and sent it to that bank for collection. What was done with the check after that does not appear, except as it may be inferred from the fact that it was received by the First National Bank of Port Chester (on which bank it was drawn) on the 14th of June, where it was protested, and marked "Payment stopped."

One of the issues tendered by the defendant's answer was that the plaintiff was not an innocent holder of the check for value. Upon the trial the plaintiff made out its case by introducing the check in evidence, and relying upon the presumptions in support of negotiable

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paper, together with the allegations and admissions of the answer. The defendant then introduced evidence bearing upon the breach of warranty or failure of consideration in the sale of the horses, and this was supplemented by reading from depositions issued to Hoffman and Waitt, who were officers of the plaintiff bank. From these depositions it appeared that at the time of the delivery of the check to the plaintiff the payees thereof did not have an account with the plaintiff bank, and that the check was indorsed by the payees to Hoffman, who at once indorsed and delivered it to the plaintiff. At this point we encounter some haziness in the testimony. Hoffman stated that the check was indorsed to him and he received the money from the bank. Waitt, the cashier, testified that the plaintiff paid $600 for the check, but afterwards qualified this by saying that as cashier he credited Hoffman's account with the amount of the check. Had the conflicting inferences which may be drawn from these equivocal statements been submitted to a jury, with proper instructions, the defendant would, of course, be bound by a decision against her, because it would have to be assumed that the plaintiff had become the actual owner of the check by purchase. The difficulty with the case is that the verdict was directed against the defendant, thus entitling her to the most favorable inferences to be drawn from the evidence. Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Ladd v. Ætna Ins. Co., 147 N. Y. 478, 484, 42 N. E. 197; Weil v. D. D., E. B. & B. R. R Co., 119 N. Y. 147, 152, 23 N. E. 487.

It is obvious that if the evidence would support the inference that the plaintiff did not buy the check, but simply gave Hoffman credit for the amount upon its books, then plaintiff is not a holder of the check in due course, within the "law merchant," as that term is now defined in the Negotiable Instruments Law, so as to render its title superior to the defenses which the drawer of the check may have against the payees. Under the Negotiable Instruments Law four elements must concur to constitute such a title: (1) The instrument must be complete and regular on its face; (2) the holder must receive it before it is overdue, and without notice that it has been previously dishonored, if that is the fact; (3) it must have been taken in good faith and for value; (4) it must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Neg. Instruments Law, § 91 (Laws 1897, p. 732, c. 612). If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. Albany County Bank v. People's C.-Op. Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 244, 14 Sup. Ct. 94, 37 L. Ed. 1063; Dykman v. Northbridge, 80 Hun, 258, 30 N. Y. Supp. 164; Central Nat. Bank v. Valentine, 18 Hun, 417.

The evidence upon this feature of the case is meagre and unsatisfactory, but we must take it as it is. Hoffman, the plaintiff's president, stated that he received the money on the check, but he did not

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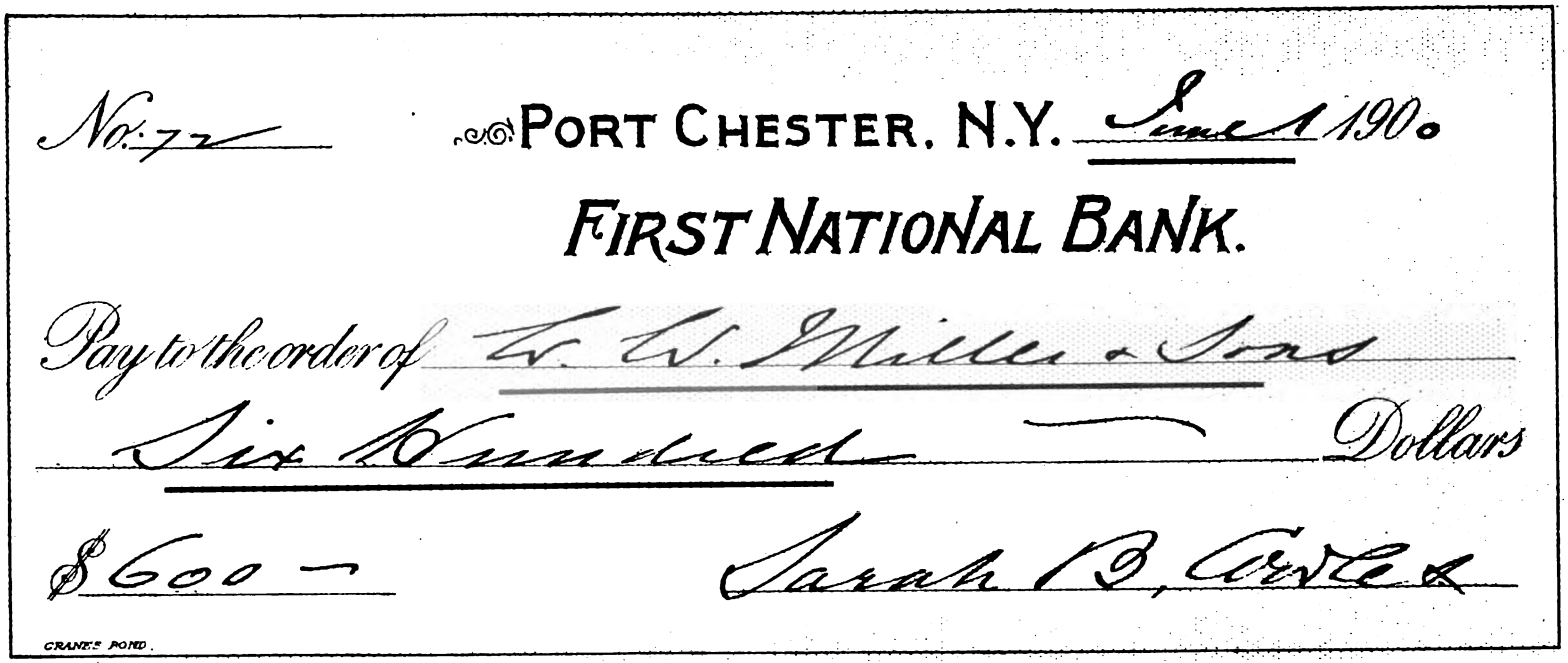
B. 39. Check: Bona Fide Holder: Deposit.



No. 72 PORT CHESTER, N.Y. June 1 1900

FIRST NATIONAL BANK.

Pay to the order of Lr. W. Miller & Sons

Six Hundred — Dollars

$600 — Sarah B. Cole

GRANE'S PO'HD.

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W. W. Miller & Sons.

George M. Hoffman

The drawer of this check delivered it to the payees, Saturday, June 2d, in payment of a team of horses. June 4th, on discovering that one of the horses was unsound, the drawer stopped payment on the check and notified the payees of that fact. Either before or after this notification the payees indorsed the check to George M. Hoffman who was the president of the Citizens' State Bank of Little River, Kansas, who transferred it to that bank. This bank caused the check to be presented for payment, and on its nonpayment brought an action against Sarah B. Cowles, the drawer, for its amount.

She sought to defeat a recovery on the ground that the horses were warranted as sound, while in fact they were not. The bank claimed to be a *bona fide* holder of the check, and if this was a fact, such defense was not available against it. The bank holding the check won in the lower courts, but the judgment obtained there was reversed on appeal to the court of last resort. It was there found that the evidence was not clear as to whether the Citizens' State Bank gave Hoffman the money for the check, or simply gave him credit for it. It was also found that the evidence did not disclose whether or not his account was good for that amount when it heard that the drawer claimed that she had a valid defense to the check. The court held that this question of fact should have been submitted to the jury and if it found that the bank simply gave Hoffman credit for the check and that the account was good for the amount of the check when it heard of the defense to it, then the bank was not in the position of a *bona fide* holder. The court said in part: "Under the Negotiable Instruments Law four elements must occur to constitute such a title: (1) The instrument must be complete and regular on its face; (2) the holder must receive it before it is overdue, and without notice that it has been previously dishonored; (3) it must have been taken in good faith and for value; (4) it must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

"If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of the bank, of the amount of a check drawn upon another bank, where the depositors account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. 92 App. Div. 47; 150 U. S. 231; 80 Hun, 258."

McMaster's Com. Cases, Vol. 1905, 73 N. E. 33.

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fix any time. For aught that appears in the record, that may have been after the plaintiff had received notice of the dishonor of the check. Waitt, the plaintiff's cashier, stated that the plaintiff had paid $600 for the check; but that is qualified by his later statement that he gave Hoffman credit for the amount upon the books of the bank.

The view of the evidence most favorable to the defendant would, we think, have justified a jury in finding that the amount of the check had simply been credited to Hoffman's account, and that no money was paid to him by the plaintiff upon the check before the latter had notice of its dishonor.

The judgments of the court below should be reversed, and a new trial granted, with costs to abide the event.

Cullen, C. J., and Gray, O'Brien, Bartlett, Haight, and Vann, JJ., concur.

Judgments reversed, etc.

GARRISON et al. v. UNION TRUST CO.

102 N. W. 978.

(Supreme Court of Michigan. March 21, 1905.)

BANKS AND BANKING — DRAFTS — COLLECTION — LIEN OF COLLECTING BANK.

A State bank sent to a savings bank a draft for collection, indorsing it generally, "Pay City Savings Bank or order." The savings bank stamped on the face of the draft, "Collection No. 4627," indorsed it on the back, "Pay to any state or national bank," and sent it to a private bank, accompanied by a letter stating that it was sent for collection and credit, and directing the private bank to return the draft at once, if it was not paid, and to give reason for nonpayment. The draft was drawn against a car of grain, which did not arrive for several days; and the private bank, according to its custom, held the draft, awaiting the arrival of the car, at which time the draft was paid. The private bank carried a balance with the savings bank, and it was its custom, when making collections for that bank, to credit it with the amount of the collections. Upon receiving payment of the draft, the private bank notified the savings bank that it had been paid, and its account credited; the notification reaching the savings bank after it had ceased to do business and was insolvent. Held, that the private bank was entitled to a lien on the proceeds of the draft, as against the State bank, which was the owner thereof, and that its failure to return the draft when it was not paid immediately did not deprive it of its right to the lien.

Appeal from Circuit Court, Wayne county, in Chancery; Joseph W. Donovan, Judge.

Action by William D. Garrison and another against the Union Trust Company, as receiver. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before McAlvay, Grant, Blair, Montgomery, and Ostrander, JJ.

Angell, Boynton, McMillan & Bodman, for appellants. Bowen, Douglas, Whiting & Murfin, for appellee. Thomas A. E. Weadock, for Carson City Bank.

Blair, J. On January 30, 1902, the State Bank of Carson City sent to the City Savings Bank a sight draft drawn by the Rockafellow

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Grain Company, Limited, upon the Vernon Milling Company, at Vernon, Mich. The form of the draft was as follows:

"$467.50. Carson City, Mich., Jany 29, 1902. For car No. 20714, at sight, pay to the order of E. C. Cummings, Cash'r, four hundred sixty-seven and $^{50}/_{100}$ Dollars. Value received, and charge the same to account of The Rockafellow Grain Co., Ltd. Per F. A. Rockafellow, Mgr. To Vernon Milling Co., No. 123 Vernon, Mich. Rockafellow Grain Co. Ltd."

On a perforated stub, the following:

"No protest. Take this off before presenting. If not paid, return without delay and state reasons given."

When this draft was received by the City Savings Bank, it bore the following indorsement: "Pay City Savings Bank, Detroit, or order, State Bank of Carson City, Carson City, Mich. E. C. Cummings, Cashier."

With the draft came a letter from the Carson City Bank, of which the following only is important:

"Carson City, Mich., Jan. 30, 1902. City Savings Bank, Detroit Mich. — Gentlemen: I enclose for credit [here follow several items] for col., credit and advice,
No. 123, Rockafellow Gr. Co. on Vernon Milling Co..... $467 50
"No protest.

"Yours truly,

"[Signed] IRA CUMMINGS, Asst. Cash."

The difference between the manner in which items were treated when sent "for credit," and when sent "for col. [collection] credit and advice," was as follows: Items sent "for credit" were items drawn on other banks, and were credited by the City Savings Bank as soon as received. If they were not paid, the Carson City Bank would be charged back with the amount. Items sent for "collection, credit and advice" were forwarded to some bank where the collection was to be made, and they were not passed to the credit of the Carson City Bank until the collection had actually been made, at which time the Carson City bank would be credited and advised thereof.

On receiving this draft, the City Savings Bank marked upon its back: "Pay to the order of any State or national bank. City Savings Bank, Detroit, Mich. H. R. Andrews, Cashier" — and on its face, with a rubber stamp: "City Savings Bank. Collection, No. 4627, Detroit, Mich."

The City Savings Bank then sent the draft to Wm. D. & Arthur Garrison, at Vernon, with the following letter:

"City Savings Bank. Detroit, Mich., 1/31, 190-. W. D. and A. Garrison, ———, Esq., Cashier. Dear Sir: I enclose for collection, and Cr.

Kindly follow instructions below.

Please
Report by
Number.
4627. No Pro. $467 50

C. C. No. 2123.

"Protest all items unless otherwise instructed. Advise payment promptly and return at once if not paid. When unpaid, give reason.

"Respectfully yours,

"H. R. ANDREWS, Cashier."

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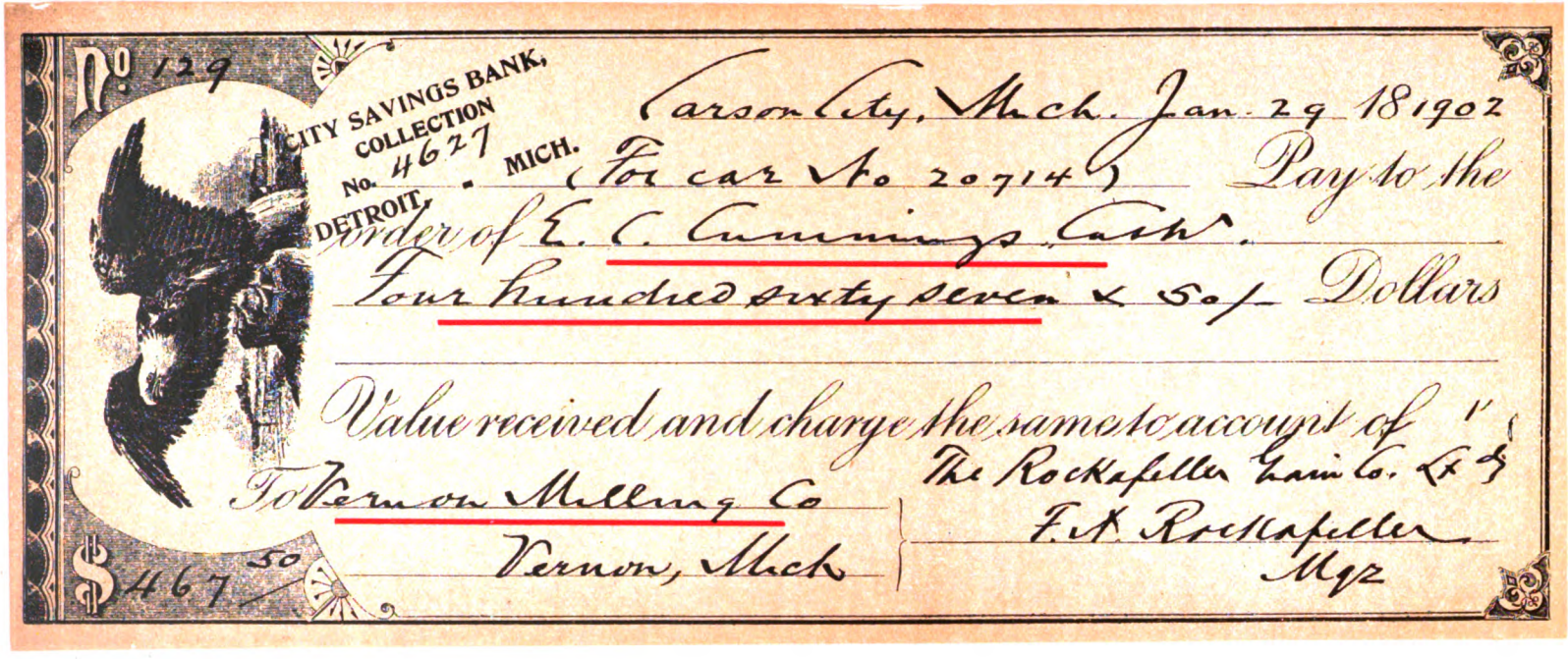

No. 129

CITY SAVINGS BANK,
COLLECTION
No. 4627
DETROIT, MICH.

Carson City, Mich. Jan. 29 1902

(For car No 20714)

Pay to the order of E. C. Cummings, Cash.

Four hundred sixty seven & 50/ Dollars

Value received and charge the same to account of
The Rockefeller Grain Co. Ltd
F. K. Rockefeller
Mgr

To Vernon Milling Co
Vernon, Mich

$467 50/

B. 40. Collections: Notice: Credit: Banker's Lien: Title to Item Sent for Collection: Bona Fide Holder.

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Pay City Savings Bank, Detroit, or order State Bank of Carson City, Carson City, Mich.

E. C. CUMMINGS, Cashier.

Pay to the order of any State or National Bank, City Savings Bank, Detroit, Mich.

H. R. ANDREWS, Cashier.

The Rockafellow Grain Co. placed this draft with the State Bank of Carson City for collection only. This bank indorsed it, as shown in the first indorsement above, and sent it to the City Savings Bank of Detroit, with which bank it had a general running account.

The material part of the letter inclosing the draft read: "I enclose . . . for col., credit and advice, No. 123. Rockafellow Gr. Co. on Vernon Milling Co., $467.50." On receiving the draft the City Savings Bank stamped it with a collection number, as shown on its face, and giving it the last indorsement shown above, inclosed it in a letter to the "Garrison" Bank at Mt. Vernon. The material part of this letter read: "I enclose for collection and Cr. . . . No. 4627 $467.50."

The draft was paid February 10th, and the Garrison Bank credited the amount to a larger debt balance which the City Savings Bank owed the Garrison Bank. A receiver was appointed for the City Savings Bank February 12th, and the court held that it was insolvent as early as February 8th, and ordered that all deposits made on that day be returned. The State Bank of Carson City sought to recover the money for the drawer of the draft, and the Garrison Bank insisted on maintaining the credit it had made of the amount to the debit balance of the failed City Savings Bank.

The trial court held that the State Bank of Carson City should have the $467.50 from the City Savings Bank, and that the Garrison Bank should, in effect, account to the City Savings Bank for the amount, as money collected in trust for a special account. The appellate court reversed this finding so far as the Garrison Bank was concerned, allowing it to hold the money as a credit to the general account of the City Savings Bank. The court, the Supreme Court of Michigan, said in part: "Where a negotiable instrument indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank 'for collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks."

The court adds that this dictrine has been repudiated in New York and some other States.

McMaster's Com. Cases, Vol. 1905, 102 N. W. 978.

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The draft was paid February 8th. The reason why it was held was because the car of grain against which the paper was drawn had not arrived. On the same day, February 8th, the Garrisons credited on their books the account of the City Savings Bank with the amount of the collection, and sent to the City Savings Bank notice of this credit as follows:

"Vernon, Mich., Feby. 8/02. We credit your acc't with No. 4627, $467.50. W. D. & A. Garrison, G. S."

This notice was written upon the letter of the City Savings Bank of January 31st, which was returned to the City Savings Bank; reaching Detroit at the opening of the bank, Monday, February 10th, at which time the bank had ceased to do business, and was in the hands of the Banking Commissioner. Under authority of the Banking Commissioner, the Garrisons were charged with the amount of the collection, and "State Special Account" was credited with the same amount for the account of the State Bank of Carson City. After this credit was made, the Carson City bank was notified as follows:

"Detroit, 2/10. City Savings Bank, Detroit, Mich. Your favor of the ——— instant received with stated enclosures.

Your No. or date	We credit	For collection.
123	$467 50	

On February 8th, at the close of business, the account of the Garrison bank with the City Savings Bank showed a credit balance of $1,378.13. This includes a deposit of $707.05 made on that day. The Garrisons had for a number of years carried a balance at the City Savings Bank, and for 12 or 15 years had been making collections for the City Savings Bank in the same manner as done in this case; crediting the proceeds of such collections to the City Savings Bank against such balance on a running account existing between them. The Garrisons had no knowledge of the relation which the City Savings Bank bore to the draft in question, except so far as was disclosed by the indorsement on the back thereof, by the rubber stamp on the face thereof, and the letter of instructions sent to them by said bank, and did not know, if such was the fact, that the paper was the property of the Carson City bank, and had only been turned over to the bank for collection. The City Savings Bank was the correspondent of the Carson City bank, and they had been doing business with each other for some time. There was a running account between the two banks, and there were no remittances of cash, but the course of their dealings was entirely a matter of debit and credit. This was also the case with the bank of the Garrisons. On the 12th day of February, 1902, the Union Trust Company was appointed by the court receiver of the City Savings Bank, and on March 4th following an order was made directing said receiver to return to depositors all deposits made on the 8th day of February, 1902. Upon demand being made by the Garrisons for the repayment of their deposit of $707.05, the receiver refused to comply therewith, except after deducting the amount of the collection of $467.50. Thereupon the Garrisons filed their petition, praying for an order directing the receiver to refund the amount of their said deposit. The Carson City bank also filed a petition, alleging that the City Savings

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Bank received the proceeds of its draft above set forth on February 10, 1902, while insolvent, and praying for an order directing the payment to it of the sum of $467.50, with interest. The respondent, the Union Trust Company, receiver, answered the petitions, seeking the instruction of the court, and asking that the petitions be consolidated and heard as one, and they were so heard. After hearing the proofs the court entered an order directing the payment of $467.50 to the Carson City bank, and the payment to the Garrisons of $239.55, being the amount of their deposit of $707.05, less the amount of said collection of $467.50. From this order the Garrisons appeal.

After the order on these petitions had been entered, notice of appeal given, bond on appeal filed, and the proposed case on appeal prepared and served and presented for signature, counsel for the Carson City bank sought to have the order set aside, and to introduce proof of the insolvency of the City Savings Bank for a period of six months prior to the 8th day of February, 1902. This application was denied.

Counsel for the Garrison bank contend that, under the circumstances of this case, that bank had a lien upon the proceeds of the draft of $467.50 to secure the payment of its balance against the City Savings Bank; that the Carson City bank was merely a general creditor of the City Savings Bank as to the proceeds of the draft, and, as such, not entitled to a specific return of the amount collected; and that in any event the acceptance of the Garrison bank's deposit on February 8th of $707.05 was a fraud, from which no rights could accrue to the City Savings Bank. No brief has been filed on behalf of the State Bank of Carson City.

The brief filed on the part of the Union Trust Company, receiver of the City Savings Bank, does not discuss or refer to the propositions advanced by the counsel for the Garrison bank, but takes the position, first, that the words appearing upon the face of the draft, viz., "City Savings Bank. Collection, No. 4627, Detroit, Mich.," were notice to the Garrison bank that the City Savings Bank was acting as agent for collection, and not as owner of the draft; second that the Garrison bank disobeyed the positive instructions that, if the draft was not paid promptly, it should be returned at once to the City Savings Bank.

In Gibbons v. Hecox, 105 Mich. 509 (vide page 513), 63 N. W. 519, 520, 55 Am. St. Rep. 463, Mr. Justice Long, speaking for the court, said: "The general rule derived from the cases is that the bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of the customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid. The reason giving for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made in given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. In re Farsnworth, 5 Bliss. 223, Fed. Cas. No. 4,673, Judge Blodgett, of the United States Circuit Court of Illinois, held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after the filing of petition in bankruptcy, and can apply such proceeds upon the note. In Muench v. Bank, 11

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Mo. App. 144, the court say: 'The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterwards acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right, and placed by him with the bank for collection.'" See, also, Morse on Banks (4th Ed.), §§ 324, 338; Cockrill v. Joyce, 62 Ark, 216, 35 S. W. 221. In the case last cited the paper was deposited for collection and credit. The court say: "The law on this subject is well settled, and is thus stated by a recent writer: 'A banker has a lien on all securities of his debtor for the genaral balance of his account, unless such lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account. . . . And so, if the securities be deposited after the credit was given, unless there be an express contract or circumstances that show an implied contract inconsistent with such lien.' 1 Jones, Liens (2d Ed.), § 214." We find no circumstances here to take the case out of the general rule, but, on the contrary, the circumstances clearly entitled the Garrison bank to a lien upon the proceeds of the draft, as against the City Savings Bank, unless it had notice that the latter bank was merely an agent for collection or had disobeyed its instructions, as contended by the receiver, which we shall discuss later on.

The important question, however, remains — whether the Garrison bank was enttled to a lien on the proceeds of the draft as against the Carson City bank, the owner of the draft. We think that, under the circumstances disclosed by this record, it was. The State Bank of Carson City indorsed the draft over generally — "Pay City Savings Bank, Detroit, or order" — which constituted prima facie evidence of ownership of the draft by the City Savings Bank. The instructions sent by the latter bank to the Garrison, that the draft was inclosed "for collection and credit" did not, in view of the unbroken course of dealing between the banks, impugn their apparent title. Cody v. Bank, 55 Mich. 379, 21 N. W. 373. Although the proceeds of the draft were not to be credited to the Carson City bank until collected, it never was contemplated that the money, when collected, should be remitted to the Carson City bank. The instructions were explicit that, when collected. the proceeds should be credited to the transmitting bank. The Carson City bank had no thought of the proceeds of the collection forming a special fund to be held for it, but intended to rely in this instance, as it had in all its past transactions, upon the credit of the City Savings Bank, and its financial responsibility. As testified by Mr. Fuehrer, who was with the City Savings Bank at the time of the transactions in ques-

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tion: "The State Bank of Carson City and the City Savings Bank had been doing business for some time. The City Savings bank was the correspondent of the Carson City bank. The manner in which this draft came to the City Savings Bank was not unusual in any way. It came in the customary way. . . . There was a running account, as it were, between the State Bank of Carson City and the City Savings Bank. That is true, also, as between the City Savings Bank and the bank of W. D. & A Garrison, at Vernon. There were debits and credits on the books of each of them — I mean the City Savings Bank books and the Carson City bank books. Q. I suppose there would also be actual remittance of cash, or was it all a matter of debit and credit? A. All a matter of debit and credit. That was true, also, as between the City Savings Bank and the Garrison bank." Under such circumstances, if the collection had been credited and reported to the City Savings Bank by the Garrison bank, and to the Carson City bank by the City Savings Bank, while solvent, the right of the Garrison bank to retain the proceeds of the collection would be unquestionable, under the arrangement between the respective banks. Must the Garrison bank lose its lien because the City Savings Bank had closed its doors when notice of the collection reached it?

Although the rule is well established that, when a bank acts as agent for the collection of paper, the property does not pass from the depositor, it is equally well settled that, when the money had been collected and credited, the title passes. Wallace v. Stone, 107 Mich. 190, 65 N. W. 113. In Commercial Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, Mr. Justice Brewer, speaking for the court, said: "We also agree with the Circuit Court in its conclusions as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity — the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had actually reached the vaults of the Fidelity. It was a complete transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal — the plaintiff. The conclusions of the Circuit Court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made." Under this high authority, the Garrison bank, having collected the draft without knowledge of the insolvency of the City Savings Bank and having given that bank credit for the amount thereof, stood in precisely the same position as though it had actually transmitted the money to the bank.

Mr. Morse, in his work upon Banks and Banking (4th Ed.), §§ 591, 592, discussing the question "when a correspondent bank can hold paper sent to it for collection, or the proceeds of it, against the real owner," says: "When the last bank has successfully effected the collection, it is directly liable to the owner to pay the amount over

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to him only until such time as it has actually remitted the amount to its predecessor. But some nice questions have arisen where such predecessor, intervening between the real owner of the paper and the bank actually receiving the money, becomes insolvent before the receiving bank has actually paid over the amount to this predecessor. The general rule of law is that, if a person employs an agent to collect money under such circumstances that the agent naturally employs a subagent to accomplish the actual collection, then the principal will be entitled to sue the subagent, and collect the money directly from his, without regard to the relationship or condition of accounts existing between such agent and subagent, and although the subagent had no knowledge that his employer was an agent and not a principal. But if the owner has delivered the paper to the agent, with no indicia whatsoever to show that such agent is not the owner, and the subagent receives it from the agent, supposing him to be the owner, and gives him credit upon the strength thereof, then the principal cannot recover from the subagent. . . . The leading case illustrative of this principle is that of the Bank of the Metropolis v. New England Bank. The latter gave to the Bank of the Commonwealth for collection a piece of negotiable paper indorsed generally, so that, for all that appeared upon it, the Bank of the Commonwealth might be the sole and real owner. The Bank of the Commonwealth forwarded it to its correspondent, the Bank of the Metropolis, with which it had a running account. That bank collected it, and gave the Bank of the Commonwealth credit for it upon the running account. The Bank of the Commonwealth failed, being indebted to the Bank of the Metropolis, and soon afterward the Bank of the Metropolis was notified of the true ownership of this piece of paper. The latter refused, however, to account to the New England Bank, which accordingly brought suit. The case is reported in 1 How. 234, 11 L. Ed. 115; but at a second trial at nisi prius in the lower court the rulings of the Supreme Court appeared to have been so misunderstood that the court reiterated them with much clearness and succinctness, in the following shape: (1) If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection, merely, as an agent, then the Bank of the Metropolis was not entitled to retain the money as against the New England Bank, for the general balance of the account with the Commonwealth Bank. (2) And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks. (3) But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of deal-

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ings between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error (the Bank of the Metropolis) is entitled to retain against the defendant in error (the New England Bank) for the balance of account due from the Commonwealth Bank. Chief Justice Taney, in the first opinion in Bank of the Metropolis v. New England Bank, expressly denied that that the former was put upon its inquiry as to the true ownership of the paper; the indorsement by the true owner being general, and not 'for collection.' The cited cases also establish that the collecting bank, the subagent, may retain the money, if without making an actual payment, it has merely given credit to the agent, or suffered balances to its own credit to remain undrawn with the agent upon the strength of these receipts. But unless it has made some payment, or suffered a balance to remain undrawn, or otherwise substantially relied on the agent's ownership, so that it would be unjustly prejudiced by the denial of that ownership, then it cannot retain the money. The true owner, by indorsing, 'For collection,' could save all question; but if he chooses to neglect this precaution, to indorse generally, and thereby to permit his agent to appear as the owner, then, if a subtgent or any other person be misled, and a loss occurrs, it is proper that the owner whose carelessness has given opportunity for the subagent to be deceived should, as between these two, bear the loss. Where a negotiable instrument indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank 'for collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks." The doctrine of Bank of the Metropolis v. New England Bank has been adopted and applied in Vickery v. State Savings Association (C. C.), 21 Fed. 773; Wood v. Bank, 129 Mass. 358, 37 Am. Rep. 366; Wyman v. Bank, 5 Colo. 30, 40 Am. Rep. 133; Rathbone v. Sanders, 9 Ind. 217; Millikin v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Carroll v. Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101. It has been repudiated in New York and some other States. We incline to the view of Mr. Morse (4th Ed., § 600) that the doctrine of the Supreme Court of the United States is the better one, both upon reason and authority.

Did the words, "City Savings Bank. Collection, No. 4627, Detroit, Mich.," stamped upon the face of the draft, notify the Garrison bank that the City Savings Bank was not the owner of the draft, but a mere agent for collection? This draft was sent to the Garrison bank for "collection and credit," in accordance with the uniform practice of twelve or fifteen years. The instruction to credit the proceeds of the draft to the City Savings Bank was inconsistent with the idea that that bank was a mere agent for collection, and was in harmony with the indorsement showing ownership. In the absence of any evidence in the record to invalidate the assumption, we think the Garrison bank might reasonably assume that the words were stamped upon the draft as a part of the bank's system of keeping track of its own

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collection items by number. We do not think these words, under the evidence in the case, tended to show that the City Savings Bank was acting as an agent for collection. As said by Mr. Justice Campbell in Cody v. Bank, 55 Mich. 379, 21 N. W. 373: "When the paper came into the defendant's hands, it had an unqualified blank indorsement of plaintiff's which presumptively transferred title to any one who might become the holder. The fact that Rice and Messmore indorsed it for collection had no tendency to show that they held it themselves as agents for plaintiff," etc.

Should the amount of the draft be deducted from the deposit of $707.05 because the Garrison bank disobeyed instructions? This certainly presents a very unusual question. Ordinarily failure to follow instructions is complained of because such failure results in the partial or total lost of the collection. But in this case the failure to follow instructions, if there was such failure, resulted in securing the entire collection of the draft. The draft in this case was drawn against a car of grain to arrive. It was presented at once, and the drawee did not refuse payment or acceptance, but stated that he was willing to pay it as soon as the car of grain arrived. He was a customer of, and had money on deposit with, the Garrison bank, and actually did pay the draft when the car arrived. As shown by the record: "Q. Now, have you frequently had paper of this kind, drawn by the same party and on the same parties, frequently come to your bank for collection, drawn on the City Savings Bank? A. Yes, sir. Q. Was it customary for instructions of the kind that appear upon the stub attached to this draft to be put upon ordinary paper that came from them — 'If not paid, return without delay and state reasons given?' A. Yes, sir; they always put that upon the draft. Q. Now, what was your practice in collecting paper of this kind drawn by the same parties in the way I have described — getting there before the goods arrived? A. Held the draft until the goods arrived." The usual construction of the language used was that the draft should be returned at once if payment was refused or if not paid promptly. The parties, by their course of dealing, had placed a practical construction upon the meaning of the adverb "promptly," which justified the course taken by the Garrison bank in this instance. It results that, in our opinion, the Garrison bank was entitled to credit the amount of their collection upon their balance with the City Savings Bank, and to have repaid to them the amount of their deposit of $707.05.

A decree will be entered in conformity with this opinion.

Since writing the foregoing, a brief has been filed on behalf of the State Bank of Carson City, which has received consideration. After such consideration, we find no occasion for modifying the views above expressed.

Renewal Note and Mortgage as Payment of the Original Debt.

Doubt often arises as to whether an existing note and mortgage is or is not discharged and extinguished by a new note and mortgage, for the same debt, passing between the parties.

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The following quotation is from 49 S. E. 959:

"In Smith v. Bynum, 92 N. C. 108, it was held that when there was a settlement between the mortgagor and mortgagee, and a new note and mortgage taken, the property in the first mortgage was released. Ashe, J., says: 'If the plaintiff had not come to a settlement with the mortgagor, and taken a new note with another mortgage to secure it, his lien under that mortgage would have continued, and he would have had the right to recover in this action, but by his settlement . . . the mortgage of January, 1882, was discharged.' The decision is based upon the fact that the parties came to a settlement. In Joyner v. Stancill, 108 N. C. 153, 12 S. E. 912, the referee expressly found that Stancill 'accepted said note in full satisfaction of and in payment of and in discharge of said Rountree & Co's. note, . . . and treated it as a discharge of pre-existing securities.' Shepherd, J., after reviewing the decision, says that 'the finding of the referee is explicit upon this point, that the new note was accepted in full satisfaction of and in payment the former one.' These cases are distinguished from Hyman v. Devereux, 63 N. C. 624; Vick v. Smith, 83 N. C. 80, and Collins v. Davis, 132 N. C. 106, 43 S. E. 579, by the fact that a settlement was had, and a new note taken in payment of the discharge of the original. The general rule is well settled that the taking of a second note and mortgage, of itself, does not discharge the original security unless it is intended so to operate. Jones on Mortgages, § 924. 'Whether a new note shall be treated and have effect between the parties as a payment of a former one for which it is substituted will depend upon the purpose and understanding of the parties to the transaction, but not only will the intention of the parties be determined by the express agreement of the parties, but, in the absence of this, by the circumstances attending the transaction from which such intention may be inferred. . . . In the absence of any express agreement and of any circumstances showing intention, the renewal of the note does not affect the security. The burden is upon the mortgagor to show the existence of an agreement that the mortgage lien should be released upon the execution of the new note, and not upon the mortgagee to show an agreement that the mortgage should continue as a security for the debt covered by the new note.' Id., § 926. Again: 'The taking of further security for the mortgage debt, whether it be by a second mortgage upon the same land, or real or personal security upon other property, is generally no waiver of the original mortgage.' Id., § 929."

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INDIANA TRUST CO. v. BYRAM. (No. 5,142.)

72 N. E. 670.

(Appellate Court of Indiana. Dec. 14, 1904.)

CLAIMS AGAINST DECEDENT'S ESTATE — BURDEN OF PROOF — PRINCIPAL AND AGENT — PROMISSORY NOTE — DELIVERY — EVIDENCE.

1. Under Burns' Ann. St. 1901, § 2479, regulating the trial of claims against decedent's estates, one claiming a note made by his agent and payable to claimant, found in the possession of the agent on the latter's decease, has the burden of showing the execution of the note.

2. For over twenty years, and until his death, decedent had been claimant's agent, and had authority to make investments and take notes and securities, and made annual statements which were claimant's only information as to the transactions and the amount due her. A note made by decedent in his own handwriting and payable to claimant was found, on decedent's death, in a box which had always been in his exclusive possession, and on this note indorsements of payments had been made, but the note had not been mentioned in any of the statements, and claimant had no previous knowledge of its existence. Held sufficient to show that decedent held the note as claimant's agent, and hence claimant was entitled to recover the amount due thereon.

Wiley, J. dissenting.

Appeal from Circuit Court, Marion county; H. C. Allen, Judge.

Sophronia A. Byram filed a claim against the estate of Norman S. Byram, deceased. From a judgment for claimant, the Indiana Trust Company, executor, appeals. Affirmed.

Quincey A. Myers and Chas. A. Dryer, for appellant. Jas. W. Noel, for appellee.

ROBY, J. Appellee filed her claim against the estate of Norman S. Byram, deceased. The case was tried in the Marion Circuit Court, special finding of facts made, conclusions of law stated thereon, and judgment rendered for the amount of the note which formed the basis of the claim. The findings of fact are in effect as follows: From 1878 to his death decedent was the agent of the appellee, who was his cousin, and loaned and reloaned, invested and reinvested, her money in the purchase of stocks, bonds, notes, and other securities, and upon such terms and conditions and at such times as to him seemed best, retaining such stocks, bonds, notes, and other securities in his exclusive possession and control during the whole time of such agency, acting without charge or compensation for his services, and rendering an annual statement on or about January first of each year to appellee concerning her property and business in his hands, which statement he transmitted to her in New York, where she resided, except that no statement was made for January 1, 1902, in the early part of which year he was taken ill, and departed life June 16th. Decedent kept the papers and securities aforesaid in his private safe in his private office, in a paper box on which were the letters and word "S. A. Byram." This box was, at all times prior to his death, in his exclusive possession and control.

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About six or eight weeks before his death, and while he was too ill to go to his office, he directed that the box be brought to his house, which was done. He did not leave the house after that, and after his death the box was found in a locked bureau drawer therein. It contained the instrument sued on, a promissory note dated at Indianapolis April 1, 1898, payable on demand to the order of S. A. Byram for $738.67, payable at the Capitol National Bank of Indianapolis, with six per cent. interest from date and attorney's fees, value received, and without relief from valuation laws, and signed "N. S. Byram." On the face of said instrument the words "Certificate 30 as collateral" were written, and on its back was the following: "Paid on this note July 26, 1898, forty dollars ($40.00); Feb. 1, 1899, paid one hundred fifty seven dollars ($157.00)"—all in the handwriting of decedent. The instrument was folded in certificate No. 30 of a corporation named, which certificate was for ten shares of $100 each in said corporation. The certificate was dated April 23, 1898, and certified that N. S. Byram was the owner thereof. No assignment or indorsement by said Byram was on said certificate. The instrument sued upon was made by the use of an ordinary printed form, the blanks in which were filled in decedent's own handwriting. The indorsements on said note and the signature thereto are also in his handwriting. Said box contained notes, stocks, bonds, and the instrument in suit, with copies of decedent's annual statements rendered to appellee from 1878 to 1901. The itemized statements aforesaid are included in the finding of facts. They refer to certain securities and money which decedent held in his possession belonging to appellee. Neither of them makes any reference to the instrument sued upon, nor to any note purporting to be executed by the decedent payable to appellee, nor do they show an indebtedness from him to her. The fourth and fifth findings of fact were in terms as follows: "(4) And the court further finds that at the time of the death of decedent said note was held by decedent as trustee and agent of claimant, and for her benefit, and not for the decedent individually. (5) That said Norman S. Byram as such agent had possession and control of said paper sued upon until the day of his death, and that, except as herein stated, he had never surrendered the same to claimant or to any other person for her use and benefit, and the claimant has never had any control or power over said paper, nor had the same in her possession or control; that afterwards all the papers, notes, stocks, and bonds in said box were turned over to said claimant upon the order of this court, at the request and petition of the executor, except the paper sued upon, and the copies of the annual statements made by decedent to claimant." The conclusions of law were that the note sued upon was executed and delivered by the decedent to appellee; that she was the owner and holder thereof, and entitled to recover thereon the sum of $614.33; and judgment was rendered in accordance therewith. The special finding, excluding the fourth and fifth items, contains a fair resumé of the evidence. Appellant excepted to the conclusions of law, and filed a motion for venire de novo, based upon the absence of a finding as to the execution of the note in suit. This motion was overruled, as was also his motion for a new trial. Errors are assigned upon each ruling.

The burden of establishing the execution of the note rested upon

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B. 41. Promissory Note : Necessity of Delivery : Trustee.

$7387 67/100

Indianapolis, April 1, 1898

On demand ___ after date I promise to pay to

the order of S. D. Adams

Seven thousand three hundred eighty-seven and 67/100 Dollars

at National Bank of Indianapolis

Value received with interest at 6%

Certificate 30 as collateral.

No. ___ Due ___

Paid on this note July 26, 1898 ($40.00).

Feb. 1, 1899, paid one hundred and fifty-seven dollars.

The maker of this note, who lived in Indianapolis, acted as the agent of the payee, S. A. Byram, a woman, his cousin, who lived in New York. He invested and reinvested her funds in any kind of investments and securities he saw fit, and kept such securities in a box with her name on it in his safe.

He died, and during his last illness he had the box brought to his house where he kept it in a bureau drawer and where it, with this note in it, was found after his death; attached to the note was a certificate of the Capital National Bank standing in his name and which had no transfer indorsed on its back. The payee, S. A. Byram, had no knowledge of the existence of the note until it was found after the death of the maker. She presented the note as a claim against the maker's estate and it was allowed by an intermediate court — one of the judges dissenting. The two opinions exhaustively cover the law in such cases — the dissenting one, which held that the note ought not in law to be allowed, being, seemingly the one which states the law as it is usually enforced.

The question was whether there had been, in law, a delivery of the note to or for the payee. *Delivery* of a note by the maker is as essential to its validity as is the signing of his name to it. If it is stolen from the maker before delivery it is held to be void, even in an innocent purchaser's hands. 50 At. 897. The delivery need not be direct from the maker to the payee — it may be to another for the payee. But, for an instant at least, the maker must part with ownership of the paper — and that cannot be accomplished by a mental operation with the paper yet in his possession or control. There are cases where a parent has made a deed to his infant children and has continued to hold it where delivery is presumed, as "Where the grant is to a child and is beneficial, its acceptance (delivery) is presumed, although the deed remains in the possession of the grantor." 103 Ind. 502. "We do not think that a person could appoint himself as such trustee, and then make a valid delivery of his own property to himself as such trustee, or that an intention or promise to give would make a perfected gift so as to constitute the intender or promisor a trustee for the * * * beneficiary." The force of this quotation was apparently avoided here by the fact that Byram was *already* a trustee for the payee when he delivered the note to himself.

McMaster's Com. Cases, Vol. 1905, 72 N. E. 670.

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appellee, by reason of the statute regulating the trial of claims against decedents' estates. Section 2479, Burns' Ann. St. 1901. There was no controversy as to the note having been written and signed by decedent, but execution includes delivery. Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229; Smith v. James, 131 Ind. 131, 30 N. E. 902. The actual controversy between the parties is as to whether or not the note sued upon was delivered. The execution of a promissory note is an ultimate fact. Smith v. James, supra; Vaughan v. Godman, 103 Ind. 499–502, 3 N. E. 257. If it had been found that the note was "delivered," the other facts necessary to execution being admitted, such finding would have been effective, but it is not in terms made. The finding is therefore insufficient to sustain the conclusions and judgment, unless the evidentiary facts set out are such as that but one inference can be drawn from them, in which event the absence of the statement of the ultimate fact does not prevent the court, as a matter of law, from drawing the unavoidable inference. If the facts found leave room for a difference of opinion between reasonable men, then the ultimate fact must be determined by the court or jury trying the case. Keller v. Gaskill, 9 Ind. App. 670, 36 N. E. 303; Cincinnati, etc., R. Co. v. Grames, 136 Ind. 39, 34 N. E. 714. It appears from the finding that decedent was appellee's agent from 1878 until his death, and that he had authority of the most broad character to make investments and take notes and securities for her. Persons who gave notes to such agent cannot escape liability, when sued, because of the fact that appellee had never had the instruments in her own hands, and did not know of their existence or the existence of the makers. Delivery to the agent was delivery to the principal. Skinner v. Baker, 79 Ill. 496; Fletcher v. Shepherd, 174 Ill. 262, 51 N. E. 212; Miller v. Irish, etc., Ass'n, 36 Minn. 357, 31 N. W. 215; Sowards v. Moss, 58 Neb. 119, 78 N. W. 373.

It is, however, contended that an agent cannot act as such where his personal interest is or may be antagonistic to that of his principal, and that therefore decedent could not deliver his note to himself as the agent of appellee. The rule invoked is a wise and salutary one. It is designed to guard against the abuse of fiduciary duty, and all such transactions are void "as respects the principal unless ratified by him with a full knowledge of all the circumstances." It is supplemented by the further rule that all profits and advantages procured by the agent in the transaction of agency affairs inures to the benefit of the principal, and it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent. Mechem, Agency, 469; Rochester v. Levering, 104 Ind. 568, 4 N. E. 203; McCormick v. Malin, 5 Blackf. 509. The doctrine asserted would be applicable were the agent attempting to compel his principal to take his note in the final settlement of their affairs, instead of the money with which he had been intrusted. It is not applicable where the principal elects to enforce the note made by the agent, as in the case at bar.

It remains only to inquire whether the inference of delivery necessarily arises from the facts disclosed by the finding. The note in suit is shown to have been written and signed by the decedent, and payments indorsed by him thereon. The business relation between him and appellee was one of extreme confidence upon her part. The annual statement constituted her means of information as to the

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investments made and the amount due. So far as those statements show, there was not due to her at any time the sum represented by the note in suit. The decedent, however, was not limited by the information contained in the statements made by himself. He knew the absolute and entire truth. What seems to us a discrepancy was no doubt a simple circumstance to him, but in any event it is impossible to explain his conduct with regard to the note upon any theory except that he intended it to be paid, such intention being carried down to the time when the box was brought to him at his residence, since otherwise it is not believable that the shrewd and intelligent man of affairs would have left the note, as he did, among the papers belonging to and connected with appellee's affairs and marked with her name. "The acts which constitute the delivery of a promissory note are not essentially different from those required to complete the execution of a deed." Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319; Anderson v. Anderson, 126 Ind. 62, 24 N. E. 1036. "To constitute delivery, there must be an intention to part with control over the deed as its owner." Berry v. Anderson, 22 Ind. 36; Dearmond v. Dearmond, 10 Ind. 191; Vaughan v. Godman, 94 Ind. 119. Where a father made a deed to his infant children, and held the same, never having caused it to be recorded, the jury were instructed that "it is sufficient if you find from the evidence, taking into consideration all the circumstances proved, as surrounding the transaction, that John Burkholder either delivered it to some one for them, or intended to or did hold same for the benefit of his children." In approving the transaction, the Supreme Court said: "We think there must be some act or declaration on the part of the grantor from which it may be inferred that he intended to part with title in the property, and this whether the grantees be infants or adults. . . . It may be delivered without being actually handed over, and, if once delivered, its retention by the grantor does not affect the title of the grantee." Burkholder v. Casad, 47 Ind. 418; Nye v. Lowry, 82 Ind. 316; Vaughan v. Godman, supra; Fulton v. Fulton, 48 Barb. 591. "No particular form is necessary to perfect the delivery of a deed. A deed may be delivered by any acts or words evincing the intention of the grantor to deliver it. Thus, in Folly v. Vantuyl, 9 N. J. Law, 153, Folly made a bond to his daughter, and, holding it up to her, said, 'Mary, this is your bond; what shall I do with it?' adding, 'I will take care of it for you.' He indorsed it 'Mary's bond,' and put it away in his trunk. This was held to be a good delivery." Mallett v. Page, 8 Ind. 365; Somers v. Pumphrey, 24 Ind. 231–240. Where the grant is to a child and is beneficial, its acceptance is presumed, although the deed remains in the possession of the grantor. Vaughan v. Godman, 103 Ind. 502, 3 N. E. 257.

The second finding of fact is in part as follows: "That all indorsements on said note and the written portion of said note, including the signature, were made by and in the handwriting of said decedent, and were placed in said box for the purpose and with the intent to deliver the same to said claimant. The same was at the time of decedent's death left in said box, among the papers of said claimant, by said decedent for the use and benefit of said claimant." The possession of the instrument by the maker, acting as agent for the payee, does not prevent the application of the rule relative to delivery to a

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third person, as is shown by the cases above cited. Cases in which the grantor is treated as agent for the payee are very numerous. The following are a few of them: One member of a partnership made a deed to himself and the other partners, retaining possession of the deed. It was contended that there was no delivery because the deed had been retained by the grantor. The Supreme Court said: "It is fairly inferrable from the allegations of the complaint that the property was purchased and held as partnership property, and, of course, the delivery of the deed to one partner would be a delivery to the partnership. If the complaint did not show partnership, there would be no force in appellant's argument, for delivery to one of several grantees would be valid and effective as to all." Henry, Assignee v. Anderson, 77 Ind. 361; Tucker v. Bradley, 33 Vt. 324. The delivery of a chattel mortgage was held good although made to the agent for the mortgagee, who was also attorney for the mortgagor. Fletcher v. Martin, 126 Ind. 55, 25 N. E. 886. See, also, Squires v. Summers, 85 Ind. 252; In re Reeve's Estate, (Iowa) 82 N. W. 912; Munro v. Bowles, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; Stewart v. Weed, 11 Ind. 92; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478. It is universally held that the absolute retention of control over the instrument by the maker is inconsistent with the intention to deliver. Fifer v. Rachels et al., 27 Ind. App. 654, 62 N. E. 68; Osborne et al. v. Elsinger, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240. Cases of this class are distinguished from the one at bar in that the maker of the note sued upon here was the agent of the payee, expressly authorized to take and hold paper for her, while in those cited the person holding the instrument was the agent of the grantor exclusively. It was said by the Supreme Court in Hatton, Ex'r v. Jones, 78 Ind. 466–472, that "we do not think that a person could appoint himself as such trustee and then make a valid delivery of his own property to himself as such trustee, or that an intention or promise to give would make a perfected gift so as to constitute the intender or promisor a trustee for the use of the promised or intended beneficiary." That case is distinguished from the one at bar in that the agency relied upon here is not self-created, nor does it arise out of the transaction in which the note was made.

That part of the fifth finding to the effect that appellee never had control or power over said paper was evidently intended to refer to physical control and manual possession. So construed, it is not inconsistent with the rest of the finding. Taking them together, it sufficiently appears that the note sued upon was held by decedent as the agent of appellee, and is therefore enforceable at her suit.

Judgment affirmed.

Comstock, C. J., and Black, Myers, and Robinson, JJ., concur.

WILEY, J. (dissenting). I am unable to agree with my associates either in the conclusion reached in the majority opinion, or in the reasoning leading thereto, and, owing to the importance of the question involved, I have concluded to express my views in a dissenting opinion.

The facts upon which the decision of the questions involved must rest are fairly and fully stated in the majority opinion, and need not be repeated here. To entitle appellee to a recovery it must affirm-

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atively appear from the facts specially found that the note in controversy was in fact delivered. I do not need to pause to enlarge upon this elementary proposition, or to cite authorities in support of it. Counsel for appellant have insisted, and argued at some length, that parts of the special finding of facts are conclusions merely, and not statements of substantive, issuable facts. I do not deem it important to determine whether or not some conclusions are stated as facts, for it is the rule in this State that, if the special finding contains sufficient facts to warrant the conclusions of law stated thereon, such special finding will no be deemed to be defective because it may state some evidentiary facts or conclusions of law. In such event the latter will be treated as surplusage. Baldwin v. Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841; City of Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Whitcomb et al. v. Smith, 123 Ind. 329, 24 N. E. 109. The decisive question is to determine whether or not the ultimate facts found are sufficient upon which the conclusions of law rest, or, in other words, to determine whether or not the conclusions of law are warranted by the ultimate facts. If the facts show that there was a delivery of the instrument sued on, either actual or constructive, then they are sufficient to support the conclusion of law that appellee is entitled to recover. On the contrary, if the facts do not show the execution of the note, which includes a delivery, then the conclusions of law are wrong. Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Anderson v. Anderson, 126 Ind. 62, 24 N. E. 1036; 2 Am. & Eng. Encyc. of Law (2d ed.), p. 201, and authorities there cited.

As far as the special findings go on the question of the delivery is to the extent that it was the intention of the decedent to deliver the note to appellee, and that at the time of his death he left it in a certain box, among the papers of the appellee, for her use and benefit. In addition is the following: "And the court further finds that at the time of the death of the decedent said note was held by decedent as trustee and agent of claimant for her use and benefit, and not for the benefit of the decedent individually." The additional facts that have any bearing upon the question at issue are stated in the fifth finding, to the effect that the decedent, as an agent of appellee, had possession and control of the note until the day of his death, and that, "except as herein stated," he never surrendered the same to appellee or any person for her use and benefit, and that she never had any control or power over it, or had it in her possession. This finding must be construed in connection with those that precede it, in which it is stated that the decedent held the note as the agent and trustee of appellee, and placed it in the box for the purpose and intention of delivering it to her. Do these facts constitute a delivery of the note? This inquiry must be answered, in my judgment, in the negative. There is no finding that the decedent ever parted with the note, that he ever delivered it to the appellee, or that he ever delivered it to a third person for her use and benefit, or to be by such person delivered to her. These facts show that he never surrendered dominion over the instrument. This being true, he could have destroyed it at any time, for he had it in his possession to the hour of his death. Tiedeman on Commercial Paper, § 34, lays down the rule that so necessary is delivery to the life of a bill or note that,

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if it is found among the papers of the drawer or maker at his death, it cannot be sued on by the payee. He further states the rule to be in such case that the personal representative cannot make an effectual delivery of it. A case directly in point upon the first proposition above stated by Mr. Tiedeman is that of Disher v. Disher, 1 P. Wms. 204. See, also, the case of Smith's Ex'rs v. Wyckoff, 3 Sandf. Ch. 84. The findings show that the decedent was the agent for appellee for certain specific purposes, and these were that, as such agent, he had been for a number of years, and up to the time of his death, "loaning and reloaning, and investing and reinvesting, her money in the purchase of stocks, bonds, notes, and other securities." This fixes and limits his authority as appellee's agent, and, so far as the findings show, he possessed no other power or authority whatever.

It is clear that there was not any delivery of the note to the payee, and, if there was in fact a delivery, it was delivered by the maker to himself, as agent or bailee for the use and benefit of appellee. This suggests the inquiry, can an agent deal with himself so as to make the delivery of his own note to himself, as agent, effective for the benefit of the payee? The authorities answer this inquiry in the negative. Mechem on Agency, §§ 66, 68, 375, 355, 367, 368; Hatton, Ex'r v. Jones, 78 Ind. 466; Reinhard on Agency, § 54. In Hatton v. Jones, supra, the court said: "We do not think that a person could appoint himself as trustee and then make a valid delivery of his own property to himself as such trustee, or that an intention or promise to give would make a perfect gift so as to constitute the intender or promisor a trustee for the use of the intended or promised beneficiary." Upon the question of delivery, the Supreme Court, in Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319, said: "That an instrument is not complete and effectual until it has been delivered, or until that has been done which is legally equivalent to a delivery, is elementary. . . . To constitute a delivery, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. . . . The final test is, did the maker do such acts in reference to the deed or other instrument as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee?" The rule there declared is decisive of this case. There is not a fact found that even tends to disclose that the decedent did any act or acts in reference to the note that evinced an unmistakable intention to give it effect and operation, or to relinquish all power and control over it in favor of the appellee.

In his discussion of the necessity of the delivery of a written instrument, so as to give it validity, Mr. Daniel, in his work on Negotiable Instruments (§ 63, p. 82), declares the rule to be that, so long as a note remains in the hands of the maker, it is a nullity. Baylev v. Taber, 5 Mass. 286, 4 Am. Dec. 57; Marvin v. McCullum, 20 Johns. 288; Freeman v. Ellison, 37 Mich. 459; Smith v. Foster, 41 N. H. 215; Dexter Savings Bank v. Copeland, 77 Me. 269; McFarland v. Sikes, 54 Conn. 250, 7 Alt. 408, 1 Am. St. Rep. 111. Also that, even though it be placed by the maker in the hands of his agent for de-

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livery, it is still undelivered as long as it remains in his hands and may be recalled; and, while there, the payee has no right to it unless it be wrongfully withheld by the agent. The author cites many authorities in support of the proposition, to which reference is made. Daniel, Neg. Inst., supra. Again, the same author, supra, says: "So essential is delivery that it has been held that where a promissory note, the writing of which is unknown to the grantee, lay in the grantor's possession, and was found among his papers after his death, the payee could not claim or sue upon it; and though such a note should be found, accompanied by written directions to deliver it to the payee, the payee will still have no right of action unless the directions be valid as a testament." No pretense is made in this case that the payee of the note, appellee, knew that it was in existence until after the death of the maker, and she never had it in her possession, or exercised any control or dominion over it. Mr. Daniels also lays down the rule that, if the party who has signed or indorsed the instrument die before delivery, it is a nullity, and cannot be delivered by his personal representatives. Daniel, Neg. Inst., § 64. The following authorities support the text: Clark v. Boyd, 2 Ohio, 56; Clark v. Sigourney, 17 Conn. 511; Bromage v. Lloyd, 1 Exch. 32; Drum v. Benton, 13 App. D. C. 245. To constitute the delivery of a deed, there must be an intention of the vendor to part with the control over it as its owner. Berry v. Anderson, 22 Ind. 36. In Hotchkiss v. Olmstead, 37 Ind. 75, the court said: "To constitute delivery, there must be an intention to part with control over the instrument, and place it under the power of the grantee or some one for his use." A man signed and acknowledged deeds conveying his real estate to three sons, put the deeds in envelopes, and placed the envelopes in a box on a mantel in his room. He afterwards stated to a third person that he did not have any land, that he had conveyed it to his sons, and that one son had his deed, and that the deeds for the other two sons were in a box for them. After his death the deeds to his two sons were not found in the box where he said he put them. It was held there was no delivery. In Osborne et al. v. Eslinger, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240, the following facts were exhibited: A grantor signed and acknowledged certain deeds, and placed them in an envelope with her name and the words "Deeds to Children" indorsed thereon. She kept them in her possession for about two years, and then handed a package containing the deeds to an aged relative, who lived with her, and intrusted her to take care of the papers until after her death, and then deliver them to the one who was to settle her estate. She afterward took possession of the package, and placed them in a press in her house, saying to a relative: "In case I get sick, you take care of these papers, and when I die give them to the one who settles my estate." Soon afterward she became sick, and called the relative to her bedside and asked her if she had taken charge of the papers, and, being informed that she had, said, "All right." The custodian of the package did not know what it contained, but after the death of the grantor delivered the deeds to the grantees therein named. The Supreme Court, upon these facts, held there was no delivery. See, also, Fifer v. Rachels, 27 Ind. App. 654, 62 N. E. 68.

It is clearly discernible from the authorities that, to constitute a

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delivery of a deed, there must be a complete surrender and parting with control of the same by the grantor, and it must pass under the power and control of the grantee or some one in his behalf. The rule is equally as strict in regard to the delivery of promissory notes. In Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, it was said: "Delivery is a part of the execution of a promissory note, and until delivery it is destitute of force." In Bean v. Bean, (N. H.) 53 Atl. 907–909, securities were left by a decedent in an unsealed envelope in his wife's possession; on the envelope, in the handwriting of the decedent, was the statement, "The Property of Electa C. Bean [wife] and Emma R. Bean [daughter];" the securities were certificates of stock and savings bank books, which they described in detail; the daughter knew nothing of the package until after the death of her father; the stocks and bank books were not assigned; the decedent had previously caused to be transmitted to his wife and daughter certificates of other corporations. Under these facts it was held that there was no delivery of the securities, and hence no gift. In Cutting v. Gilman, 41 N. H. 147, the court said: "Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel; without actual delivery the title does not pass." In Streissguth v. Kroll, 86 Minn. 325, 90 N. W. 577, it was said: "The delivery of a written instrument is one of intention, and, to constitute a complete delivery thereof, it must be made in a manner evincing an intention to part presently and unconditionally with all control over the instrument, and thereby give it effect." The rule, as I understand it, is without variance that there can be no delivery, either actually or constructively, of a written instrument, without an intention to deliver on the part of the maker or grantor, for the essence of delivery is the intention of parties, and the intention must be clear that the maker or grantor intended to part with all control and dominion over the instrument. He must put it beyond his control. Mr. Tiedeman on Real Prop. (2d ed.), § 813, lays down the rule as follows: "In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element" — citing authorities. It is also held that an intention to deliver an instrument, not carried out by the maker, will not be sufficient. In re Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Fifer v. Rachels, supra; Walls v. Ritter, 180 Ill. 616, 54 N. E. 565. So far as we are advised, the unbroken rule is that the retention of the instrument in the possession of the maker or grantor, and his absolute dominion over it, is inconsistent.

Again, the question of delivery is a question of fact. It is an ultimate fact, and in this case the burden was upon appellee to establish that fact. In Vaughan v. Godman, 94 Ind. 195, it was said: "The question of delivery is a question of fact to be determined by the evidence. In all disputes as to whether or not a deed has been delivered, the most important inquiry is to ascertain the intent of the grantor in the act or several acts which it may be claimed constituted a delivery. Did he intend to part with all control over the deed? Did he intend to divest himself of the title and lodge it in the grantee?" It is essential to delivery that the minds of both parties should assent, in order to bind them, and if, through inattention, infirmity, or otherwise, one does not assent, the act of the other is

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nugatory. Daniel, Neg. Inst. § 67; Ferguson v. Miles, 3 Gilman, 358, 44 Am. Dec. 702; Fonda v. Sage, 46 Barb. 123; Whyte v. Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.

To determine whether or not the facts specially found will warrant a judgment in favor of appellee, I must apply the rules of law which I have been considering to the facts found. The fact of delivery, as such, is not found. As far as the findings go in this regard is to show that the written part of the note, signature, and indorsements were in the handwriting of the decedent; that the note was left by decedent in a box, in which other papers, bonds, etc., belonging to appellee were kept by decedent; that the note was in a certificate of stock, and an indorsement that it was intended as collateral; that the note remained in his exclusive possession and control up to the time of his death, and that appellee never had possession of it or dominion over it; that the note was placed in the box by the decedent "with intent to deliver the same to claimant;" that decedent was the agent of appellee to loan and invest money for her; that he held such note "as trustee and agent of claimant and for her benefit, and not for the decedent individually;" that he had never, "except as herein stated," surrendered the same to "claimant or any other person for her use and benefit." It is also found as a fact that during all the years decedent was acting as appellee's agent he made annual statements to her of the business he had transacted for her as such agent, and the last three statements, covering the years since the date of the note, are set out in full. These statements speak for themselves, and it is a significant fact that neither of them make any mention of the note in controversy, while all other transactions are itemized. In neither of the three last statements is the amount of the note required to balance the account between them. The statement of January 1, 1899, shows that he had securities and cash of hers, aggregating $24,295; January 1, 1900, $25,625, less cash overdrawn, $404; and January 1, 1901, $26,362, which included $858 in cash. The statement of January 1, 1899, showed that he held for her 17 notes, that of January 1, 1900, 15 notes, and that of January 1, 1901, 13 notes. It is a strange coincidence that the decedent had the note in suit in his possession and considered it a binding obligation against himself, and never mentioned it when rendering to appellee an account of his stewardship. The fact is apparent that the decedent accounted for all the money and securities of appellee in his possession and under his control. There is but one finding that can possibly be tortured into a finding of the ultimate fact of delivery, and that is the fourth, and the effect of that is that decedent, as "trustee and agent," held the note for appellee. The word "trustee" adds no force to the finding, for not a fact is stated which constituted decedent a trustee. Under the statute appellant was entitled to prove all defenses to the action, except set-off and counterclaim, without answer. Section 2479, Burns' Ann. St. 1901. Under the statute, therefore, the plea of non est factum was in, and appellee was required to prove the execution of the note, and this includes delivery. As I have shown in a former part of this opinion, decedent could not constitute himself appellee's agent, for the purpose of delivering to himself as such agent his own individual note. He could not execute his own note to himself, as agent for appellee, without

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her knowledge or consent, and, as he could not, it was not executed. If appellee's theory is correct, then an agent who has authority to loan his principal's money and take notes for it could, sua sponte, execute his own note to himself, or, in other words, contract with himself, and thus use or dissipate his principal's money, and yet not be guilty of embezzlement, although utterly insolvent.

In addition to what I have said concerning the delivery of a note by an agent to himself for his principal, I cite the following: "If a bill or note is delivered to the personal agent of the drawer or maker, the delivery is not complete, so as to pass title, until the agent has in turn delivered it to the payee of his agent. Until such delivery, the maker or drawer can recall it from the agent." Section 26, Tiedeman on Bills and Notes, citing Devries v. Shumate, 53 Md. 211. In the case before us the fact is established that the decedent signed the note and delivered it to himself as appellee's agent. So far as its execution is concerned, he did no more. He was in absolute control and possession of it. The payee was ignorant of its existence, so far as the facts show. No indebtedness is shown to have existed from decedent to appellee. He could have destroyed or recalled the note at any time before his death without doing any unlawful act or rendering himself liable for its destruction. The findings show that he intended the note for appellee, but an unexecuted intention is not effective. The special findings do not show a delivery of the note, and as delivery was an essential fact in its execution, the findings are insufficient to support the conclusions of law. There can be no presumption in favor of appellee on the question of delivery, and, even if there could be, such presumption could not control the failure of the findings to show affirmatively a delivery in the face of the burden resting upon appellee. Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

The judgment should be reversed, and the court below directed to restate its conclusions of law and render judgment for appellant.

Note as Payment of Existing Debt: Extension of Time of Debt.

It is the rule that where a promissory note is given for an antecedent debt, the note does not operate as a discharge of the debt unless it so agreed by the parties to the debt. But it seems that the note does not simply act as collateral to the debt, but it also acts to extend the time of payment of the debt, and thus suspend any suit on it, until the maturity of the note.

One Cramer was erecting some buildings for Samuel Taylor, and W. F. Wahl had furnished materials which went into the buildings.

Cramer had given Wahl a note for $1,000, due August 23, 1901.

The Mechanic's Lien Law of New Jersey allowed Wahl a lien on Taylor's buildings for any sum that was due and unpaid on August 10, 1901, — Wahl having that day served a proper notice on Taylor.

In the litigation over the matter, the trial court held, in effect, that unless it was agreed between Cramer and Wahl that the note should

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be accepted in payment of the account, the account yet existed, — the note being collateral only to it, and, therefore, the lien was valid.

The appellate court held that the note, even if not taken in payment of the account, extended the time of payment of the account until the maturity of the note, hence the account was not due when the lien was filed, and it was, therefore, of no effect.

The court said in part:

"A promissory note given for an antecedent debt, although it does not operate to discharge the debt, in the absence of any agreement that it should have that effect, extends the credit until the note matures. Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390, In the present case, therefore, the effect of the note, if it was given on account of Cramer's indebtedness to the plaintiff, was to extend the time for the payment of that indebtedness until the maturity of the note, August 23, 1901, thirteen days after the stop notice was served. No obligation rests upon the owner of a building, under section 3 of the Mechanic's Lien Law, to retain in his hands money of the contractor to meet the demand of a stop notice, unless the sum claimed in such notice is actually due at the time when it was served. Kirtland v. Moore, 40 N. J. Eq. 109, 2 Atl. 269. The trial court should have instructed the jury that, if they found the note was given on account of Cramer's indebtedness to the plaintiff, then, even though it was not given and accepted as payment of that indebtedness, still it extended the time for the payment thereof until the date of the maturity of the note, and that, as the plaintiff's demand on the defendant was made prior to that time, the defendant was justified in refusing to recognize that demand, and in paying out to other creditors of Cramer the funds of the latter in his hands."

60 Atl. 63.

New Jersey.

Oral Guaranty of Note: Negotiable Instruments Law.

SWENSON et al. v. STOLTZ et ux.

78 Pac. 999.

(Supreme Court of Washington. Dec. 20, 1904.)

HADLEY, J. This action is based upon an alleged oral guaranty of a promissory note. The note contained a promise to pay to the order of George A. Stoltz, for value received, the sum of $1,500, and was executed by Charles T. Uhlman and Halycon Uhlman. The complaint alleges, in effect, that, as payment to plaintiffs of $1,500, for value received, by George A. Stoltz, and in consideration thereof, the said Stoltz transferred and delivered said note to the plaintiffs, and orally gurantied to them that the note was perfectly good — as good as gold — and would be paid by said makers when it became due; that plaintiffs then received and accepted said note and said guaranty from said Stoltz; that, at the maturity of the note, plaintiffs

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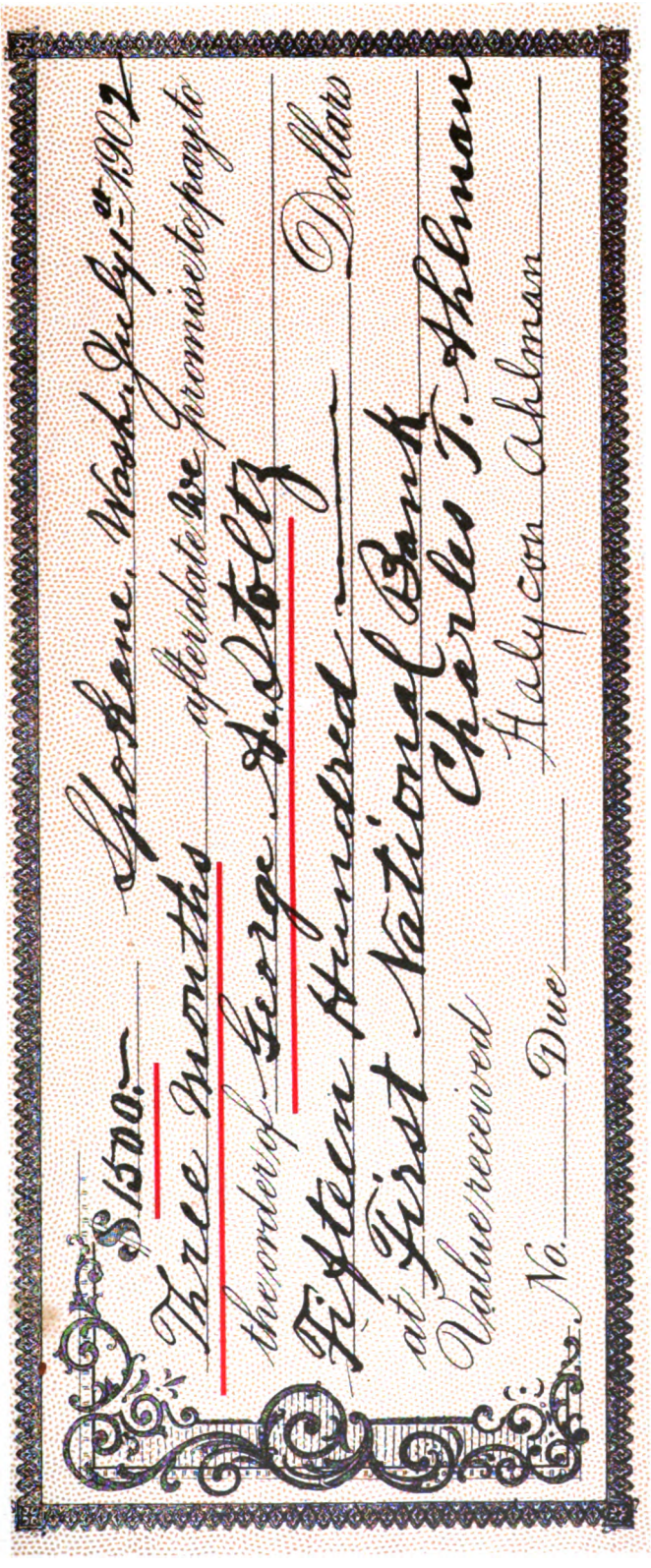
B. 42. Oral Guaranty of Note: Negotiable Instruments Law.



$1500. Spokane, Wash. July 1st 1902

Three months after date I promise to pay to the order of George Stoltz Fifteen Hundred Dollars at First National Bank Value received

No. Due

Charles T. Ahlman
Halycon Ahlman

Without indorsing this note, the payee, George A. Stoltz, sold it to Simon Swenson and another. It was alleged, and the court found, that Stoltz orally guarantied to Swenson that the note was perfectly good—as good as gold—and would be paid by said makers when it may become due. The Negotiable Instruments Law is in force in Washington where Swenson sued Stoltz for the amount and recovered judgment. The above law says: "No person is liable on the instrument whose signature does not appear thereon . . ." The court said in part: "This is not a suit on the instrument but upon the guaranty . . . that the amount the note represented would be paid when due. The guaranty of a note is not a promise to answer for the debt of the maker, and is not within the statute of frauds when it is negotiated in consideration of value received by the guarantor, but it becomes the original and absolute obligation of the guarantor himself, whereby he promises to pay his own debt to the guarantee; that is to say, the debt he owes his guarantee for what he has received from the latter. The note meanwhile is delivered and held as collateral to the promise of the guarantor. If the maker pays it at the date of its maturity, the guarantor's obligation is by that fact discharged; but if the maker fails to pay, the guarantor remains liable upon his own obligation, which is absolute and independent of the note itself. 21 N. Y. 336, 80 N. Y. 269, 50 N. E. 702, 42 Or. 474. "That an oral guaranty under such conditions is binding upon the guarantor is held in 67 N. Y. 237, 45 Ohio St. 236, 18 N. W. 570, 25 Pa. 89." As to the clause in the Negotiable Instruments Law which says no liability can exist without the person's signature is on the paper, the court said in part: "Such is no doubt true where liability is predicated on the instrument itself, but as we have seen, this is not such a case. The liability sought to be enforced neither arises out of the instrument, nor is it based thereon. This note, made by third parties, is merely an incidental and collateral matter to the agreement (guaranty) sued upon here, which is in effect an agreement to make good (to Swenson the money he turned over to Stolz)." All of the decisions above cited to bear out this decision were made prior to the enactment of the Negotiable Instruments Law except 42 Or. 474. See 69 Pac. 1027, 70 Pac. 506.

McMaster's Com. Cases, Vol. 1905, 78 Pac. 999.

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presented it to the makers and demanded payment, but they failed and refused to pay it; that immediately thereafter they notified said defendant Stoltz of the nonpayment of the note, and demanded of him that he pay the amount thereof; that thereafter, and prior to the commencement of this suit, said demand was repeated, but said Stoltz neglected and failed to pay the amount, or any part thereof. Judgment is demanded for the amount with interest, less a credit of $93.60. The answer denies the material allegations of the complaint. A trial was had before the court and a jury, which resulted in a verdict against the defendant, George A. Stoltz, for the sum of $1,695.94. Judgment was thereafter rendered for the amount against George A. Stoltz and against the community composed of the defendants, George A. Stoltz and Lucy Stoltz, his wife. The defendants have appealed from the judgment.

The main contention of appellants is that the court erred throughout its entire conduct of the case, including the overruling of the demurrer to the complaint, by holding that the facts stated are sufficient to make appellants liable. As far as controverted facts are concerned, they have been settled by the jury in favor of respondents, and against George A. Stoltz. We shall therefore confine ourselves to the matter of their sufficiency to entitle respondents to recover. Appellants insist that, under our statute relating to negotiable instruments (sections 30, 31, c. 149, p. 347, Sess. Laws 1899), the title to the note did not pass to respondents in the absence of the payee's indorsement thereon. Those sections are as follows:

"Sec. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

"Sec. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

It will be observed that the two sections, taken together, provide that an instrument, when payable to order, is negotiated by the indorsement of the holder, completed by delivery, and that the indorsement must be written upon the instrument itself, or upon a paper attached thereto. Section 49 (page 349) of the same act, however, provides as follows: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." It is thus clear that, while sections 30 and 31 state how the negotiation may be completed, yet section 49 expressly says that mere delivery of an instrument payable to order vests title in the transferee and also carries with it the right to compel the indorsement of the transferrer. In the event of a suit upon the note itself, and against the makers, the necessity for such indorsement might become material, in order to maintain the suit as upon an assigned instrument, under the terms of section 4835, 2 Ballinger's Ann. Codes & St. But this is not a suit against the makers of the note.

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DIVINE v. MILLER et al.

49 S. E. 479.

(Supreme Court of South Carolina. Nov. 24, 1904.)

LIMITATIONS — PAYMENTS — ADMINISTRATOR — RENEWAL OF NOTE.

1. Where a creditor collects proceeds of collateral after the death of the debtor, in pursuance of his instructions, payment of the same on the note of the debtor does not arrest limitations.

2. An administrator by his promise in writing may renew note of intestate before it is barred so as to bind the personalty, but the real estate can only be affected by the promise of an heir to the extent of his interest.

WOODS, J. On August 11, 1894, Dr. E. Miller gave to John F. Divine his promissory note for $1,676.02, payable one day after date, Miller died intestate on February 17, 1897, and thereafter, on September 16, 1901, the plaintiff filed his complaint against the administrators of Miller's estate and his heirs at law; setting out his own note; alleging that there were other debts outstanding against the estate, and that the entire personal estate had been assigned to the widow as a homestead; and asking that the assets be marshaled, the claims established, and the real estate sold for their satisfaction. The defendants in their answer admit that there is no personal estate in the hands of the administrators and set up as a defense the statute of limitations. The circuit judge held that this defense could not avail, because of a payment made on the note, and the written promises made by C. D Miller, one of the administrators, before the expiration of the statutory period. The appeal turns on the correctness of this ruling.

The payment relied on was made under these circumstances: Dr. E. Miller, the intestate, assigned to the plaintiff a bond and mortgage of Mrs. Beulah M. Watson as collateral to his note. Believing that Watson might set up defenses against him which would not avail against Divine, the assignee, Miller requested Divine to foreclose in his name the Watson mortgage, and apply the proceeds on his own note as a payment. After full conference with Miller, J. T. Barron, Esq., Divine's attorney, commenced the foreclosure litigation, and conducted it against Mrs. Watson, under the direction of Miller, up to the time of his death. After the death of E. Miller, C. D. Miller, one of the administrators of his estate, who was also his son, corresponded with Mr. Barron on the subject, and in his letters promised in the most explicit manner that the estate would pay the balance of the debt to Divine after the application of the proceeds of the sale of the Watson land. This was in 1898, less than six years from the maturity of the Miller note.

If the suit on the Watson collateral mortgage had continued under Dr. E. Miller's direction to its termination, and the proceeds of the sale had been applied to his note under his express instructions, then the payment would have been his payment, and would have arrested the currency of the statute. Hopper v. Hopper, 61 S. C. 124, 39 S. E. 366. Under the arrangement with Miller, Divine was not merely the holder of a collateral, but he was the agent of Miller, acting under his express direction in the conduct of the suit and the collection

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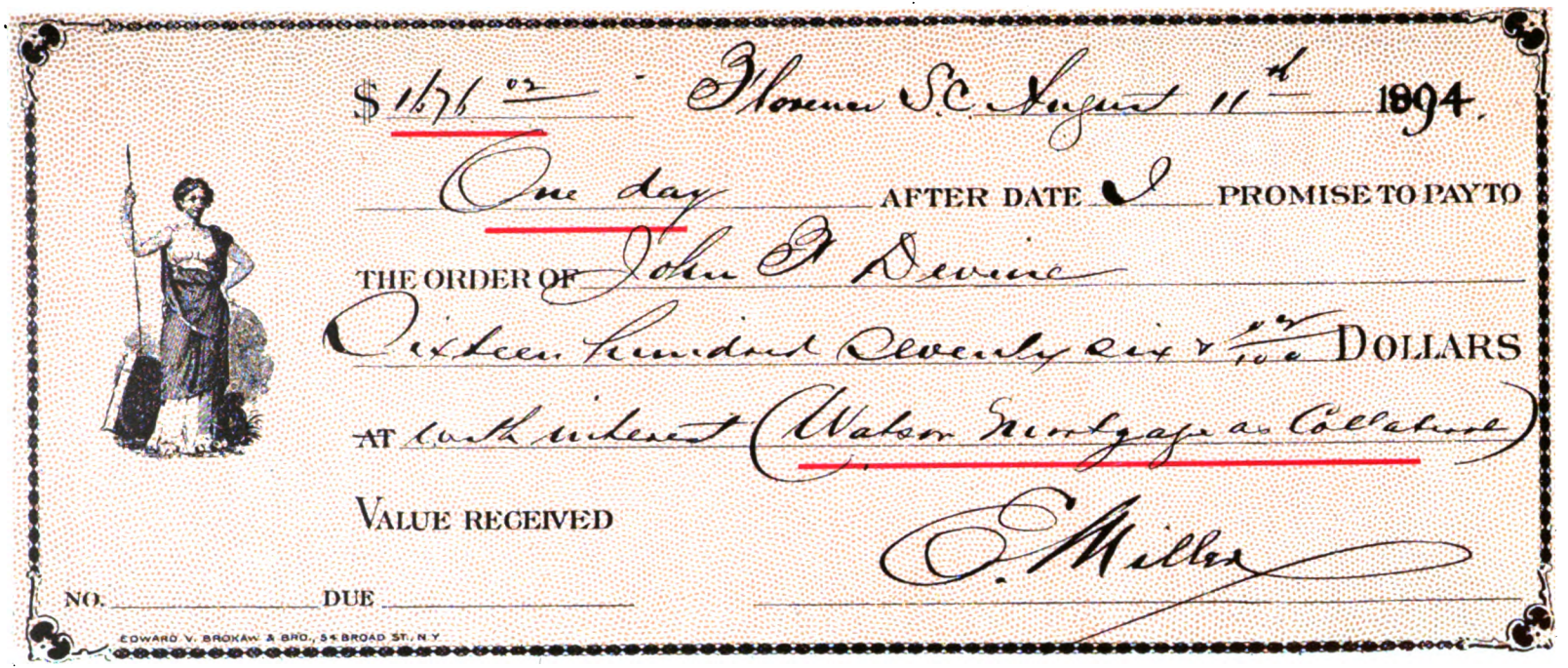

$ 16 71/100 Florence S.C. August 11th 1894.

One day AFTER DATE I PROMISE TO PAY TO

THE ORDER OF John B Devine

Sixteen hundred Seventy six 71/100 DOLLARS

AT 10% interest (Watson Mortgage as Collateral)

VALUE RECEIVED

C. Miller

NO. DUE

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

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Paid on the within note Twelve Hundred Dollars. Proceeds of Watson mortgage. Aug 11/98

The maker of this note, E. Miller, requested the payee, Devine, to foreclose the collateral mortgage, mentioned on the face of the note, and apply the proceeds of the mortgage on this note. Devine's attorney carried on the foreclosure under Miller's personal direction, but before the foreclosure sale was had Miller died. Thereafter, and before the Statute of Limitations had barred an action against Miller on this note, the attorney applied the proceeds of the mortgage on this note, leaving a balance yet due and unpaid on the note, which balance was demanded of Miller's Estate. At the time of this demand against the estate this note would have been outlawed unless the payment above mentioned revived it. A payment that will make a new date from which the Statute of Limitations will run — wiping out the time that has already run — must be one made by the *debtor* or by his direction.

Miller had directed Devine, and also had directed Devine's attorney, to apply the proceeds of the mortgage, when collected, on this note. This made them Miller's agents for that purpose, and had he been living when the payment was made it would have stopped, the running of the Statute of Limitations. But death terminates the agency and all of the agent's powers, and hence this payment on the note was made by the *creditor* from proceeds of collateral or property of the debtor collected by and applied by the creditor. Such payments do not bind the debtor, whether he be dead or alive, so as to arrest the running of the Statute of Limitations as to the balance yet due.

It seems that one of the administrators, who was also one of the heirs of Miller, made Devine a promise to pay this debt before it was outlawed. It was held that this promise would waive the past running of the Statute of Limitations so far as the personal property of the estate was concerned, but not the real estate — except that particular heir's portion or interest in the real estate. The power of an executor or an administrator to waive the Statute of Limitations varies in the several States. In most of the States it is a matter of discretion with the executor. But it seems that in the following States the executor may not waive the statute: New York, Virginia, West Virginia, California, Louisiana.

McMaster's Com. Cases, Vol. 1905, 49 S. E. 479.

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of the money. But Dr. Miller having died before the sale of the Watson land, from which the payment was realized, the payment cannot be attributed to him as his act. His death did not affect Divine's interest in the collateral and his right to collect it, but it ended the special agency and the control of Miller over the litigation and the proceeds of the sale. To be effective in arresting the statute, the payment must have been made in the name of Miller, and by his agent, as if he himself were making it. After his death this was impossible. Johnson v. Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; Hunt v. Rousmanier's Administrators, 8 Wheat. 205, 5 L. Ed. 589.

The promises made by the administrator, C. D. Miller, before the bar of the statute was complete, are sufficient to defeat the plea of the statute interposed by him. Reigne v. Executor of Desportes, Dud. 118; Johnson v. Ballard, 11 Rich. Law, 178. But such a promise made as administrator does not bind the heir, or affect his right to the protection of the statute as to real estate descended to him. Gibson v. Lowndes, 28 S. C. 301, 5 S. E. 727. On the other hand, a promise made by the heir alone, to which the administrator is not a party, will not bind the estate. Bolt v. Dawkins, 16 S. C. 211. In this case, therefore, the promise of Charles D. Miller, the administrator, could not bind the heirs other than himself, so as to affect their interest in the real estate. For while his letters indicate that he regarded himself as representing the interests and wishes of the family, there is no proof of this authority to act for the others as to the real property. But in making promises to pay, and in all his efforts to secure indulgence, as the letters clearly show, he treated with the plaintiff in the dual capacity of administrator and heir. By these promises as administrator he renewed the debt against the estate as to the personalty, and as heir against the real estate, to the extent of the interest he inherited, and the statute of limitations cannot avail him. When the facts of the case of Gibson v. Lowndes, supra, are considered, it will not be found to conflict with this view. It is true, the payments in that case were alleged to have been made by Mrs. Lowndes, who was a devisee, and also named in the will as executrix; but she had not qualified as executrix, and, therefore, was not the personal representative of the testator. In this case when the promises were made the debt was not barred. C. D. Miller was an heir, and also administrator; and, as we have seen, when he promised to see the debt paid he was acting in both capacities. It will hardly be contended that a debt cannot be renewed at all by a new promise, so as to defeat the plea of the statute of limitations interposed to protect the real estate of the intestate. Surely, if it can be done at all, it can be done by one who is both heir and administrator. The real estate of the intestate, E. Miller, is therefore liable for the plaintiff's debt to the extent of the interest of C. D. Miller, but no further.

As the action is on behalf of the plaintiff and "all other creditors of E. Miller who may come in and seek relief by, and contribute to the expenses of, this action," and no other creditors have proved their demands, we express no opinions as to their rights.

The judgment of this court is that the judgment of the Circuit Court be modified as herein indicated.

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Corporation: Powers of Secretary.

The following quotation as to the implied powers of the secretary of a corporation, is from 49 S. E. 1005:

"A secretary of a corporation, as such, has no authority to make contracts for it. 'The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.' Cook on Corp., § 717. And then Thompson on Corp. § 4697, says: 'The law does not ordinarily imply, in the secretary of a business corporation, the power ex officio, to bind the company by means of letters or documents signed officially.' And also in Clark & Marshall on Corporations, § 704, we find: 'Unless authority is expressly conferred, however, or he is clothed with apparent authority by being intrusted with the management of the business, or part of it, the secretary of the corporation has no authority to make any contracts on its behalf and in its name, or bind it by such acts. He has no such authority merely by virtue of his office.' The secretary not having authority by virtue of his office to make such a contract as is relied upon by the plaintiff for the basis of this suit, the defendant cannot be held liable by reason of the letters and telegrams sent by Sager unless he had at the time express authority from the corporation to make sale of this land, or unless he was held out by the defendant in such a way as to make it apparent that he had such authority, or unless the contract was ratified by the defendant. Every one who deals with an agent is presumed to know the extent of his authority, and, if he exceeds his express or apparent authority, his acts do not bind the principal, but only bind the agent, unless they have been ratified by the principal. Curry v. Hale, 15 W. Va. 867; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Wells v. Michigan Life Ins. Co, 41 W. Va. 131, 23 S. E. 527; Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555."

C. H. LARKIN CO. v. DAWSON.

83 S. W. 882.

Court of Civil Appeals of Texas. Nov. 30, 1904.)

PLEDGES — ENFORCEMENT OF PLEDGE — DUTY OF PLEDGEE — NEGLIGENCE — LIABILITY — INSTRUCTIONS.

1. Where defendant, at the time he executed the note sued on, deposited with plaintiff a note of a third person for a larger sum as collateral security, and at the time such collateral note matured the maker was amply able to pay the same, but, notwithstanding, defendant requested plaintiff to collect the note, plaintiff was grossly negligent in failing to do so, and the amount thereof was lost by the maker's subsequent insolvency, plaintiff was liable to defendant for the amount of such collateral note, less the amount of defendant's note for which it was pledged.

2. An instruction that if at the time of maturity of a collateral note the maker was not insolvent, and it could have been collected by the use of reasonable care,

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which was not used by the pledgee, and the maker afterwards became insolvent, the pledgor was entitled to a verdict, was not erroneous in that it limited the maker's solvency to the date of the maturity of the collateral note.

3. Where a note disclosed the date of its maturity it was not incumbent on the court to inform the jury when it became due.

4. Where, in an action on a note, defendant insisted that plaintiff had been negligent in failing to collect collateral, the failure of the court to inform the jury that the diligence required of plaintiff in collecting the collateral note did not arise until after its maturity was not error.

5. Where a note is pledged as collateral, the pledgor is relieved of responsibility as to its collection; the pledgee, as the holder of the legal title, being entitled to receive payment, and, in the event of default, to collect the same and apply the proceeds in payment of the principal indebtedness.

Appeal from District Court, Brewster county; B. C. Thomas, Judge.

Action by the C. H. Larkin Co. and others against J. J. Dawson. From a judgment in favor of defendant, the C. H. Larkin Company appeals. Affirmed.

W. Van Sickle, for appellant. Sanford & Douglas, for appellee.

FLY, J. May L. Hornbeck and W. W. Turney, as executors of the estate of C. H. Larkin, deceased, and C. H. Larkin Company, a corporation, sued appellee on a promissory note of date December 7, 1898, for $225, due and payable on September 15, 1899. Appellee, among other things, pleaded that on the day he executed the note to C. H. Larkin he indorsed, transferred, and delivered to said Larkin a note for $519.70, dated September 1, 1898, and due on September 1, 1899, with ten per cent. per annum interest from date, as collateral security for the payment of his note for $225; that said note had been executed to appellee by E. E. Carpenter, who at the time and for more than a year thereafter was solvent, and had abundant property out of which the amount of the note executed by him could be realized; that said Larkin and said C. H. Larkin Company failed and refused to collect the amount due on the Carpenter note when it became due, and delayed taking any steps for such collection until long after said note had become due, and Carpenter had disposed of most of his property, and the note had become worthless, wherefore he pleaded for judgment against C. H. Larkin Company for the full amount of the Carpenter note, after deducting the amount due on his note for $225. The suit was dismissed as to May L. Hornbeck and W. W. Turney, and, being tried by jury, resulted in a verdict and judgment in favor of appellee for $486.19.

The facts show clearly that appellant had neglected to take proper steps to collect the collateral security until Carpenter, the maker of the note, had disposed of all his property and had become insolvent. When the note became due, and for several months thereafter, Carpenter had sufficient property subject to execution to fully pay off and discharge his note to appellee, but no adequate effort was made to collect the note until it was too late. Appellee informed appellant just before the note was due that Carpenter was disposing of his property, and asked it to collect the note, but no action was taken. The Carpenter note constituted all the available assets of appellee,

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and he so informed the pledgee. Larkin, at the time the note was given him, agreed to collect it promptly, and, after paying his note, deliver the balance to appellee. When negotiable instruments made by a third party are used as collateral security for the promissory note or bill of exchange of the pledgor, so that the pledgee becomes a party thereto, and such collateral paper matures before the principal debt, it is the duty of the pledgee to use reasonable and ordinary care and diligence in the collection of the collateral. "Where the opportunity of collecting collateral bills or notes is lost by the insolvency of the parties thereto, by reason of the supine negligence of the pledgee, when with ordinary care the same might have been enforced, the latter is liable to account for the full loss and damage of the pledgor." Colebrook on Coll. Sec., § 114. The case of Douglass v. Mundine, 57 Tex. 344, is similar to this: and, in discussing the question of the liability of a pledgee for negligence in collecting collateral securities left with him, the court said: "The debtor transfers and delivers to the creditor a lot of solvent notes, in amount more than sufficient to pay the debt, and guaranties their payment. By the fault of the creditor these collaterals become entirely worthless. It will not do to say that, because the debtor was in default in not paying his note, therefore the creditor could, without incurring liability, inflict loss upon the debtor through his negligence and fault."

The second assignment of error complains of that part of the charge where the jury is instructed that, if they believed that at the time of maturity of the E. C. Carpenter note, said Carpenter was not insolvent, and it could have been collected by the use of reasonable care and diligence, and the Larkin Company did not use such care and diligence, and that Carpenter afterwards became insolvent, then a verdict should be returned for appellee. The ground of objection being that it limited the time of Carpenter's solvency to the date of the maturity of the note, and not after the date of the maturity of the note. We see no force or merit in the assignment. The charge, when read altogether, is plain and pertinent to the issues.

It was not incumbent on the court to inform the jury when the Carpenter note became due. The note showed that, just as it showed the date on which it was executed.

The fourth assignment of error complains of the charge because it did not inform the jury that the diligence required of appellant in collecting the note did not arise until after the maturity of the note. There is no merit in the assignment. No jury of average intelligence would be misled by the charge.

The Carpenter note having been transferred to appellant, appellee was relieved of responsibility in regard to the collection of the note. "The pledgee of negotiable bills of exchange or notes acquires, where the same are transferred so as to make him a party thereto, the legal title in such negotiable collateral securities, and is entitled to receive the sum due upon the same from the parties liable thereon, and, in the event of default, to proceed by action to collect the whole face value thereof; holding the proceeds to be applied in payment of the principal indebtedness." Appellee could not have collected the note if he had so desired. The contention of appellant that appellee acquiesced in an extension of time of payment of the Carpenter note is not sustained by the record. The record does not disclose that

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B. 44. Collateral: Duty of Holder.

$ 225. Brewster, Tex. Dec 7 1898

September 15. 1899 AFTER DATE I PROMISE TO PAY TO

THE ORDER OF C.H. Larkin

Two Hundred Twenty Five —— DOLLARS

AT E. E. Carpenter note $219.70 due Sep. 1. 1899 as collateral

VALUE RECEIVED

NO. _____ DUE _____

J. J. Dawson

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

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Dawson, the maker of this note, did not pay it when it was due, nor was the collateral note paid. Carpenter, the maker of the collateral note, was good when his note fell due, and it could have been collected from him at any time for a year thereafter. During all of this time Dawson told Larkin to collect the Carpenter note — that Carpenter was disposing of his property — but Larkin did not act and the Carpenter note became worthless. Larkin sued Dawson on his note of $225, and in reply Dawson asked for judgment against Larkin for $486.19 — the difference between the two notes —. Dawson got what he asked for. The court said in part: "Where the opportunity of collecting collateral bills or notes is lost by the insolvency of the parties thereto, by reason of the supine negligence of the pledgee, when with ordinary care the same might have been enforced, the latter is liable to account for the full loss and damage of the pledgor." Colebrook on Coll. Sec. § 114. . . . "The debtor transfers and delivers to the creditor a lot of solvent notes in amount more than sufficient to pay the debt, and guaranties their payment. By the fault of the creditor these collaterals become entirely worthless. It will not do to say that because the debtor was in default in not paying his note, therefore the creditor could, without incurring liability, inflict loss upon the debtor through his negligence and fault."

In the case of Easton *v.* Bank (C. C.), 24 Fed. 523, it is said: "When negotiable instruments are pledged as collateral, it is the duty of the pledgee not only so to deal with them as not to destroy or impair their value, but he is to use ordinary diligence to make them available for the payment of the debt. If he suffers indorsed paper to mature without resorting to the necessary steps to charge the indorser, or fails to pursue reasonably the primary parties he may become responsible for any loss tnat may ensue." See also Hawley *v.* Brownstone (Cal.), 56 Pac. 468

McMaster's Com. Cases, Vol. 1905, 83 S. W. 882.

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any extension was given; the only mention of an extension being that in a letter of appellant to appellee, in which it was stated that an extension had been asked by Carpenter and refused by appellant. Authority is ample to sustain the position of the court. In the case of Easton v. Bank, (C. C.) 24 Fed. 523, it is said: "When negotiable instruments are pledged as collateral, it is the duty of the pledgee not only so to deal with them as not to destroy or impair their value, but he is to use ordinary diligence to make them available for the payment of the debt. If he suffers indorsed papers to mature without resorting to the necessary steps to charge the indorser, or fails to pursue reasonably the primary parties, he may become responsible for any loss that may ensue." In the case of Farm Inv. Co. v. Wyoming College & Normal School, (Wyo.) 68 Pac. 562, the question at issue was fully discussed, and the court said: "The duty thus imposed upon the pledgee may, if necessary, require him to resort to active measures to protect the pledge, and prevent a loss occurring through the insolvency of the parties liable for their payment. Reasonable and ordinary care is all that he is bound to exercise. If, because of his gross negligence, he fails to collect the same when it might have been done, and the pledgor is injured, and the value of the collateral paper lost, he becomes chargeable with the face of the securities, as in payment and discharge pro tanto of the principal debt. . . . And the damages resulting to the pledgor by reason of loss occasioned through supine negligence of the creditor may be set up by way of counterclaim in an action brought against the pledgor upon the principal debt." In the case of Hawley v. Brownstone, (Cal.) 56 Pac. 468, the court said: "That a pledgee may become liable through his gross negligence where the pledgor is injured thereby, and that the pledgee of negotiable paper as collateral security is bound to use ordinary diligence in preserving the legal validity of the pledge, and is answerable for a loss through a corresponding degree of negligence to the extent of such loss, are propositions well established."

The other assignments of error are disposed of by our conclusions of fact, and, there being no error shown by the record, the judgment is affirmed.

Note: Memorandum Declaring It Void at Owner's Death on Certain Conditions Being Performed: Agency.

On the death of Donald McFadgen there was discovered among his effects the note described in accompanying illustration. On the back of the note was written: "It is hereby stipulated if this note is not paid in full before the death of the owner, then the makers of the note shall first pay all funeral expenses, the balance to be used for a monument and otherwise caring for the lot, which shall discharge the full indebtedness of this note."

The executor of McFadgen's estate sued the makers on the note. They answered that they had expended the amount of the note as directed in the memorandum on the back.

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Judgment was given against the makers of the note for the full amount thereof. The court said in part:

"Conceding for the purposes of this case only, that the memorandum is to be considered as incorporated into the terms of the note, and was written there when the note was signed, we are unable to reach the conclusion that the memorandum can be enforced under the circumstances of this case. The note was payable on demand. It was the property of the payee when he died on January 25, 1903, about six weeks after the note was given. It was under his control, and could have been disposed of by him at any time up to his death. He had made no absolute disposition or application of the debt evidenced by the note during his lifetime for the purpose indicated by the memorandum. The title to the note was in him at all times. There had been no delivery of the money represented by the note for the purpose shown by the memorandum. Primarily, the money was given to the makers as a loan to be paid on demand. The makers were constituted the payee's agents to expend the money, for the purposes shown by the memorandum, upon his death. The agency was not to go into effect until his death, but by his death the authority terminated. The memorandum therefore was an attempt to dispose of his property upon his death without the formality of a will. It was not effectual for that purpose. If there had been an irrevocable delivery of the money for the purpose named in the memorandum, a different question would be before us. But he controlled this property during his lifetime, and the law took hold of it for the purposes of administration upon his death. The estate cannot be administered by an agent appointed in this manner. The attempted appointment of an agent became nugatory upon the death of the principal. No valid agency was created. 'We think it may be declared a general rule that, if the intended disposition of property be of a testamentary character, not to take effect in the testator's lifetime, such disposition will be inoperative, unless declared in writing in conformity with the statute relating to wills.' Comer v. Comer, (Ill.) 11 N. E. 848. 'She did not, by this act, make a gift of the money to the defendant, but constituted him her agent to make the payments for the purposes and to the persons named in the memorandum, in the event of [her] death; and only after the "instructions' thus given by her had been carried out was any property remaining to belong to the defendant. Such disposition of her estate was testamentary, and could not be made orally. The defendant was merely her agent to carry out her instructions, and upon her death his agency terminated, and the money remained a part of her estate, subject to administration.' Knight v. Tripp, (Cal.) 54 Pac. 267. See, also, Perry on Trusts, § 92; Hart v. Ketchum, (Cal.) 53 Pac. 931; Crispin v. Winkleman, (Iowa) 10 N. W. 919.

"The judgment is affirmed. All concur."

102 N. W. 163.

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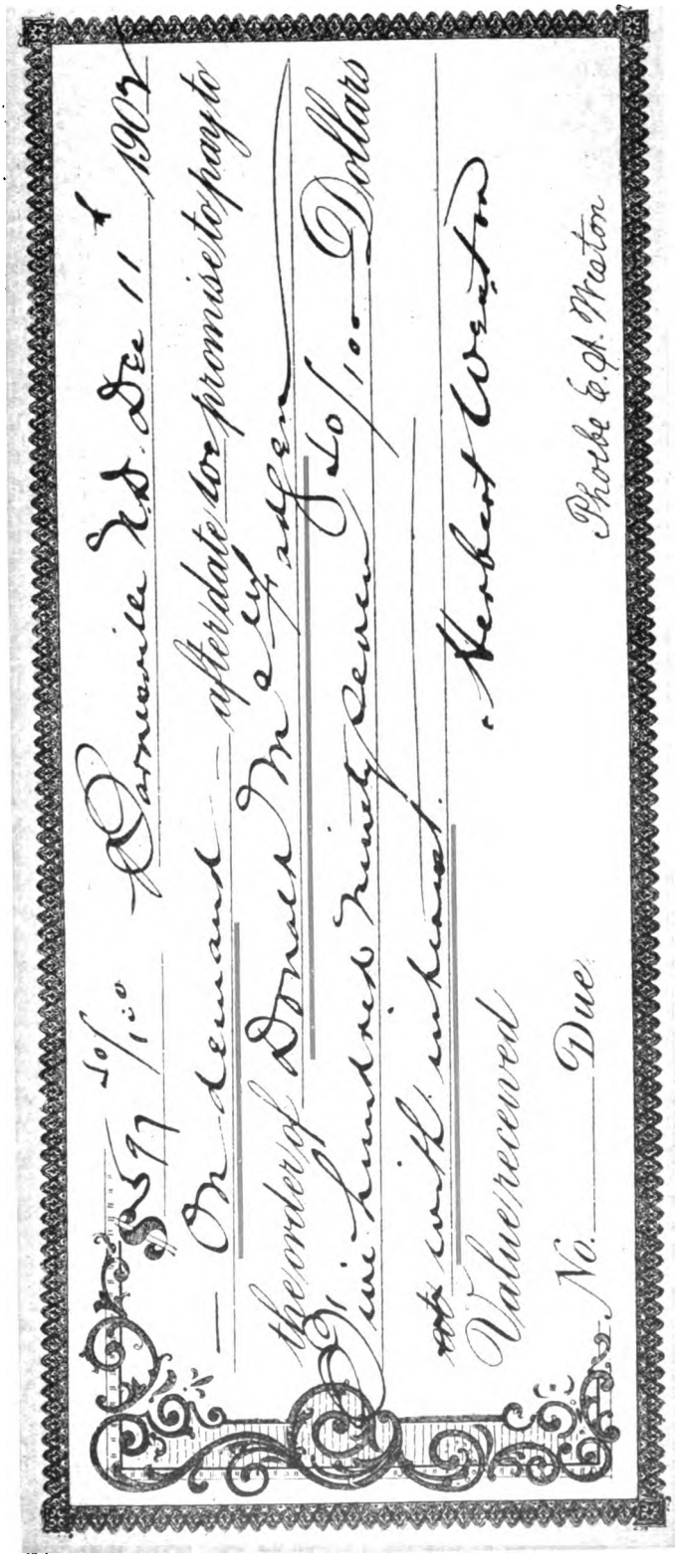
B. 45. Promissory Note to Be Void if Unpaid at Maker's Death: Agency: Will.


$577 50/100
Sarasota Fla. Dec 11 1902
On demand after date for value promise to pay to
the order of Bruce Dr agent
Five hundred sixty seven 50/100 Dollars
with interest.
Value received
Herbert Croxton
No. Due
Probate of Mr. Maton

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McFadgen, the payee of this note, died six weeks after its date, and among his effects was found this note with the following memorandum written on it:

"It is hereby stipulated if this note is not paid in full before the death of the owner, then the makers of this note shall first pay all funeral expenses, the balance to be used for a monument and otherwise caring for the lot,, which shall discharge the full indebtedness of this note." After the death of McFadgen, the makers of the note expended the amount it called for in paying the funeral expenses and in erecting a monument to the deceased. Notwithstanding this the executor sued them on the note and recovered judgment against them for the full amount. The memorandum on the note was not signed, but the court said in effect that the judgment would have been the same if it had been signed by McFadgen, or if it had been incorporated in the body of the note before it was executed. The note was payable on demand. McFadgen could have collected it in full at any time before his death. It was his unrestricted property just previous to his death. This stipulation undertook to direct how this much of his property should be disposed of after his death — but this can be done only by a will executed in the manner prescribed by law. This erroneous conception of the law comes to the surface daily through the efforts of owners of property to "give it away" — but yet retaining the benefits and partial or absolute control of a whole or part of it during the donor's life — the recipient not to have absolute control and enjoyment of the thing given until the death of the donor. Such attempted gifts are a nullity.

A note payable only after the death of the maker is good, and probably one so payable, even if payable in the manner here prescribed, would have been fully discharged if the directions had been carried out. But here the note was payable on demand.

The court said in part: "The makers were constituted the payee's agents to expend the money, for the purposes shown by the memorandum, upon his death. The agency was not to go into effect until his death, but by his death the authority terminated. The memorandum therefore was an attempt to dispose of his property upon his death without the formality of a will. . . . The estate cannot be administered by an agent appointed in this manner. . . . We think it may be declared a general rule that if the intended disposition of property be of a testamentary character, not to take effect in the testator's lifetime, such disposition will be inoperative unless declared in writing in conformity with the statute relating to wills."

In 71 S. W. 869, a note payable to "R." contained these words written on its face before its execution: "This note, however, to become null and void on the death of said 'R.'" It was held that the executor of "R." could enforce the note against the maker. To the same effect is 100 N. Y. 817.

McMaster's Com. Cases, Vol. 1905, 102 N. W. 163.

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Check: Duplicate — Liability of Indorser.

The San Augustine Brick Company delivered to Henry Lewis its check, payable to his order, dated December 2, 1902, for $500.

Lewis indorsed the check to other parties and it was deposited by them in another bank. This bank lost or mislaid the check and it was not duly presented for payment. Some time thereafter this bank induced the makers of the check to issue a duplicate therefor, as shown, in effect, in accompanying illustration, and this duplicate, indorsed by Lewis, was forwarded for collection.

The duplicate check was not good, and was protested for non-payment. The bank owning the check sued Lewis as indorser, and won in the lower court, but was beaten on appeal. The court said:

"This suit was brought in the County Court of Nacogdoches county by the Commercial National Bank of Nacogdoches against the San Augustine Brick Company, Henry Lewis, and Mayer & Schmidt, a firm composed of Abe Mayer and John Schmidt, to recover upon a duplicate check drawn by the brick company upon the First National Bank of San Augustine in favor of the said Henry Lewis, and by the said Lewis indorsed to Mayer & Schmidt, and by said Mayer & Schmidt indorsed to the plaintiff, by whom the original check was lost before presentment. When the case was called for trial the plaintiff dismissed as to Mayer & Schmidt, and on submission to the court without a jury judgment was rendered in favor of the plaintiff against the defendants San Augustine Brick Company and Henry Lewis. The defendant Lewis alone has appealed.

"The original check was drawn on December 2, 1902, by the San Augustine Brick Company on the First National Bank of San Augustine, in favor of Henry Lewis, for the sum of $500. It was indorsed by Lewis to Mayer & Schmidt, and by them indorsed to the plaintiff, to be collected and placed to their credit. The plaintiff lost the check, and did not present it for collection. It did not discover the loss of the check until several months after it had acquired it, and on August 20, 1903, it applied to and obtained from the brick company the duplicate sued on. The duplicate is indorsed by the defendant Lewis, but is not indorsed by Mayer & Schmidt. It was presented by the plaintiff to the San Augustine bank for payment, but payment was refused for the want of funds to the credit of the drawer. The brick company, when it drew the check, had funds to its credit with the bank more than enough to pay the check, and had sufficient funds with it to pay the sum for the months of December, 1902, and January, 1903, after which it withdrew its deposits and became insolvent. The indorsement by Lewis of the duplicate check did not change his relation to the original, or create any liability on the duplicate different from the original. The use of the word 'duplicate' across the check signified that it was made as a substitute for the original, and that no new liability was created thereby. Benton v. Martin, 40 N. Y. 345. The loss, mislaying, or destruction of the bill or note will not dispense with a regular presentment for payment, and, the defendant having been discharged from liability upon the original by laches as to presentment, the plaintiff could not recover

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on the duplicate. 4 Am. & Eng. Encyc. Law, 468; Benton v. Martin, supra. The judgment of the court below will be reversed, and judgment will be here rendered in favor of the defendant Lewis.

"Reversed and rendered."

83 N. W. 423.

"The indorsement by Lewis of the duplicate check did not change his relation to the original, or create any liability on the duplicate different from the original. The use of the word 'duplicate" across the check signified that it was made as a substitute for the original, and that no new liability was created thereby. Benton v. Martin, 40 N. Y. 345. The loss, mislaying, or destruction of the bill or note will not dispense with a regular presentment for payment, and the defendant having been discharged from liability upon the original by laches as to presentment, the plaintiff could not recover (from him) on the duplicate."

MALANAPHY et al. v. FULLER & JOHNSON MFG. CO. et al.

101 N. W. 640.

(Supreme Court of Iowa. December 13, 1904.)

CONTRACTS — PROMISE FOR THE BENEFIT OF ANOTHER — PRIVITY — EQUITIES — ASSUMPTION OF OBLIGATIONS — PRINCIPAL AND SURETY — RELEASE OF PRINCIPAL — DISCHARGE OF SURETY.

1. Where, on the sale of a firm's business, the purchaser agreed to assume a debt owing by the firm to defendant, defendant was within the privity of the purchaser's promise, and was entitled to sue the purchaser thereon by direct action.

2. Where, on sale of a firm's business, the purchaser agreed to assume a debt owing by the firm to defendant, defendant's right under such agreement was subject to all the equities arising out of the contract between the principal parties.

3. Where, as a part of a sale of a firm's business, the purchaser assumed a debt of the firm to defendant, the purchaser thereby became the principal debtor, and the firm was liable as surety only.

4. A purchaser of a firm's business assumed a debt owing by the firm to defendant, evidenced by a note. Defendant thereafter refused to accept the purchaser's note for the debt, but did accept a note signed both by the purchaser and the firm, and held the same as written evidence that both the purchaser and the old firm were obligated for the payment of the debt, without surrendering the original note. Defendant thereafter recovered judgment, and in consideration of a small payment by one of the members of the purchasing firm released him from further liability. Held, that such release discharged the members of the original firm from liability.

Appeal from District Court, Winneshiek county; L. F. Fellows, Judge.

Action in equity to restrain the enforcement of a judgment at law under execution. The action was commenced by M. J. Malanaphy and James Daly, formerly partners, under the firm name of Malan-

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aphy & Daly, and as such doing business at Decorah, this State, as dealers in farm implements. Before trial the said Malanaphy died intestate, and Mary A. Malanaphy, administrix of his estate, was substituted as plaintiff. The material facts are not seriously in dispute. On June 20, 1889, the firm of Malanaphy & Daly was indebted on merchandise account to the defendant company in the sum of $179, and on that day the firm note was given for said sum, due November 1, 1890, with interest after maturity. Shortly thereafter Malanaphy & Daly sold and transferred its business, including stock on hand, to the partnership firm of Christen & Gilbertson. As part of the consideration for the sale Christen & Gilbertson assumed and agreed to pay the indebtedness to defendant represented by the note given as above stated. Malanaphy & Daly wrote to the defendant company, giving advice of the sale, and requesting the acceptance of a note of Christen & Gilbertson in place of their obligation. This the defendant by letter declined to do. It appears, however, that a note payable to the defendant company was executed for the sum named, due November 1, 1890, with interest after maturity, signed "Christen & Gilbertson," and below, "Malanaphy & Daly," and this note was sent to the defendant company. The record is silent as to any correspondence, if such there was, subsequently had, making further reference to the subject. It sufficiently appears, however, that the defendant company was advised as to the assumption of the debt by Christen & Gilbertson, and the secretary thereof testified as a witness upon the trial that, while the company refused to accept of the later note and release Malanaphy & Daly on the former one, it did accept and hold such later note as collateral security. The firm of Christen & Gilbertson thereafter obtained goods of the defendant company on credit, and later on a judgment was recovered against said firm on such account. In February, 1892, the defendant company brought suit in the District Court of Winneshiek county on the said note of Christen & Gilbertson and Malanaphy & Daly, and obtained judgment by default against Clarence Christen, one of the members of the firm of Christen & Gilbertson and M. J. Malanaphy and James Daly, for the face amount of such note and interest accrued. In February, 1895, the defendant company accepted from said Clarence Christen the sum of $200, of which sum it applied $41.60 on said note judgment, and the balance on the judgment held by it against Christen & Gilbertson. In consideration of such payment, defendant executed and delivered to said Christen a writing whereby, as to the note judgment in question, it did "release the said Clarence Christen from any and all liability under and by virtue of said judgment, and hereby discharge said judgment of record as to said Clarence Christen, but as to the other defendants the judgment shall be and remain in full force and effect." It appeared that this was done without the knowledge or consent of Malanaphy and Daly. Defendant being about to enforce collection of the balance of such note judgment by execution, this action was brought for an injunction to restrain the same, and further praying that said judgment be held as of no further effect, and for cancellation thereof. Trial being had, there was a decree in favor of plaintiffs, and defendants appeal. Affirmed.

Dan. Shea, for appellants. W. L. Converse, for appellees.

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BISHOP, J. The contention of plaintiffs in the court below was that the release of Christen from all further liability upon the judgment now sought to be enforced operated ipso facto to release both Malanaphy and Daly, and such is the argument in this court. A correct understanding of the relations of the several parties, each to the other, will serve to make clear the proper determination of the question thus presented. The defendant company having refused to accept of a note signed by Christen & Gilbertson in payment of the note held by it against Malanaphy & Daly, the latter, as a matter of course, continued to be bound upon its obligation according to the terms thereof. Now, as already stated, when Malanaphy & Daly sold and transferred its property to Christen & Gilbertson, the latter, in consideration thereof, and as part payment of the purchase price, assumed and agreed to pay the debt owing by Malanaphy & Daly to the defendant company. The rights of the parties arising out of this situation may be stated thus: As between Christen & Gilbertson and the defendant company, the implied relation of debtor and creditor arose eo instante by operation of law. It is well-settled doctrine that, where one for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of the promise, and he may single out the promisor and sue him by direct action. Johnson v. Knapp, 36 Iowa, 616; Poole v. Hintrager, 60 Iowa, 180, 14 N. W. 223; Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429.

Necessarily the rights of a party for whose benefit a promise is made must be measured by the terms of the agreement between the principal parties, and the right to recover from the promisor is not absolute in all cases. Among other limitations, the party to be benefited takes subject to all inherent equities arising out of the contract, as affecting the principal parties, one with the other. This follows naturally from the relation of privity which the law implies. Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Brandon v. Hughes, 22 La. Ann. 360; Trimble v. Strother, 25 Ohio St. 378; 7 Am. & Eng. Encyc. Law (2d ed.) 109. Turning our attention to the principal parties to the contract, it is quite clear that as between them the promisor became primarily liable for the debt. It assumed the relation of a principal, and, as to it, the obligation of the promisee became that of a surety only. As supporting this conclusion, see Corbett v. Waterman, 11 Iowa, 86; Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986; Jefferson v. Asch, 25 L. R. A. 257, note; 27 Am. & Eng. Encyc. Law (2d ed) 433. Now, as a creditor for whose benefit a promise is made takes subject to the equities existing between the principal parties, it follows conclusively that, if he accepts of such promise, he becomes bound to observe the relationship of principal and surety existing between the principal parties, and must act in recognition thereof.

As we think, the status of the parties to this action was fixed, as of the time of the promise, by the rules of law thus referred to. We may proceed, therefore, to inquire what change, if any, resulted from the subsequent execution and delivery of the note signed by both the firms named. As we have stated, the giving and retention of such note seems to have been without agreement relating in terms thereto. The statement made by the secretary of the defendant company that it was held as collateral security was evidently a mere conclusion on

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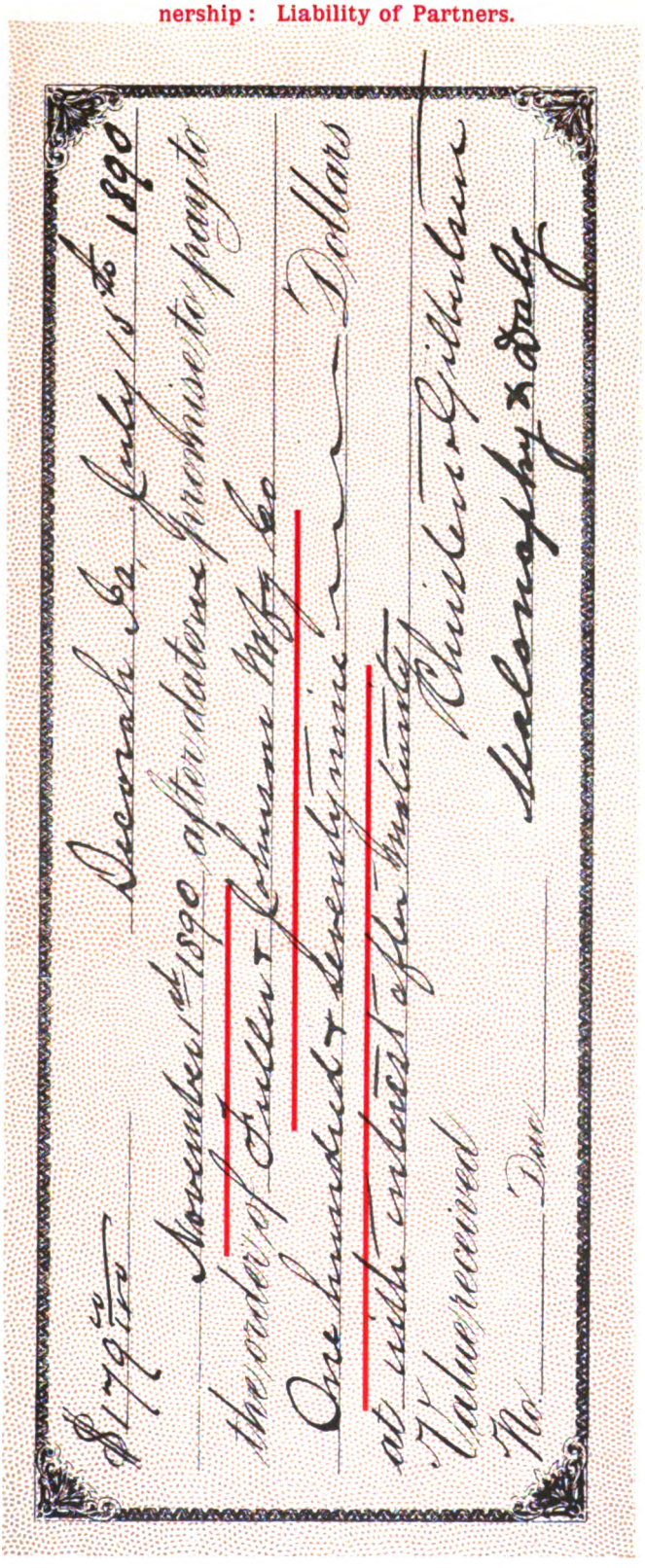
B. 46. Partnership: Firm Note: Dissolution of Partnership: Liability of Partners.


$179.50/100
Newark, N.J. July 15th 1890
Six months after date we promise to pay to
the order of Cullen & Johnson Mfg. Co
One hundred & seventy nine 50/100 Dollars
at with interest after maturity
Value received
No. Due
Clinton & Gilbert
Mahoney & Daly

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The firm of Malmaphy & Daly, dealers in farm implements, gave their note (not this one) for merchandise to the Fuller & Johnson Mfg. Co. Soon after this M. & D. sold out their business to Christensen & Gilbertson, and this new firm (C. & G.) assumed and agreed to pay the debts of the old firm (M. & D.), and included in such debts the described note to the Fuller & Johnson Mfg. Co. as mentioned.

M. & D. wrote to the Fuller & Johnson Mfg. Co. and told them of the deal and that C. & G. had assumed the payment of the note mentioned, and asked the company to accept a note of C. & G. in place of their note that the company held. This the company declined to do. Later, *this* note was sent to the company and the company retained it, as they said, as collateral to the other one. C. &. G. from time to time made purchases from the F. & J. Mfg. Co. Subsequently the F. & J. Mfg. Co. secured a judgment (1) against C. & G. by reason of these purchases, and soon after a judgment (2) was obtained against Christensen and against M. & D. on this note. Christensen then paid the F. &. J. Mfg. Co. $158.40 on the judgment against C. &. G. (1) (which was obtained on account of purchases of C. & G.) and he paid $41.60 on the judgment (2) which was obtained on this note, and thereupon the F. & J. Mfg. Co. released Christensen from all liability by reason of this note and judgment, but retained the judgment as to M. & D. — it being remembered that this note and judgment represented the debt of M. & D. to the F. & J. Mfg. Co., which no one had ever paid, and as to the payment of which the F. &. J. Mfg. Co. had declined to accept the note of C. & G. This release of Christensen released the judgment as to M. & D. It would not have released them if, in law, M. & D. had continued to be the principal debtors on their original debt to the F. & J. Mfg. Co. But, when C. & G. assumed and agreed to pay this debt of M. & D., the relation of M. &. D. changed (as between the two firms) from that of principal to that of surety, and while the F. & J. Mfg. Co. were not obliged to accept C. & G. as sole debtors, they were obliged to take notice of the changed relations of M. & D. from that of principal debtor to that of surety. (48 S. E. (Ga.) 118, 35 Mich. 42, 47 Minn. 151, 67 N. Y. 95.) So, in releasing Christensen, the company had in law released a principal, and releasing a principal released a surety. The general rule as to creditors being bound by the changed relations above stated does not appear to hold in West Virginia (34 W. Va. 303). In Ohio (30 Ohio St. 389). In Texas (90 Tex. 110). In Alabama (56 Ala. 493).

McMaster's Com. Cases, Vol. 1905, 101 N. W. 640.

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his part as to the effect of the situation. However this may be, it is clear that such was not the effect implied by law. As the later note was for the same amount, due at the same time, and upon the same terms, as the original note of Malanaphy & Daly, and as Malanaphy & Daly were already liable for the debt represented on a direct promise, and the firm of Christen & Gilbertson liable in the same measure upon a promise implied by law, it must be evident that the only change in the situation was the substitution, through the medium of the note, of a direct promise on the part of Christen & Gilbertson in lieu of the implied promise theretofore existing. The defendant company received nothing collateral in character. It simply held the note as written evidence that both firms were obligated for the payment of the note. It is to be said, however, that the receipt and acceptance of the note had the effect to further apprise the defendant company of the relation existing between the two firms, and of its obligation to respect the same.

Accepting of the situation as we find it, our conclusion is that the release of Christen operated to release his principals, Malanaphy and Daly, who, as to him, and with knowledge on the part of the defendant company, were secondarily bound only for the payment of the judgment. The conclusion thus reached has support in the following cases: Ames v. Maclay, 14 Iowa, 281; Chambers v. Cochran, 18 Iowa, 159; Taylor v. Short's Adm'r, 27 Iowa, 361, 1 Am. Rep. 280; Roberts v. Richardson, 39 Iowa, 290.

It follows that the decree of the trial court was right, and it is affirmed.

AMERICAN EXCH. NAT. BANK v. AMERICAN HOTEL VICTORIA CO. et al.

92 N. Y. Supp. 1006.

(Supreme Court, Appellate Division, First Department. April 7, 1905.)

NEGOTIABLE INSTRUMENTS — NOTICE OF DISHONOR — SERVICE.

Negotiable Instruments Law (Laws 1897, p. 740, c. 612), §§ 67, 68, provide that notice of dishonor, to charge an indorser, may be given by delivering it personally or through the mail, either to the party himself or to his agent in that behalf. Held, that testimony of a witness that he served notice on a corporation conducting a hotel by leaving the notice at the cashier's window did not show sufficient service; it not appearing that the attention of any one was drawn to the notice, and the president and manager of the company having testified that no such notice was brought to his attention.

Appeal from Trial Term, New York county.

Action by the American Exchange National Bank against the American Hotel Victoria Company and another. From a judgment in favor of plaintiff, defendant hotel company appeals. Reversed.

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, INGRAHAM, and LAUGHLIN, JJ.

R. Neil Burgess, for appellant. Robert Forsyth Little, for respondent.

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LAUGHLIN, J. The action is against Charles M Reed, the maker, and the appellant, as indorser, of a promissory note payable to the order of Costikan Freres. The complaint alleges that the appellant duly indorsed the note prior to maturity, having received full value therefor, and delivered the same to the payee for full value; that the payee subsequently and before maturity, for full value, duly indorsed and delivered the note to the plaintiff; that the note was duly presented for payment at the First National Bank of Erie, Pa., where it was made payable, and payment thereof duly demanded and refused, whereupon it was duly protested for nonpayment, and that notice thereof was forthwith duly given to all of the indorsers. The answer of the appellant put in issue, among other things, the allegations of the complaint concerning notice to it of the presentation of the note for payment, the demand and refusal of payment, and of the protest. The plaintiff proved the making and indorsement of the note, the delivery to it, and offered the note in evidence with the notary's certificate showing that he protested it for nonpayment on the 14th day of October, 1901, the day it fell due. For the purpose of proving the service of the notice of protest on the appellant, the plaintiff called one Mairs, who testified that on the 16th day of October, 1901, he served an original notice of protest made by the notary at Erie, Pa., on the 14th, and addressed: "To American Hotel Victoria Co. S. B. A. Price, Prest." — upon the appellant at the Victoria Hotel, Broadway and Twenty-Seventh street, by leaving it "at the cashier's window." He does not show that the cashier or any one else was present or that he drew the attention of any one thereto, or that he made any effort to find any officer of the defendant, or any one in charge of the hotel, to whom to deliver it. The defendant called Mr. Sweeney, who testified that he was elected president of the defendant and purchased its capital stock on the 2d of January, 1901, and continued to be president down to the time of the trial; that he had charge of the management of the business of the appellant and of the hotel during the same period, and on the 16th day of October, 1901; that he did not see or receive any notice of the protest or dishonor of the note, and the first he knew of the existence of the note, or heard of it, was when he received a letter from attorneys stating that they had the note for collection and that, unless it was paid within a certain time, action would be brought thereon. At the close of the evidence, counsel for the appellant moved to dismiss the complaint upon the ground, among others, that the plaintiff had failed to prove notice to it of the dishonor of the note. The motion was denied, and an exception taken.

We are of opinion that the judgment must be reversed. The appellant is sued solely as indorser of this note. The evidence is wholly insufficient to show the service of the notice of protest upon it. Negotiable Instruments Law, §§ 167, 168 (Laws 1897, p. 704, c. 612), provide that notice of dishonor, to charge an indorser, may be given by delivering it personally or through the mail either to the party himself, or "to his agent in that behalf." This doubtless was not intended to change the rule as it theretofore existed. Eaton & Gilbert on Commercial Paper, 489. Where personal service is relied upon, the evidence must show either actual personal service, or an ordinarily intelligent, diligent effort to make personal service, upon the in-

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dorser, either at his place of business during business hours, or at his residence if he have no place of business; but, if he be absent, it is not necessary to call a second time, and the notice may in that event be left with any one found in charge, or, if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. Stewart v. Eden, 2 Caines, 121, 2 Am. Dec. 222; Bank of Commonwealth v. Mudgett, 45 Barb. 663; Id., 44 N. Y. 514; N. Y. & Alabama Contracting Co. v. Selma Savings Bank, 51 Ala. 305, 306, 23 Am. Rep. 552; Allen v. Edmondson, 2 Exch. Rep. 718; Williams v. Bank of U. S., 2 Pet. 96, 7 L. Ed. 360; Huffcut's Negotiable Instruments, p. 47. The evidence in this case shows that personal service was not made upon any officer of the corporation, and there is no evidence that the notice was left with any agent of the corporation, or even where it might be reasonably inferred that an officer or agent of the corporation would receive it. It does not even appear on what floor or in what part of the hotel the cashier's window was, at which the notice was left. There can be no inference from such evidence that the notice was received by the corporation, and the president and manager of the hotel, who was in charge, testifies that it was not brought to his attention.

It follows, therefore, that the judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

RUSSELL v. KIDD et al.*

84 S. W. 273.

(Court of Civil Appeals of Texas. December 10, 1904.)

BILLS AND NOTES — ACTION ON DRAFT — GAMBLING TRANSACTIONS — EXECUTED CONTRACT — EFFECT.

1. Where a draft is drawn for money collected for the plaintiff, the drawers cannot defeat liability in an action thereon by the drawee, even though it represented the fruits of a gambling contract to which the plaintiff and defendants were parties.

Appeal from District Court, Jefferson county; A. T. Watts, Judge.

Action by David Russell against George W. Kidd and others. From a judgment for defendants, plaintiff appeals. Reversed.

Byers & Byers, for appellant. Lanier, Martin & O'Fiel, for appellees.

GILL, J. David Russell sued the firm of Moore, Hathaway & Co. to recover the amount of a draft drawn by the firm in his favor for $883, which was dishonored by the drawee. The defendant B. E. Moore, one of the members of the firm, failed to answer, and judgment by default was rendered against him. The other defendants answered by general demurrer, and further that they were not liable on the draft sued on, because it was given in settlement of a gambling transaction, consisting of a purchase and sale of cotton futures, in which no actual delivery was contemplated. A trial before the court

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without a jury resulted in a judgment for the defendant firm and the answering members thereof. The trial court found, as a conclusion of fact, that the transaction out of which the draft grew was between the defendant firm and plaintiff, in which no delivery was intended, and in which it was understood that the defendant firm was to become liable to plaintiff, and to settle only according to difference in price. The court further found that the contract, though made under the rules of the New Orleans Cotton Exchange, and requiring actual delivery at maturity, was in fact a device to cover a gambling transaction, and was therefore unenforceable. By appropriate assignments, the plaintiff, who is appellant here, assails the trial court's fact conclusions, and his conclusions of law as well.

The general history of the transaction is as follows: The defendant firm was engaged in the brokerage business at Beaumont, Tex.; buying and selling cotton and grain on commission. B. E. Moore, one of the members of the firm, was a member of the New Orleans Cotton Exchange. The rules of the last-named concern provide that only members could operate on the floors of the exchange, and that all contracts for future delivery must provide for the actual delivery of the goods bought when the contract matured. Plaintiff authorized the firm, through its representative, B. E. Moore, to purchase for him a certain number of bales of cotton, to be delivered at a named time in the future. Plaintiff placed with the firm the necessary margin or earnest money. The firm became the agent of plaintiff for a stipulated commission. Moore, acting according to these instructions, made the purchase on the New Orleans Cotton Exchange. Some time thereafter, but prior to delivery day, Moore, without authority from plaintiff, and without his knowledge, sold plaintiff's contract at a profit of $883 over what it cost plaintiff. This sale of plaintiff's contract was also made on the New Orleans Cotton Exchange. Later still, but prior to delivery day, plaintiff notified his brokers, the defendants, that he wished his contract sold. They then reported to him the sale they had made, and sent him the draft in question to cover his profits, which they had actually collected, and were holding. The bank on which the draft was drawn refused to honor it because defendants had no funds on deposit with it. Plaintiff then brought this suit. The facts thus far are undisputed.

We may concede that the contract made on the floor of the New Orleans Cotton Exchange by the defendants for plaintiff was a gambling contract, yet the judgment cannot stand. It is settled law that the courts will not enforce gambling contracts, but will leave the parties where they are found. But it has been determined with equal clearness that the fruit of a gambling venture is property about which the parties will be allowed to litigate. The courts will enforce no wagering contract, nor render any judgment based upon its terms. But when a wagering contract has been executed, and its fruits paid to the agent of the winner, the agent cannot hold it against his principal. Floyd v: Patterson, 72 Tex. 205, 10 S. W. 526, 13 Am. St. Rep. 787, and authorities cited. Applying these rules to the case at hand, it becomes clear that the judgment of the trial court is wrong. The plaintiff hired defendants, as brokers, to make a contract for him. They did so for a stipulated wage. They sold his contract for a profit, which they now hold. The court, in determining this controversy, is not called on to inquire into the nature of the contract

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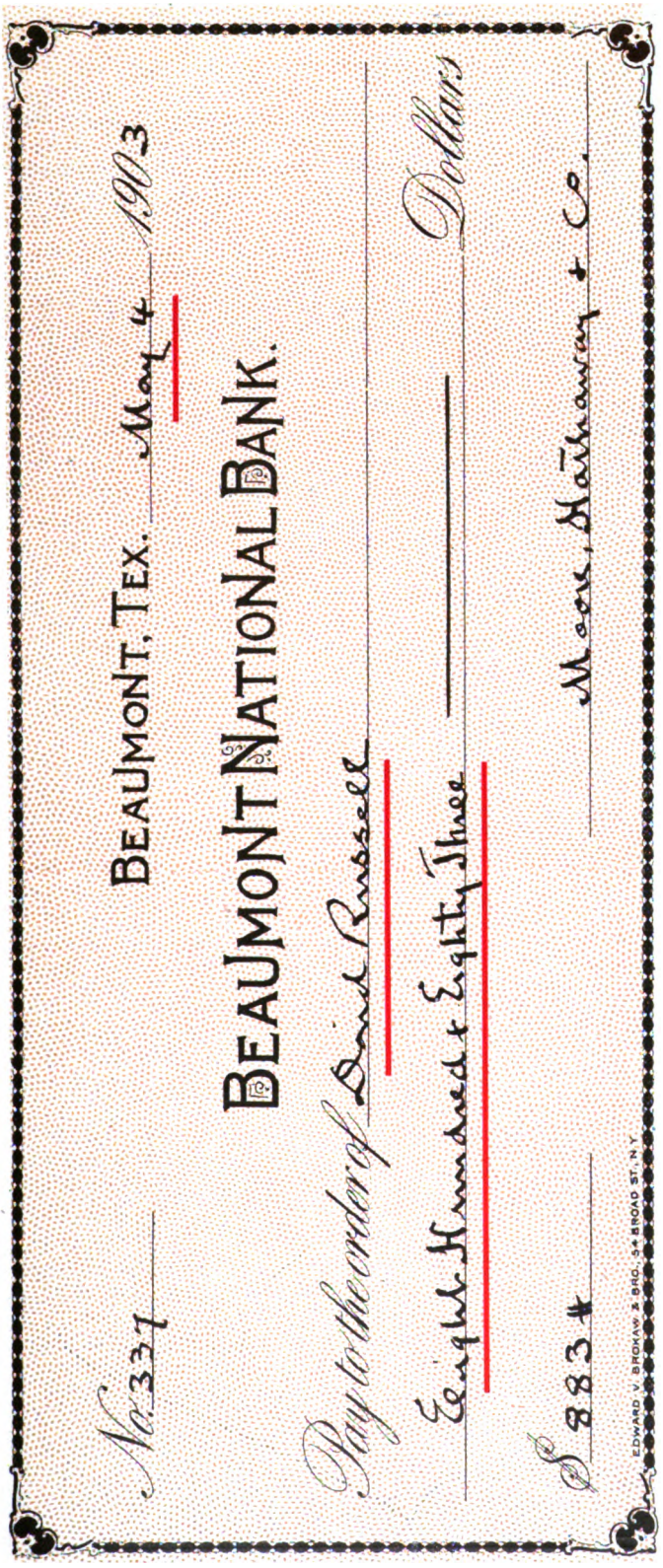
B. 47. Gaming Contract : Validity of Check Given for Profits.



No. 337 Beaumont, Tex. May 4 1903

BEAUMONT NATIONAL BANK.

Pay to the order of Bond Russell

Eighty Thousand Eight Hundred and Eighty Three Dollars

$ 80883 Means, Nathaniel & Co.

EDWARD V. BROWN & BRO., 54 BROAD ST., N.Y.

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Moore, Hathaway & Co., the drawers of this check, which was not paid for lack of funds, were brokers in Beaumont, Tex., buying and selling cotton and grain on commission. One of the partners, Moore, was a member of the New Orleans Cotton Exchange. Russell, the payee of this check, deposited a margin with Moore, H. & Co., and ordered them to buy cotton for him for future delivery on the New Orleans Cotton Exchange. The order was placed and before the deal matured the brokers, without Russell's knowledge, sold it out at a profit of $883, for which they subsequently sent him this check, which was not paid. Russell then sued the firm on the check. The deal on the New Orleans Cotton Exchange was held to be a gambling contract and the trial judge held that the check could not be enforced against the drawers. The appellate court held that it could, and said in part: "We may concede that the contract made on the floor of the New Orleans Cotton Exchange by the defendants for plaintiff was a gambling contract, yet the judgment cannot stand. It is settled law that the courts will not enforce gambling contracts, but will leave the parties where they are found. But it has been determined with equal clearness that the fruit of a gambling venture is property about which the parties will be allowed to litigate. The courts will enforce no wagering contract, nor render any judgment based upon its terms. But when a wagering contract has been executed and its fruits paid to the agent of the winner, the agent cannot hold it against his principal. . . . Applying these rules to the case at hand, it becomes clear that the judgment of the trial court is wrong. The plaintiff hired defendants, as brokers, to make a contract for him. They did so for a stipulated wage. They sold his contract for a profit which they now hold.

The court in determining this controversy is not called on to inquire into the nature of the contract thus sold. The inquiry stops when it is ascertained that defendants have collected money for plaintiff which they have refused to pay over."

McMaster's Com. Cases, Vol. 1905, 84 S. W. 273.

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thus sold. The inquiry stops when it is ascertained that defendants have collected money for plaintiff which they refuse to pay over.

The judgment of the trial court is reversed, and judgment here rendered that plaintiff recover of defendant firm and the individual members thereof the amount of the draft, with interest and costs.

Reversed and rendered.

THIRD NATIONAL BANK OF CUMBERLAND, MD. v. LABORINGMAN'S MERCANTILE & MFG. CO. et al.*

49 S. E. 544.

(Supreme Court of Appeals of West Virginia. December 13, 1904.)

CORPORATIONS — AUTHORITY OF PRESIDENT — RATIFICATION BY DIRECTORS — NOTES OF CORPORATION.

1. The president of a corporation has no inherent authority, by virtue of his office, to execute a negotiable note which will bind the corporation.

2. The directors of a corporation may ratify any act done or contract made by its president without authority, which they could have authorized him to do or make.

3. The authority of an officer of a corporation to do a particular act may be inferred from proof of his habitual doing of such acts, with the acquiescence of the directors of the corporation. And where no such acts are proven, if any act or contract of such officer, made without authority, is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully as if the officer had been expressly authorized to do the act or make the contract.

4. M., as president of the defendant corporation, without authority, made the negotiable note of the corporation; had it discounted by the plaintiff bank, and the proceeds thereof credited to the bank account of defendant. The proceeds of the note so deposited were by direction of M. credited on the books of defendant to an account due it from another company, of which M. was manager, and for which indebtedness he was liable to defendant. Defendant then, by its checks drawn on this fund in bank by its manager in favor of various wholesale houses, its creditors, paid out the same; but all of these transactions were, at the times thereof, unknown to the directors of the company, but were afterwards brought to their notice. The defendant failed to return to the bank the money, the benefit of which it had thus received, when its receipt had become known to defendant's directors. Held, that the failure of the defendant to return to the bank the money so received by it, when its receipt had become known to its directors, was a ratification of the execution and use of the note by Murphy as aforesaid.

5. It is a general principle, which applies without regard to the mode of ratification, that a voidable engagement, made by one assuming to act as agent, cannot be ratified in part, so far as it is beneficial to the principal, and repudiated so far as it is detrimental to him.

(Syllabus by the Court.)

Error to Circuit Court, Tucker county; John Homer Holt, Judge.

Action by the Third National Bank of Cumberland, Md., against the Laboringman's Mercantile & Manufacturing Company and others. Judgment for defendant company, and plaintiff brings error. Reversed.

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Cunningham & Stallings, for plaintiff in error. C. O. Strieby, for defendants in error.

MILLER, J. The Third National Bank of Cumberland, Md., a corporation organized under the laws of the United States, commenced its action in debt in the Circuit Court of Tucker county against the Laboringman's Mercantile & Manufacturing Company, a corporation organized under the laws of the State of West Virginia, P. M. Murphy, president, P. M. Murphy, N. B. Twigg, M. M. Phelps, W. E. Patterson, E. S. Muse, J. B Guinard, F M Houser, J W. Baker, Samuel Buser, B. A. Stuckey, and Geo. W. Everett, for the recovery of $1,000 debt, with $2.79, protest charges, and interest, and at the August rules, 1901, filed its declaration therein, in which it is alleged that the defendant company, by P. M. Murphy, its president, made its certain negotiable note in writing, dated the 29th day of March, 1901, and subscribed its name thereto, as follows, to wit, "Laboringman's Mer. & Mfg. Co.," by P. M. Murphy, president, thereby meaning the Laboringman's Mercantile & Manufacturing Company, whereby it promised, three months after date, to pay to the order of P. M. Murphy, president, $1,000, at the Third National Bank of Cumberland, Md., without defalcation, for value received; that said P. M. Murphy, president, before the maturity of the note, indorsed the same to P. M. Murphy, and in like manner Murphy indorsed it to Twigg; that all of the defendants indorsed the note in the order as above named; that said Geo. W. Everett indorsed it to the plaintiff bank; and that at its maturity the note was protested for nonpayment. At the November term, 1901, of the court, on motion of the plaintiff, the action was abated as to all of the said indorsers of the note, including P. M. Murphy, president, and was ordered to be proceeded in against the defendant the Laboringman's Mercantile & Manufacturing Company. The plaintiff at the January rules, 1902, filed in the clerk's office an amended declaration against the defendant corporation alone, but otherwise substantially in the language of its original declaration. At the March term, 1902, of the court, the defendant company entered its plea of nil debet, and it also filed two several special pleas in writing, both verified by affidavit. One of said special pleas avers that the defendant did not make or deliver for discount the note sued on and described in the declaration, and that said note was not discounted by plaintiff for defendant. The other plea avers that the defendant company did not make or deliver for discount the note sued on and described in the declaration, and that said note was not discounted by the plaintiff for the defendant; that P. M. Murphy never had the authority of the defendant to make or deliver the said note for discount to the plaintiff; that N. B. Twigg and the others named therein, whose names appear on the back of the note, never indorsed the same; that the plaintiff never discounted the note for defendant; and that the defendant never became liable to pay the plaintiff the sum of money in the said note specified. Issue was joined on each of the aforesaid pleas, and at the same term a trial of said action was had before a jury. At the conclusion of the evidence the defendant demurred thereto, in which demurrer the plaintiff joined, and the jury found for the plaintiff the sum of $1,042, if the law, upon the demurrer to the evidence, be for the plaintiff; but,

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B. 48. Corporate Note: Bona Fide Holder: Powers of Officer.

$1000 Cumberland Md March 20 1901

Three Months after date we promise to pay to the order of P. M. Murphy President

One Thousand ——— Dollars

at Third National Bank of Cumberland

Value received. Laboring mens Mer and Mfg Co

By P. M. Murphy President

No. ——— Due ———

CRANE'S BOND

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P. M. Murphy was president of the Laboring Man's Mercantile and Manufacturing Company, a corporation with numerous stockholders and many directors, carrying on a general mercantile business. The by-laws of the company stated, among other duties of the president, that he was to sign all contracts for the company, but the by-laws were silent as to the issuing of the commercial paper of the company. The company at one time authorized the borrowing of $3,000, and directed the president and the secretary to execute a note for it, which they did. This is the only note the directors specifically authorized. Murphy made other notes in the name of the company, signed by himself as president, of which the company had no notice. He made this note, which was indorsed individually by some of the directors, and the proceeds of which were placed to the credit of the company in the bank, which discounted it and were checked out in the regular course of business to the creditors of the company by the manager. Before this note came due Murphy, who was largely in debt to the company, absconded. The note was not paid and the bank brought an action on it against the company. The bank was beaten in the lower court on the ground that Murphy could not bind the company by executing its promissory notes, but it won on appeal on the ground that the company had the benefit of the proceeds of the note and did not return the money when it heard of the unauthorized execution of the note, thus ratifying it.

If the company had not received the direct proceeds of the note it would not have been liable.

The court said in part: "The president of a bank or of any other corporation has, except to the very limited extent which we have above indicated, no inherent authority by virtue of his office to enter into contracts or agreements which will bind the corporation."

"In the absence of any thing in the act of incorporation bestowing special power upon the president, he has from his mere official station, no more control over the corporate property and funds than any other director."

"The president and secretary have no inherent power to execute notes in the name of the corporation."

"Where the president of a corporation executes in its behalf and within the scope of its charter, a contract which requires the concurrence of the board of directors and the board, knowing that he has done so does not dissent within a reasonable time, it will be presumed to have ratified the act." This would be doubly so if the corporation had the benefits of the contract.

But neither the directors nor the stockholders can ratify a contract which they had no legal power to make. Thus they cannot authorize or ratify an accommodation indorsement or consent that the corporation be bound by it unless that power is conferred by the charter. 116 N. Y. 281, 58 N. E. 1017, 61 S. W. 572. In this latter case the accommodation indorsement was made in pursuance of a resolution passed at a stockholders' meeting. In the New York case a bonus was received by the company for making such indorsement.

McMaster's Com. Cases, Vol. 1905, 49 S. E. 544.

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if the law be for the defendant, they found for the defendant. The court sustained defendant's demurrer, and gave judgment against the plaintiff for costs. To this judgment the plaintiff excepted, and obtained from this court a writ of error and supersedeas to the same.

Upon the issues thus made, the burden was upon the plaintiff bank to prove the authority of Murphy to make said note for the company.

It appears from the record that the defendant did a general mercantile business at Davis, Tucker county, W. Va. Said P. M. Murphy was at the date of the note in controversy, and had been for some time prior thereto, president, W. E. Patterson, secretary and a director, and W. W. Golightly, general manager, of the company. Who the other directors were, is not shown. Its stockholders numbered about 100. There is no evidence in the record showing the extent of the authority of the president of the company, except a by-law in these words: "The president shall preside at all meetings of the stockholders and board of directors, call all special meetings, sign minutes of all meetings; all contracts made by the company, and all certificates of stock." Murphy, as it is shown, claiming to act as president, executed the note in controversy, payable to himself as president, and then indorsed as such, and also individually, and presented it, with the other names indorsed thereon, some of which on the trial proved to be forgeries, at the Third National Bank of Cumberland; had the same discounted, by the bank, and the proceeds thereof placed to the credit of the defendant. It is not shown that any of the directors or officers of the company had at that time any knowledge of the making or discounting of the note. Said W. E. Patterson, J. B. Guinard, and Geo. W. Everett, stockholders in said company, whose names appear on the back of the note, testified that they did not indorse and did not authorize any person to indorse or put their respective names upon said note for them, and that they had not seen the note until the day of the trial. H. E. Weber, president of the bank, testified that the note sued on came into possession of the bank through Murphy, as president of the defendant company; that it was discounted; that the proceeds thereof were placed to the credit of the defendant; that the bank then and prior thereto had an open account with the defendant; that the "note was signed by Murphy, president, brought to us by Murphy, president, and Mr. Murphy is the only person we ever saw or knew, of the company, until we came up here to try this case." He further testified that on May 19, 1899, Murphy came to the bank, represented himself to be the president of the defendant company, asked to open an account with the bank, and at the time deposited some money therein, and said that later he would probably want a loan of $3,000; that on the 26th day of May, a week later, and almost two years before the note in controversy was made, the bank discounted a $3,000 note for the company, and placed its proceeds to the credit of defendant. It further appears that the proceeds of the two notes and some deposits, amounting to $1,400 or $1,500, placed in the bank by Murphy and Golightly for the company, were checked out and paid to wholesale merchants who were creditors of the defendant, in checks in their favor drawn on said bank; but nothing is shown by the records of the company or otherwise to prove that the directors or other officers of the company, except Murphy and Golightly, had any notice or knowledge of the aforesaid transactions. It is also shown that at the time of the execution and discount of the $1,000 note there was another

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company at Davis, called the Davis Poultry Company, of which Murphy was manager; that this last-named company owed the Laboringman's Mercantile & Manufacturing Company about $1,044, for which said Murphy was liable; that Murphy told Golightly that he [Murphy] had deposited in the plaintiff bank, to the credit of defendant, $1,000 of his own money, which should be placed on the books of the defendant company to the credit of the Davis Poultry Company; and that the credit of $1,000 to the poultry company was accordingly made on the books of the defendant company, leaving a balance of $44.73 due to defendant from the poultry company. It also appears that Murphy told said W. E. Patterson that he had received some money from the estate of his [Murphy's] father; that he had deposited $1,000 thereof to the credit of defendant company, which was to be applied by defendant to its account against the Davis Poultry Company, and on Murphy's private account as manager of the last-named company. This information was communicated by Patterson to Golightly. It is further shown that one George Thompson loaned to Murphy for defendant company $200 on the 15th day of January, 1901, and $500 on the 2d day of February, 1901; that Thompson took no notes or other written evidence for these loans; that they were repaid to him with the checks of the defendant company, signed by Murphy, as treasurer, and countersigned by Golightly, as manager; that F. A Cruikshank, on the 12th day of February, 1901, loaned to Murphy $200 for the defendant company, for which Murphy gave the company's note, signed by him as president, which note was afterwards paid to Cruikshank, at his own house, in currency, by Murphy, but not until after the note had been placed in the hands of A. R. Stalling, an attorney, for collection, and after Murphy had been notified of that fact. Murphy then requested Cruikshank to take the note out of the lawyer's hands, and he [Murphy] would pay it. In December, 1900, or January, 1901, A. Thompson loaned $400 to Murphy, as the president of defendant company, and received its note therefor from Murphy, which has never been paid; the company having repudiated it. In May, 1901, J. W. Baker loaned to Murphy $300, and received for it the note of the defendant company, executed by Murphy, and payable at its office, which has not been paid. It is shown by the record book of the defendant, introduced in evidence, that the $3,000 note and loan obtained thereon were authorized by the company, and that the note of the company therefor, in pursuance of such authorization, was executed by Murphy, as president, and by Patterson, as secretary. There is no pretense that any officer of the company except Murphy had any knowledge of any of the other loans. After discounting the $1,000 note, and before it fell due, Murphy left the country; being largely in debt to the defendant. He was not served with summons in said action, and was not present at the trial thereof. The evidence further shows that the proceeds of the $1,000 note were credited by the bank on its books to defendant company, and by its checks drawn by W. W. Golightly, its manager, paid out through the bank to the creditors of the company.

The question presented is, did the court err in sustaining the demurrer of defendant to the evidence, and in rendering judgment thereon in favor of the defendant? It is conceded by counsel for the plaintiff in error that Murphy, as president of the Laboringman's

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Mercantile & Manufacturing Company, had no inherent authority to execute the note for the company. In First National Bank v. Kimberlands, 16 W. Va. 579, Greene, J., says: "The president of a bank or of any other corporation has, except to the very limited extent which we have above indicated, no inherent authority by virtue of his office to enter into contracts or agreements which will bind the corporation." In Stokes v. New Jersey Pottery Co., 46 N. J. Law, 237, 241, it is held: "In the absence of anything in the act of incorporation bestowing especial power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must therefore be derived from the board of directors." Cook on Corporations, vol. 2, p. 1506, note, says: "The president and secretary have no inherent power to execute notes in the name of the corporation." It is not contended by the bank that Murphy had express authority from his company or its directors to execute or discount the note in controversy

Plaintiff in error contends that, notwithstanding the unauthorized execution and discount of the note by Murphy, the company ratified his acts by holding him out as its agent, and by retaining the proceeds of the note. Morawetz on Priv. Cor., vol. 2, p. 595, says: "The doctrine of ratification must not be confounded with the doctrine of estoppel by acquiescence or laches. Actual ratification of an act involves a voluntary adoption of the act. Full knowledge of the act assented to, and an intention to adopt the act as the act of the corporation, are therefore essential. A corporation can never be charged with an unauthorized act of its agents on the sole ground that the act has been ratified by the shareholders, unless the shareholders had full knowledge of the act." The same rule applies to a ratification by the directors of a corporation of the unauthorized act of an agent or officer. The case of National Bank v. Kimberlands (point 8 of syllabus), holds that "the directors of a bank may ratify any act done or contract made by the president without authority which they could have authorized him to do or make." On page 581 of the same case the court says: "Evidences of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence defines and establishes, as to the public, those powers." And this principle is equally true when applied to the president. But as the inherent power of the president is so much more limited than that of the cashier, the evidence of this character, from which the right to exercise unusual powers can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank. Not only may the authority of an officer of a corporation, as a bank, to do a particular act, be inferred from proof of his habitually doing such acts with the acquiescence of the directors of the corporation, but, where no such acts are proven, if any act or contract of such officer made without authority is subsequently ratified by the directors upon

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full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully as if the officer had been expressly authorized to do the act or make the contract. This ratification need not be shown by direct evidence that it was expressly approved by the board of directors, but such ratification may be inferred from their accepting the benefits of the act or contract; as, if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation and applied to its use, even without the knowledge of the directors, if it is not returned, when it becomes known to the directors that it has been applied to their use, such conduct would be a ratification of the contract of such president or other officer."

There is nothing in this record showing the existence of such facts as constitute a public holding out by the company that the execution and discount of the $1,000 note by Murphy was within the scope of his delegated authority, but the record book of the defendant company does show that Murphy was expressly authorized to negotiate the $3,000 note. It does not appear that the directors had knowledge at the time of any of the other loans obtained from the Thompsons, Cruikshank, and Baker. Murphy's conduct indicates an intention on his part to conceal his acts from the directors of his company. As soon as Cruikshank had placed his claim in the hands of an attorney for collection, Murphy went at once and paid the note, and took it up; fearing, no doubt, that suit might be commenced and summons served on the proper offcers of the company if he did not do so, and that this might lead to an investigation of the affairs of the company. The stockholders and directors of the Laboringman's Mercantile & Manufacturing Company were bound to take notice of the entries in its books made in the due course of its business, but no entry relating to the $1,000 note or its proceeds is shown therein. Golightly says that his company had an account against the Davis Poultry Company and Murphy, its manager, for $1,044.73; that, on request of Murphy, that account was credited with $1,000 paid by Murphy as aforesaid. This entry on the books of the company certainly would not be notice of the execution and discount by Murphy of the $1,000 note. No person except Murphy and Weber, the president of the bank, is shown to have had any knowledge of the note transaction until after the protest of the note. Murphy had not been habitually executing and discounting notes, nor borrowing money in the name of the defendant, with the knowledge or acquiescence of its directors. Neither was the execution or discount of the $1,000 note expressly ratified by the said directors, with or without full knowledge of all the circumstances of the case. But its proceeds were actually placed to the credit of defendant on the books of the bank, and appropriated by the company to its own use, by checking the same out to its creditors in payment of its debts. A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance. 10 Cyc. 1069. Where the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified the act. Id.1073. "A leading prin-

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ciple in the law relating to this subject is that where a contract is made by one assuming to act in behalf of a corporation, and for a purpose authorized by its charter, and the corporation, after knowledge of the facts attending the transaction is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act, and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole, and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; that it cannot keep the advantage while repudiating the burden; that it cannot disaffirm the contract while keeping the consideration." Id. 1078. In the case of Bank v. Kimberlands, supra, in which the facts are somewhat dissimilar to the facts in the case under consideration, the court applied the above-quoted general principle, and held that "the acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and, if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned when its receipt becomes known to the directors." The directors of the defendant company had, or should have had, notice of the execution of the note in controversy, and of its disposition to the bank by Murphy, by reason of the present action brought upon that note. But the company, having then received the benefit of the transaction, repudiated it, and did not, when sued, nor since that time, return to the plaintiff the money thus received and used by it. The failure of the defendant to return the money so received, when its receipt had become known to its directors, was and is a confirmation of the transaction.

It is suggested that, while there may be a recovery in such cases in an action of assumpsit for money had and received, this action in debt may not be maintainable, because it is alleged that defendant, by Murphy, its president, made its certain note — being the one in suit — but that the only evidence of the alleged contract of defendant is the unauthorized note upon which the action is predicated. "It is a general principle, which applies without regard to the mode of ratification, that a voidable engagement cannot be ratified in part so far as it is beneficial to the corporation, and repudiated so far as it is deleterious." 10 Cyc. 1072. Hence the receipt and use of the proceeds of the note, having been ratified by the company, by reason of its failure to return the money, when its receipt had become known to its directors, the note upon which the money was obtained from the bank was also thereby ratified.

For the reasons stated, we hold that there was and is a ratification by the company of the whole transaction, that this action in debt can be maintained by the plaintiff against the defendant company upon the note in controversy, and that the defendant is liable to the plaintiff thereon. We therefore reverse and set aside the judgment of the court below, and enter such judgment as that court ought to have entered. It is therefore considered that the defendant's demurrer to the plaintiff's evidence be, and the same is, overruled, and that the plaintiff do recover from the defendant company the said sum of $1,042 found by the jury as aforesaid, with interest thereon

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from the 13th day of March, 1902, until paid, and its costs by it in the prosecution of said action expended.

Note upon Application for a Rehearing.

Defendant insists that plaintiff had no right of action on the note, if at all, until after its execution by Murphy had been ratified by the failure of defendant to return to plaintiff the money realized thereon, and that the defendant was not required to do this until its directors had full knowledge of the transaction.

It might be inferred from an expression in the above opinion that neither the defendant nor its director had any knowledge of the note sued on, or of the disposition of its proceeds, until after the action was commenced. That feature of the case was not sufficiently discussed in the opinion, and for that reason this note is appended thereto.

The record shows that on the 1st day of July, 1901, the date of the maturity of the said $1,000 note, it was duly protested for the non-payment thereof against all of the indorsers thereof; and that written notices of protest were signed by the notary, and mailed on that day to the following named persons, informing them that the note had not been paid, payment thereof having been demanded and refused, and that they would be held responsible for the payment thereof. The said notices were under separate covers, and addressed to Davis, W. Va., to Laboringman's Mercantile & Manufacturing Company. N. B. Twigg, M. M. Phelps, W. E. Patterson, E. S. Muse, J. B. Guinard, F. M. Houser, J. W Baker, Samuel Buser, B A. Stuckey, and Geo. W. Everett.

Section 7 of chapter 51 of the Code of 1899 provides that the protest in the case of a negotiable promissory note shall be prima facie evidence of what is stated therein (or at the foot or on the back thereof, if signed by the notary) in relation to presentment, dishonor, and notice thereof. Section 8 of chapter 99 declares that the sending of a notice of protest or dishonor of any bill, note, or other negotiable instrument by or through the mails, properly addressed to the last known post office of any party, shall be deemed equivalent to personal service of the notice on such party.

J. W. Baker, whose residence was Davis, W. Va., W. E. Patterson, Geo. W. Everett, J. B. Guinard, and W. W. Golightly were witnesses on the trial, and said nothing as to the notices of protest. If the notices were not received by them, that fact could have been shown. Therefore, under the statute, without evidence to the contrary, we must hold that the above-named parties, to whom notices were mailed, had notice of the note and of its presentment and dishonor.

Fixtures: Conditional Sale: Prior Real Mortgage.

Thomas Bathgate had a real-estate mortgage on a mill property owned by James Tait.

Subsequent to the date of this mortgage Tait put certain machinery in the mill. This machinery had been purchased from the Great Western Manufacturing Company, under a conditional sale agree-

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ment by which the title to the machinery was to remain in the company until it was paid for. The machinery was not paid for. Default was made in the payments on the Bathgate mortgage and it was foreclosed. It was held that the machinery in question became affixed to the realty and that it was covered by the Bathgate mortgage, and that the lien or title of the company was subsequent to that of the Bathgate mortgage. The decision cites and quotes extensively from cases in various States. The following statement was made as to a case decided by the Massachusetts courts, and also as to one decided by the Illinois courts:

"In the case of Hopewell Mills v. Taunton Savings Bank, 150 Mass. 521, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235, which was a case of machinery placed in a cotton mill after the date of a real-estate mortgage, it was brought up for decision on an agreed statement of facts. A description of each machine was given, the character of its annexation, and how it is run. The attention of the court is directed to the statement to the effect that these machines were not especially built for use in this particular mill, and all could equally well have been used for the same purpose in any other cotton mill having the ordinary room to hold it and power to operate it. The court in that case said: 'The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position, but such a contract cannot affect the rights of a mortgagee or of an innocent purchaser without notice of it. . . . The building mortgaged was a cotton mill, and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy, and there is much to indicate that, while there were changes in the kind of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building, until they should be worn out, or until, for some unforeseen cause, the real estate should be changed and put to a different use. Of most of them it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use, but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence.' The same doctrine is laid down by the Massachusetts Supreme Court in the cases of Thompson v. Vinton, 121 Mass. 139; Hunt v. Iron Co., 97 Mass. 279; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Bank v. Machine Works, 127 Mass. 542.

"In the Appellate Court of Illinois, in the case of Fifield & Morris v. Farmers' National Bank, 47 Ill. App., at page 119, it is held: 'The intention of the parties has much to do with the question whether certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts.' The facts of the above case are so closely similar to the facts at bar as to make it almost a remarkable coincidence. On July 1, 1891, certain citizens of the village of Winonette entered into a written agreement with one Richard Day by which they agreed to convey to said Day certain real property in said village and pay him $6,000. Day agreed

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on his part to erect on said lots a shoe factory building, and to put in the necessary machinery and equip the same for a shoe factory. By way of complying with his part of the contract, Day purchased of Fifield & Morse machinery for the shoe factory, a list of which is given in the report (pages 119 and 120). The weight of the machinery (it being all that was necessary for the fitting out of a complete shoe factory) varied from 20 pounds to 1,100 pounds, part of it fastened to the floor, or planks fastened to the floor by lag screws, and also bolted to the shafting overhead. Part of the machines were fastened to benches by wood screws, and bolted to the shafting, such benches being nailed to the floor. The machinery was all placed in the building under Day's direction, and was put in the building for the purpose of manufacturing shoes, and was all used for that purpose, and increased the value of the plant. The record showed in that case, as it did in the case at bar, that this machinery was essential to the plant, and was especially adapted for manufacturing shoes, and necessary for that purpose; and, when it was placed in the building, it was not with the purpose of taking it out. Fifield & Morse, the vendors of the machinery, knew for what purpose the machines were sold, and that they would be attached to the factory building in the manner in which they were. The machinery was sold on thirty, sixty, and ninety days' time, with the proviso that the machinery should remain their property until paid for. Day, having failed on the 23d of November, 1891, gave a trust deed or mortgage to the lots, describing the lots by number, but without making any reference in the mortgage to the machinery. On the 24th of November the Fifield-Morse company started a replevin suit for the machinery which they had sold. Under an agreement among all the parties, the property was sold, and the receiver was ordered to keep out a certain sum, to be distributed as ordered by the court. Under this state of facts, the court said: 'The sole question for our decision in this case is whether or not the machinery in question, placed in and attached to the manufacturing building in the manner shown by the testimony, and under all the circumstances, became fixtures to the real estate and passed by the trust deed of Day to appellee. The question is one not entirely free from doubt, and the authorities, as might be expected, are not altogether in harmony. In the consideration of the case, we will first notice the nature of appellant's contract with Day in regard to the sale of the machinery. They undertook to retain title in themselves, secret to all the world save to the parties to the contract, and thereby give an appearance of ownership in Day to the machines, when in fact he had none. Contracts of this nature are disapproved by courts and judges, and held void as to third parties. The Supreme Court of this State has often passed on the question, so holding them void as to third parties. Jennings v. Gage, 13 Ill. 610, 56 Am. Dec. 476; Brundage v. Camp, 21 Ill. 330; Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455; Hervey v. R. I. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309. But in addition to this, appellants allowed the machines to be attached to the freehold, and used in the building as a part of the plant; and this, too, under a deed to Day that required the machinery not to be removed within five years. We think, under those circumstances, the appellants in equity ought to be held as having waived the secret

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lien, and consented to the machinery being used as a part of the manufacturing plant. If this should not be so, then Day would be placed in an appearance of affluence by which he could procure credit and deceive the public. . . . It will be observed that appellants did not place the machinery in the factory building, but it was done by Day, who undoubtedly placed it there with the intention of its becoming a part of the factory, and this was at least impliedly assented by the appellants. The fact, if it be a fact, that appellants claimed these machines before the taking of the real estate mortgage by appellee, can make no difference. Having allowed the machines to be placed in the building, appellants ought not to be allowed, to change their attitude when creditors were pressing for security and payment."

(See Decision No. 845.)

Interest: Rate After Maturity of Note.

The legal rate of interest in Pennsylvania is six per cent. A note which was in litigation before the Supreme Court of that State, read, "With four per cent. interest, from date until paid, payable annually." The note was not paid at maturity, and the court said that it would draw interest at the rate of four per cent, until maturity, and thereafter the rate would be six per cent. The court said in part:

"It may be added, and it is but proper to say, that, where the interest on a promissory note is fixed at less than six per cent., such rate applies up to maturity of the notes, and the words 'until paid' relate to such maturity, and thereafter the legal rate of six per cent. will prevail."

59 Atl. 1098.

Landlord and Tenant: Injury of Passer-by: Liability of Owner of Property.

April 1, 1903, Julia P. A. Anthony owned a dwelling house in the city of Providence. The house was located flush to the sidewalk, and to the edge of the road, and overhanging the sidewalk was a rotten, decayed, weak and warped rain trough.

On the first of April the owner leased these premises to the Lederer Realty Corporation for ninety-five years. About a year thereafter, a passer-by was injured, by reason of this defective rain trough. In the lease of the premises the tenant "covenants to hold the (owner) harmless and indemnified against all loss, costs, damages, etc., under any claims by any third person, based upon the neglect or default of the (tenant), . . . or in the erection, maintenance, or use of any building, structure, fixture, etc., thereon, and that it will keep all buildings in good repair, ordinary wear excepted." The person injured sued the owner of the property for damages, and she was held liable on the ground that the defect which caused

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the injury existed when the property was leased. Had the defect arisen after the tenant went into possession, the tenant, and the tenant only, would have been liable:

The court said in part:

"While there is much discussion in the books and some conflict of authority regarding the liability of a landlord for personal injuries sustained by a stranger by reason of defects in the premises let, yet the following propositions of law, which were adopted by this court in Joyce v. Martin, 15 R. I. 558, 10 Atl. 620, relating thereto, seem to be well established, viz,: 'First. Where property is demised, and at the time of the demise is not a nuisance, and becomes so only by act of the tenant while in his possession, and injury happens during such possession, the owner is not liable. Second. But where the owner leases premises which are a nuisance, or must in the nature of things become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such nuisance.' The law as thus stated was followed in Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859, and affirmed in Henson v. Beckwith, 20 R. I. 165, 37 Atl. 702, 38 L. R. A. 716, 78 Am. St. Rep. 847.

"In addition to these two propositions of law, another, and one which is well supported by the modern authorities, both English and American, is this, viz.: That where a landlord demises premises which are so defective and out of repair as to be a nuisance at the time of the demise, he is responsible to third persons for injuries resulting from the dangerous condition of the premises, notwithstanding the tenant is bound under the lease to keep the premises in proper repair.

"In Mr. Taylor's standard work on Landlord and Tenant, as revised by Buswell (9th Ed.), § 175, the law is well stated in the following language: 'The landlord's liabilities in respect of possession are in general suspended as soon as the tennant commences his occupation. For where there is neither privity of estate nor privity of contract, the owner of premises is not liable for injuries sustained by third persons, unless by invitation, express or implied, the owner induces them to come upon the premises. But where injuries result to a third person from the faulty or defective construction of premises, or from their runious condition at the time of the demise, or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary use of the premises, the landlord is still liable notwithstanding the lease, although, as between lessor and lessee, the latter is presumably liable for a nuisance upon the leased premises.'

"In Moody v. Mayor, etc., 43 Barb. 282, it is held that the owners of a pier are liable for injuries sustained by an individual by reason of its defective construction and dangerous condition, notwithstanding the premises are at the time in the possession of a tenant who has covenanted to keep the pier in repair, if defects existed when the owners leased the property to him. In that case the court said: 'The injury to the plaintiff in the present case arose not from any want of repairs arising out of the use, but from the defective construction and dangerous condition, of the pier. The defendants,

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the owners, let the pier 'with the defect complained of,' and are consequently liable for the injury sustained by the plaintiff.'

"In Ingwersen v. Rankin et al., 47 N. J. Law, 18, 54 Am. Rep. 109, it is held that he who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the the nuisance is. Such liability will exist although the tenant, by the demise, stipulates to keep the premises in repair. In delivering the opinion of the court in that case, Magie, J., said: 'I am unable to bring my mind to the conclusion that the landlord's liability in such case will be discharged by reason of his having required the tenant to stipulate to keep the demised premises in repair. Such a view seems to have been takin in Pretty v. Bickmore, L. R. 8 C. P. 401, which case was followed and approved in Gwinnell v. Eamer, L. R. 10 C. P. 658. In my judgment is is impossible to reconcile those cases with the principle established by the leading cases or with reason. For it is absurd to say that one who is liable for a continuing nuisance may escape that liability by merely taking a contract from another to remedy the nuisance by repairs. The tenant cannot, either by reason of his tenancy or by reason of his contract to repair, be interposed between the person injured by the nuisance and the landlord liable therefor. Shearm & R. Negl., § 502.'

"In Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, Earl, J., in an elaborate opinion relating to the respective liabilities of landlord and tenant for a nuisance existing upon leased premises, said, amongst other things: 'It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and prima facie attaches. Pretty v. Bickmore, L. R. 8 C. P. 401; Kirby v. Boylston Market Ass'n, 14 Gray, 249, 74 Am. Dec. 682; City of Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Inhabitants of Oakham v. Holbrook, 11 Cush. 299. The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. In all such cases I believe there is now no dispute that the owner would be liable. But an owner who has demised premises for a term during which they become runious, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs he is not responsible for the nuisance during the term. Pretty v. Bickmore, supra; Gwinnell v. Eamer, L. R. 10 C. P. 658; Leonard v. Storer, 115 Mass. 86, 15 Am. Rep. 76. But these cases are not in entire harmony with the decisions in our own State, and probably would not now be generally received as authority in this country or in England.' The learned judge also quotes from the opinion of the Supreme Court of Maine (Nugent v. Railroad, 80 Me. 62–77, 12 Atl. 797, 802, 6 Am. St. Rep. 151) the following: 'It is set-

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tled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them, for by the letting for profit he authorized a continuance of the condition they were in when he let them, and is therefore guilty of misfeasance.' In support of this doctrine Judge Earl cites Joyce v. Martin, 15 R. I. 558, 10 Atl. 620.

"The case of Samuelson v. Cleveland Iron Mining Co., 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456, which is relied on by defendant's counsel, does not seem to us, when read as a whole, to be in conflict with the view which we have taken, but on the contrary, by implication, to sustain it. For there it was not shown that the roof of the mine by which the injury was caused was in a dangerous condition when possession of the mine was delivered under the contract, but the evidence tended to prove the contrary. And in view of that fact Cooley, J., said: 'It remains to be seen, then, whether a personal duty to guard against danger to the miners was still incumbent upon the defendant as owner of the mine, and was continuous while the mine was being worked by the contractors. Mere ownership of the mine can certainly impose no such duty. The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third persons.

"The late case of Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188, also relied on by defendant's counsel, is practically to the same effect, as the court, Mr. Chief Justice Beard delivering the opinion, says: 'There is no doubt that, should a landowner erect or create a nuisance upon his land, he cannot rid himself of liability arising therefrom by a demise of the property to another. This was laid down as early as Roswell v. Prior, 2 Salk. 459 (s. c. 12 Mod. 639), where it is said that: "Before his assignment over he was liable to all consequential damages, and it is not in his power to discharge himself by granting it over, more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance may continue, and has a recompense, viz., the rent for the same."' See, also, Knauss v. Brua, 107 Pa. 85; Amer. & Eng. Encyc. of Law. (2d Ed.), vol. 18, 238, 239; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Marshall v. Heard, 59 Tex. 266.

"We have examined the other cases cited by counsel for the defendant Anthony, and while some of them doubtless sustain the position taken by him, yet we are of opinion that the decided weight of authority, as well as the better reason, sustains the position which we have have taken, and hence we do not deem it necessary to further pursue our investigation upon this branch of the case.

"But counsel for the defendant Anthony argue that, in view of the fact that the lease in question is for the very long and unusual term of ninety-five years, and that no provision is made therein for any re-entry by the lessor for condition broken, a different rule should

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apply from that which obtains in ordinary cases of letting. In other words he contends that a lease for ninety-five years is in substance an absolute conveyance of the property for that time, during which the lessee can deal with it as it sees fit, and hence that no liability can attach to the lessor by reason of any accident which has happened since said demise. He says: 'This lease was far more nearly analogous to an absolute conveyance than to an ordinary short lease, so far as any liability of the lessor is concerned. Had it been an absolute conveyance, the grantor would have been liable only for damages suffered prior to the grant, and not for any occurring afterwards. If the ground of a lessor's continued liability is only that the lease contemplates the continuance of the nuisance or defect — that is, that the premises are let for use in the same condition they are in at the letting — then this case falls within the principal of an absolute grant, and not within the reason of the exception holding the the lessor liable.' While there is some force in this argument, we do not think it is controlling. It is true that the lease is somewhat unusual in the length of the term which it covers, and also in that it does not provide that the lessor may re-enter and determine the same for condition broken. But it nevertheless very carefully and fully protects all the rights of the lessor in other and equally effective ways. For instance: While perhaps the lessor cannot re-enter and take possession for nonpayment of rent, yet it is expressly provided that in such case she may proceed to sell the premises, including any buildings and improvements which the lessee shall place thereon, and thereby make herself whole on account of any arrears of rent or of any other failure on the part of her tenant to fulfill his contract. So that it is in her power to promptly dispossess the lessee of the premises and of all rights which it may have under its lease. Ample remedies in favor of the lessor are also provided for other breaches of the covenant contained in the lease, to be performed on the part of the lessee and hence, notwithstanding the great number of years for which it is given, the lessor is practically as fully and completely protected in all her rights as though she had reserved the ordinary right of re-entry for condition broken. And having such rights as those referred to, we fail to see why she does not continue to exercise, to all practical intents and purposes, the same control over the premises as though the lease were for a shorter term and contained the ordinary provisions relating to re-entry. Nor do we see, in view of the rights retained by the lessor, and the continued interest which she has in the premises as owner and landlord, that any different rule should obtain in her favor regarding the dangerous condition of the premises, or any part thereof, at the time of the execution of the lease, than ordinarily obtains in other cases of letting. In short, we are of opinion that, where real estate is in such a condition as to constitute it a public nuisance at the time of the letting, the law is that the lessor thereby renders himself liable for injuries sustained by a stranger under such circumstances as are set out in the declaration before us, regardless of the length of time for which the lease is to run. That the premises in question at the time of the letting thereof were, and for a considerable time previous thereto had been, a public nuisance — assuming that the allegations contained in plaintiff's declaration are true, as we must on

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demurrer — there can be no doubt. For it may be stated as a general proposition that every use and enjoyment by one of his own property in such a manner as to violate the rights of the public in an essential degree is a public nuisance. And to maintain a weak, warped, and rotten eaves trough twenty feet above and projecting over the sidewalk of a public street in the city of Providence, which is a menace to every person passing along said highway, is clearly violative of the rights of the public. And whoever is injured by reason of the existence of such a nuisance while lawfully using such sidewalk, as the plaintiff was at the time of the accident in question, has a remedy therefor against the person or persons responsible for the dangerous condition of the premises.

"As to the point made by counsel for defendant Anthony, that the proximate cause of the injury to plaintiff was the sliding of the ice and snow from the roof, we need only say that, even conceding that this was a proximate cause of the accident, yet the giving way of the eaves trough was also a proximate cause thereof, and, indeed, the most proximate cause in point of time. And it is well settled that, where two causes combine to produce the injury, both in their nature proximate, one of them being a natural cause, for which neither party is responsible, and the other being one for which the defendant is responsible, it is no defense that the former cause concurred with the latter in producing the injury.

"As to the demurrer interposed by the defendant Lederer Realty Corporation, we do not understand that it is relied on by counsel for that corporation as being a substantial demurrer, but only one relating to formal defects. And, this being so, it should be disposed of by the common pleas division. Miller v. Boyden, 22 R. I. 441, 48 Atl. 444. But in view of the peculiar circumstances of the case, and the wish of counsel that all the questions raised by the respective parties may be promptly disposed of, we have examined the particular grounds of the last-mentioned demurrer, and do not find that they are well taken.

"As we are clearly of opinion, under the authorities hereinbefore cited, that where there has been a public nuisance of continued existence upon the demised premises, as is shown to have been the case here, the lessor and lessee may both be held liable for damages resulting therefrom (Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Joyce v. Martin, supra), our conclusion is that the demurrers of the defendants, respectively, to the plaintiff's declaration must be overruled, and that the plaintiff's demurrer to the defendant Anthony's special plea must be sustained.

"Case remanded to the common pleas division for further proceedings in accordance with this opinion."

59 At. 855.

Landlord and Tenant: Failure of Landlord to Repair: Remedy of Tenant.

Martha S. Hill leased to Harry Rubens her country seat near Chicago, for the term of six months, at $833.33 per month. In the written lease the owner agreed to put the premises in habitable condition.

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Rubens went into possession of the property and paid two monthly instalments of rent. He refused to pay the other instalments, on the ground that the owner had not put the premises in a habitable condition. The court held that if it was true that the owner had neglected or refused to put the premises in a habitable condition, yet, under the condition of the lease, this would not excuse the failure to pay rent, -- the tenant's remedy in such cases being an action for damages or a counterclaim for damages when the rent is demanded. The agreement here to put the premises in a habitable condition was held to be an independent covenant. The difference between such a covenant, which will not excuse failure to pay any rent, and a condition precedent, which may excuse such failure is set forth in the decision, — a part of which follows:

"The lease recites 'that the party of the first part [appellee] for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part [appellant], has demised and leased to the party of the second part the premises [as above described], together with all the buildings and improvements thereon, to be occupied as a dwelling house and country seat,' together with the personal property above mentioned; 'to have and to hold the same unto the party of the second part, from the 15th day of April, 1902, until the 15th day of October, 1902. And the party of the second part in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of $5,000, payable in six equal monthly instalments of $833.33 each, the first of said instalments to be paid on the 15th day of April, 1902, and the other five instalments each to be paid on the 15th day of each succeeding month until the said sum of $5,000 shall have been fully paid; second, the said party of the first part hereby agrees to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part, on or before the said 15th day of April, 1902; meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy.' By the terms of the lease the lessor agrees to employ a gardener on the premises, and such additional help as may be necessary to maintain the lawns, shrubbery, vegetables, etc.; and also to keep a horse and wagon in the barn to be used by the gardener in the performance of his work; also to pay the water rents and the expense of sprinkling Sheridan road in front of the premises; also to cause the garden thereon to be planted with certain vegetables for the use of the lessee, provided that the gardener employed by the lessor be allowed to have certain seeds for the planting of the crop of the next season, and enough vegetables to supply his own table; also to have the lawn fertilized at her own expense if necessary; also to sell to the lessee the chickens on the place at the beginning of the lease, the gardener to have the privilege of supplying himself with eggs, etc. The seventh clause

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of the lease was as follows: 'It is agreed that the wind-mill on the water tower on the premises is not in order to supply water, and is not to be operated.' The lease contains further provisions to the effect that the parties will meet for the purpose of checking up the articles of personal property leased to the lessee; also to the effect that in case the dwelling house or barn should be destroyed by fire prior to April 15, 1902, and should not be rebuilt before April 15, 1902, then the lease should, at the option of the lessee, be null and void. The eleventh clause of the lease, so far as it is necessary to quote the same, is as follows: 'The said party of the second part [the lessee] hereby agrees that he will keep said premises in good repair, and will immediately replace all broken globes, glass or fixtures with those of the same size and quality as that broken, and will keep said premises and appurtenances in a clean and healthy condition, according to the city ordinances and direction of the proper public officers, during said term, and upon the termination of this lease in any way, will yield up said premises and said personal property to said party of the first part in good condition, loss by fire and ordinary wear and tear excepted.' By the terms of the lease the lessee agrees that the premises shall not be used for any other purpose than as a dwelling house for himself and family, and that he will not sublet the same, nor assign the lease without the written consent of the landlord, etc., 'and will not permit the same to remain vacant or unoccupied for more than ten consecutive days, and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted or placed thereon.' The last clause of the lease is as follows: 'In case said premises shall be rendered untenantable by fire or other casualty, on or after April 15, 1902, and during the term of this lease then the lessee may at his option terminate this lease.'

"MAGRUDER, J. (after stating the facts). 1. The first objection made by the appellant is that the lease was not admissible under the declaration, and that, therefore, its admission by the trial court was error. The charge is made that there was a variance between the allegations of the declaration and the terms of the lease introduced in evidence. It is said that the declaration counted upon absolute, unconditional agreement to pay money, and that the lease offered in evidence contained conditions precedent to be performed by appellee before appellant was bound to pay any money; and that, therefore, there was a fatal variance. The provision of the lease which counsel for appellant, in their objections on the trial below, pointed out as constituting a condition precedent, is the provision which requires appellee 'to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part on or before the said 15th day of April, 1902,' etc. If the agreement of the appellee to cause the premises to be put into a habitable condition and to make the same ready for occupancy before the commencement of the term involves or is equivalent to an agreement to repair the premises, then it constitutes an independent covenant merely. In the construction of a particular provision the intention of the grantor governs, and, where there is any doubt whether the intention of the grantor is to create a cove-

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nant or to create a condition, the courts are inclined to construe it as a covenant, and not as a condition. 6 Am. & Eng. Encyc. of Law (2d Ed.), p. 502; Davis v. Wiley, 3 Scam. 234; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233. The provision in question, being a covenant, cannot be regarded otherwise than as an independent covenant. It is only where covenants are dependent that the performance by each party of his own covenant is a condition precedent to his right to recover on the covenant of the other party. 18 Am. & Eng. Encyc. of Law (2d Ed.), p. 620. If the provision in question be regarded as a covenant to repair, then it is independent of the covenant to pay rent. The general rule is that the covenant of the landlord to repair or make improvements, and the covenant of the lessee to pay the rent, are independent. 18 Am. & Eng. Encyc. of Law (2d Ed.), p. 620; Haven v. Wakefield, 39 Ill. 509. It is to be observed that, in the case at bar, appellant, as lessee, covenants to pay rent in consideration of the demise alone, and not in consideration of both the demise and of the agreement to put the premises into a habitable condition and make the same ready for occupancy before the beginning of the term. This is another circumstance going to show that the covenant as to habitability and occupancy is independent of the covenant to pay rent. In Baird v. Evans, 20 Ill. 29, where the lessor agreed to make certain improvements upon the leased premises, and the agreement was held to be a condition precedent to the payment of the rent, the consideration for the payment of the rent was not merely the leasing of the premises, but the making of the improvements. Such is not the case here, and hence the covenant here under consideration, being an independent covenant, is not a condition precedent. If such a covenant is violated, the lessee has an action against the lessor for damages, or can recoup for damages. Nelson v. Oren, 41 Ill. 18; White v. Gillman, 43 Ill. 502; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233; Wright v. Lattin, 38 Ill. 293; Haven v. Wakefield, 39 Ill. 509; Palmer v. Meriden Britannia Co., 188 Ill 508, 59 N. E. 247.

"But let it be admitted that appellant agreed to pay rent, not only in consideration of the leasing of the premises to him, but also in consideration of the agreement that appellee would put them into a habitable condition and make them ready for occupancy before the beginning of the term on April 15, 1902; then, in such case, the consideration has two parts, one of which is the leasing of the premises, and the other is the making of the same habitable and fit for occupancy. It is well settled that where a covenant goes only to a part of the consideration on both sides, and the breach of such covenant may be readily compensated for in damages, it is generally considered independent. 18 Am. & Eng. Encyc. of Law (2d Ed.), p. 619.

"In Nelson v. Oren, supra, where in consideration of a certain sum of money, Nelson assigned a lease to Oren, and in the same instrument agreed to deliver up possession of the premises on a certain day, and the lease was assigned, but Oren failed to get possession on the day agreed upon, it was held that an important part of the consideration was executed by the transfer of the term, although the remaining part was not executed, and that, for the breach of the latter, appellee had a right to recover damages; and in that case we said (page 23, 41 Ill.): 'We do not consider that delivery of pos-

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session, under a fair construction of this covenant, was a condition precedent to the right of appellant to recover for the unexpired term. That would seem to be the most important part of the contract, and where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. . . . The covenant to put the appellee in possession was an independent covenant, the breach of which could be compensated in damages.' So, here, the covenant as to habitability and occupancy was an independent covenant, the breach of which could be compensated in damages, and it was not necessary to aver the performance thereof in the declaration.

"In Wright v. Lattin, supra, we said (page 296, 38 Ill.): 'If he [the landlord] covenant to repair before the term commences, it may be the tenant might refuse to enter upon the term until the repairs were made, but, having entered upon the term and received possession, he cannot abandon the lease and refuse to pay rent for the breach of any other covenant, except for quiet enjoyment. If the landlord fail to repair according to his covenant, the tenant may recoup the amount from the rent, or may sue upon the covenant.' In the case at bar the appellee covenanted to do certain things before the term of the lease began, and, while the appellant might have refused to enter upon the term until those things were done, yet inasmuch as he did enter upon the term and took possession and kept possession until the termination of the lease on October 15, 1902, he cannot refuse to pay rent for the failure of the landlord to do the things which he agreed to do before the commencement of the term. Appellant, while refusing to pay rent, did not abandon the lease.

"In White v. Gillman, 43 Ill. 502, where appellee sold to appellant, his landlord, all the crops on his land at a certain price, and agreed to leave the premises in ten days with all his traps, and did leave the premises within the time named, but left a part of such traps, it was claimed by the appellant that removal of all the traps within the time specified was a condition precedent, and, such condition not being performed by appellee, the latter had no right of action to recover the price agreed to be paid; but the construction thus contended for was not allowed.

"In Palmer v. Meriden Brittania Co., 188 Ill. 508, 59 N. E. 247, this court said (page 522, 188 Ill., page 252, 59 N. E.): 'Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenant can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment or in a separate action.' We are therefore of the opinion that the covenant here insisted upon by the appellant as being a condition precedent cannot be regarded as a condition precedent, and therefore the lease was not inadmissible under the common counts for the reason insisted upon.

"Here, there was a performance of the contract. Possession of the premises was delivered to appellant, and he occupied the premises for the full period of six months specified in the lease, and at the

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expiration of the lease nothing remained for him to do on his part except to pay the amount due for the rent. The contract was fully performed on the part of the plaintiff, and, where such is the case, recovery can be had under the common counts. In Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, 28 N. E. 834, this court said (page 74, 139 Ill., page 834, 28 N. E.): 'Indebitatus assumpsit lies upon a written contract, though it be under seal, when the plaintiff has performed, and nothing remains to be done under it but the payment of money, which payment it is the duty of the defendant, under the contract, to make. In such case the plaintiff need not declare specially.' It is well settled that while there is no liability by implication of law upon an express contract executory in its provisions, yet where there has been full performance and nothing remains to be done but the payment of money, or where there has been only part performance and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had under the common counts. Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Fowler v. Deakman, 84 Ill. 130; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; 2 Greenleaf on Evidence, § 114.

"It is claimed by counsel for appellant that the declaration is defective in not averring that appellant used or occupied the premises in question. If such a defect exists in the declaration, we think that it was cured by the pleas. The pleas, as set forth in the statement preceding this opinion, averred that, after the making of the lease, the appellee entered upon the possession of the appellant and evicted him. In Wallace v. Curtiss, 36 Ill. 56, where there was a material omission in the declaration, it was held that such omission was supplied by the special plea; it being there said (page 158): 'The pleas cured the omission. . . . The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and they may be taken as amendatory of the declaration, of the issue, and verdict, in order to favor the justice of the case.' Chitty, in his work on Pleadings (marginal page 671), cites a case which illustrates this principle, and says that, in an action for trespass for taking a hook, where the plaintiff omitted to state that it was his hook and that it was in his possession, and the defendant in his plea justified the taking the hook out of the plaintiff's hand, the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. We think, moreover, that such other formal defects as are alleged by the appellant to exist in the declaration were cured by the verdict, and under the statute of amendments and jeofails, which latter statute provides that 'judgments shall not be arrested . . . for any mispleading, insufficient pleading,' etc. 1 Starr & C. Ann. St. (2d Ed.), p. 390, c. 7, par. 6; Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; 1 Chitty's Pl., pp. 682–684.

"The agreement of the appellee to cause the premises to be put into a habitable condition and make the same ready for occupancy on or before April 15, 1902, was not an unrestricted agreement to make all such repairs as were necessary to make the premises habitable before the commencement of the term. The latter part of the agreement in question qualifies and explains its meaning in the following words, to wit, 'meaning and intending hereby that the boards

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covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy.' These words qualify and serve to explain both the preceding clauses — that is to say, the clause 'to cause said premises to be put into habitable condition,' and also the clause, to 'make the same ready for occupancy.' The true intent and meaning of the parties to a contract may be determined by an examination of the surrounding circumstances under which the contract was made, and the acts of the parties themselves in reference to it. Hadden v. Shoutz, 15 Ill. 581, Piper v. Connelly, 108 Ill. 646; Louisville & Nashville Railroad Co. v. Koelle, 104 Ill. 455.

"The evidence shows that the place rented by appellee to appellant was a country place for use and occupation in the summer time only, and that during the winter the windows and doors of the dwelling house upon the premises were inclosed with boards, and that the plumbing was disconnected from the fixtures to which it was attached, in order to prevent freezing in the winter time. The evidence also shows that the appellant visited the premises before the contract was made, and went through the house, and knew that it had been closed during the preceding winter, and that the doors and windows had been barred up, and that the plumbing had been disconnected, and that the house required airing, and that the furniture had to be dusted and arranged, and the shades and curtains hung. He was aware of those facts when he entered into the lease. The evidence also shows that appellee or her servants or agents removed the boards in question, and connected the plumbing, and aired the house, and arranged the furniture, so as to put the house in a condition to be occupied by the appellant. In other words, the proof tends to show that the covenant as to habitability and occupancy, interpreted according to the construction above given, was fully performed by the appellee before the appellant took possession.

"It is claimed, however, on the part of the appellant, that the house upon these premises was a furnished house, and that, where a furnished home is leased for a short period as for a season or summer, there is an implied covenant or warranty on the part of the lessor that the premises are fit for habitation. The doctrine thus contended for is sustained by some of the authorities, and repudiated by others. We do not deem it necessary to discuss the doctrine, or to determine the question whether it should be adopted or approved by this court or not, inasmuch as the decision of the present case does not require such discussion. It is a general rule that where there is an express covenant relating to the same matter as that embraced in the implied covenant, however qualified the latter may be, the implied covenant will be excluded upon the principle embodied in the Latin maxim, 'Expressum facit cessare tacitum.' 12 Am. & Eng. Encyc. of Law (1st Ed.), p. 1013. Express covenants abrogate the operation of implied covenants in accordance with the rule of interpretation that the expression of one thing in a contract is the exclusion of another. 8 Am. & Eng. Encyc. of Law (2d Ed.), p. 83; Finley v. Steele, 23 Ill. 56. In the case at bar there is an express covenant on the subject of making the furnished house upon the premises in question habitable and ready for occupancy by the beginning of the term, and therefore there

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is no room for an implied covenant. Where the minds of the parties have met and made an express agreement, the law does not enlarge and qualify this express agreement by implication. Taylor on Landlord and Tenant (8th Ed.), § 253. It is true that, although a lease contains express covenants, covenants may at the same time be implied; but the latter will be effective only when they are consistent with the express covenants. 12 Am. & Eng. Encyc. of Law (1st Ed.), p. 1012. An implied covenant that the house upon these premises was fit for habitation would certainly be inconsistent with the restricted meaning already given to the agreement or covenant as to habitability and occupancy.

"2. The defense sought to be made by the appellant was twofold. It is claimed that, by the terms of the lease, appellee was bound not only to make the premises habitable and ready for occupancy at the beginning of the term on April 15, 1902, but was also obliged to keep them in repair during the running of the lease, and from the beginning to the end of the term. There is nothing to this effect in the express provisions of the lease. On the contrary, appellant agreed that he would keep said premises in good repair. Upon the assumption, however, that appellee was obliged to make repairs after the beginning of the term, appellant's first ground of defense is that the house was leaky, that the water came in through the roof and around the windows during the rains in the summer of 1902, and that the basement was not properly drained, so that the house was damp. It is also claimed that these conditions could have been obviated by making certain repairs during the running of the lease. The second ground of defense urged by the appellant is that he was evicted from a part of the premises. The alleged eviction proceeds from the contention of the appellant that he was excluded from the tower and the building on the beach, as described in the statement preceding this opinion, and from two of the rooms in the stable, connected with the dwelling house.

"Appellant refused to pay any rent after the 19th of May, 1902, and some conversation took place between him and appellee and her agents, and some letters passed between them, in reference to the making of certain repairs insisted upon by appellant. There was a conflict in the testimony as to the extent of the dampness and the leaks and the absence of proper drainage, and also as to the alleged decay of certain portions of the porch around the dwelling. This was a matter for the consideration of the jury, and the jury have determined it against appellant. The court properly instructed the jury that if they should believe from the evidence that any wrongful act of the appellee, or omission to perform anything required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the appellant, he was still bound for the rent if he continued to occupy the same, and that, if the appellant did not abandon the leased premises, his obligation to pay the rent therefor remained, but that he might show, as a matter of defense, in what manner such beneficial enjoyment of the premises was diminished by such act or omission to act of the plaintiff, and recoup from the rent such damages, if any, he may have shown by the evidence he had sustained by reason of the wrongful act or omission to act of the plaintiff. Such is the law as has been declared by this court. Chicago Legal News Co. v. Browne, 103 Ill. 317; Barrett v. Boddie,

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158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am St. Rep. 175. Appellant offered no proof whatever on the question of damages, although the instructions given to the jury told them that he might recoup his damages, and were therefore exceedingly favorable to him. Inasmuch as appellant entered upon the premises, and enjoyed the use of them during the term of the lease, he could not defeat recovery by showing that there were certain leaks in the roof, or spots in the plaster or on the walls. It is not claimed on the part of the appellant that the amount of the judgment recovered against him was too large, but it is claimed that he should not be required to pay anything at all for the use of the premises, occupied by him during the whole of the term mentioned in the lease. If the defects arising out of dampness and leakage were such as to entitle the appellant to damages, then the jury were entitled to consider the difference in rental value produced by such defects, in order to determine the amount of his damages by way of recoupment; but no evidence was produced upon the subject of rental value.

"Upon the subject of eviction, the evidence is conflicting also. As to the rooms in the stable, appellant desired his coachman, with the latter's wife, to occupy certain rooms in the stable adjoining the hay loft, and, as it would be necessary to have a stove in the rooms so occupied by the coachman, some objection may have been made by the appellee or her agent to the putting of a stove in the stable. But it is not clear from the proof that there was an absolute refusal on the part of the appellee to allow the rooms to be so occupied. Appellant proposed to the appellee, or her agent, that he would himself erect a smokestack on the side of the stable to be used by the coachman. The evidence is not clear that appellee refused to allow this to be done, although the lease expressly provides that the appellant himself was not to allow any alterations to be made in the premises. As to the tower and the machine house, the lease expressly provides that the windmill on the tower was not in order to supply water, and was not to be operated. The lease also provides that the appellee was to keep her gardener upon the premises, and a horse and wagon in the barn to be used by such gardener. There is some proof tending to show that the appellant desired to use the machine house as a bath house. The proof shows that it was not built for, nor intended to be used as, a bath house. The proof also tends to show that appellant desired to make use of some part of the tower as a bath house. Some objection may have been made to the use of the tower and machine house as a bath house because they were never intended for such a purpose, but there is evidence tending to show that appellee did not prevent appellant from using the tower or the machine house for any legitimate purpose. The testimony of the appellant tends to show that he was locked out of the tower, and that he was not allowed to use the machine house, and that some restriction was placed upon his use of the rooms in the stable, so far as such use would require the putting in of a stove, and thereby running the risk of the destruction of the stable by fire. Appellant insists most strenuously that, having been evicted from the use of the tower, the machine house, and these rooms in the stable, he was not obliged to pay any rent at all for the use of the dwelling house which he occupied, or of the balance of the premises. This court has held that the question whether the

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acts of the landlord amount to an eviction of the tenant is a question of fact to be determined by the jury. Lynch v. Baldwin, 69 Ill. 210; Patterson v. Graham, 10 Ill. 531, 39 N. E. 460. 'Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, will constitute an eviction.' Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175. 'The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent unless the tenant by such act has been deprived, in whole or in part, of the possession, either actually or constructively, or the premises rendered useless.' Chicago Legal News Co. v. Browne, supra. The question whether or not there was an eviction was submitted to the jury under the instructions, and by the judgments of the lower courts this question of fact has been settled against the appellant. At the request of the appellant the court instructed the jury that any act of a permanent character done by the landlord, and which has the effect of depriving the tenant of the use of the premises leased, or of a part of them, would amount to an eviction.

"After the appellant began to complain of the condition of the dwelling house upon the premises, the appellee employed certain persons, architects and carpenters, to examine the premises and see what repairs were necessary. The appellant seems also to have caused an examination to be made. The persons so employed to examine the premises made reports, but there is evidence tending to show that the appellant himself refused to permit repairs to be made, unless a lease should be given to him for the next year upon the same terms, substantially, as he was then occupying the premises, except that he was to occupy the rooms in the stable for the whole year, and to build a chimney at his expense, and to pay the water tax for the barn. In a written memorandum signed by him, after reciting the terms above stated for a lease for the coming year, appellant used these words: 'If above accepted, will pay delinquent rent, and permit repairs.' This tends strongly to show that, although the appellee had taken measures to ascertain whether the premises needed repairs or not, the appellant himself was unwilling to have them made, unless he should be given a lease for the coming year upon terms demanded by him.

"The questions of fact whether or not appellant was entitled to damages on account of the defective condition of the premises occupied by him, and whether or not he had been evicted from any part of the premises, were submitted to the jury under proper instructions, and are not subject to review by this court. Much complaint is made in regard to instructions, and in regard to the rulings of the court upon the admission and exclusion of evidence, but after a careful examination of the whole record we are satisfied that the instructions and the rulings of the court upon the evidence conform substantially to the views heretofore expressed in this opinion, and that no errors were committed which operated to the injury of the appellant. Accordingly, the judgment of the Appellate Court, affirming the judgment of the Circuit Court, is affirmed.

"Judgment affirmed."

72 N. E. 1127.

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Landlord and Tenant: Term of Lease: Injury to Third Parties.

The following quotation as to the duration of a lease, and the liability of the landlord, and of the tenant, to third parties who have been injured by reason of defects in the premises, is from 79 Pac. 956.

"The liability of the landlord to third persons for injuries from defective repair of demised premises is thus stated in volume 18, p. 238, Am. & Eng. Encyc. of Law (2d Ed.): 'As a general rule, the landlord is not liable for injuries to third persons during the tenancy from the defective repair of the demised premises; and where the landlord has created no nuisance, and is guilty of no wilful wrong or fraud or culpable negligence, he incurs no liability for any injury suffered by any person occupying or going upon the premises during the term of the demise at the invitation or license of the tenant, such as members of the family, employees, guests, or customers of the tenant. This rule has been held to extend to the demise of a building used for public purposes. Where, however, at the time of the letting, the premises are in a dangerous or unsafe condition for the avowed purpose for which they are let, the landlord is liable for injuries to the person or goods of a third person lawfully upon the premises, arising from such unsafe condition; and this is especially true where the building is let for a public entertainment. The reason for the rule holding the landlord liable to strangers for injuries from the dangerous condition of such premises at the time of the letting is that the landlord, by letting the premises in such condition, authorizes the continuance of such condition, and is therefore guilty of misfeasance.' Again, at page 240: 'Where at the time of letting the premises are in a proper state of repair, and they are permitted by the tenant to get into a condition dangerous to the public or to third persons, the landlord is not, as a general rule, liable to third persons for injuries caused therefrom during the tenancy.' Again, page 242: 'Where a landlord is sued by a third person for injuries caused by the dangerous condition of the premises, the burden is upon the plaintiff to show that such condition existed at the time of the letting.' The rule here announced is sustained by all the authorities. Shearman & Redfield on Negligence (5th Ed.), § 708; Thompson, Com. on Law of Neg., § 1129 et seq. In Knauss v. Brua, 107 Pa. St. 85, repeated in Fow v. Roberts, 108 Pa. 489, it is said: 'We do not doubt that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises while in the possession of a tenant.' In City of Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775, Shaw, C. J., said: 'By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is prima facie liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair, so that in case of recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured from the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved.' In Glass v. Colman, 14 Wash. 635, 45 Pac. 310, this court

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held that, if premises are so constructed as to be entirely safe at the time of letting, the landlord is not responsible for damages flowing from improvements placed on the premises by the tenant after taking possession. In Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722, 29 Pac. 451, the court sites the following from Shearman & Redfield on Negligence, § 711: 'The liability of the landlord, however, exists only in favor of persons who stand strictly upon their rights as strangers. Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises'—and says: 'This statement of the law by Shearman & Redfield is quoted in many cases where this question is raised, and can be conceded to state the general consensus of judicial opinion. It would be as unreasonable as it is unjust to hold the owner of manufacturing establishments responsible for all damages that might occur by reason of the machinery not being kept in proper repair by his lessee, when he, by the very operations and conditions of the written lease, could have no supervision over it. If such a responsibility would attach during a short lease, it would also attach during a long lease, and, as no prudent man could afford to run such risks, the practical result would be to deprive the owner of the right to lease his premises.' It is true, the above language was used in reference to the lease of a shingle mill; but the same reasons apply in other cases, though perhaps with less force. See, also, Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, and cases cited. The cases cited by the respondent are in conformity with these views. They all concede that the liability of the landlord depends upon the condition of the premises at the time of letting, and not at the time of the injury, unless he is under contract to keep the demised premises in repair. There is nothing in the case of Lough v. John Davis & Co., 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848, and the same case reported in 35 Wash. 449, 77 Pac. 732, inconsistent with these views. The question as to the duty of making repairs, between the landlord and the tenant, did not arise in that case, and was not passed upon. The injury in that case resulted from a defect in the property which was not included in the lease, and the duty to repair such property rested upon the landlord, and not upon the tenant.

"The court below seems to have placed the liability of the appellants on the ground that a nuisance existed. We will not stop to inquire whether or not a mere defect in a private approach to a private residence can properly be classed as a nuisance, as the liability of the landlord for a nuisance is coextensive with his liability for lack of repairs. The nuisance must have existed at the time of the letting, or the property must have been let for a purpose which would naturally create a nuisance, or the landlord must have assented to the creation of the nuisance. A mere defect caused by a failure to repair after letting, where the premises were in proper repair at the time of letting, and where the duty to repair devolves upon the tenant, imposes no liability on the landlord, even though the lack of repair might in time create a nuisance. See authorities above cited.

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"Counsel further says that, assuming that Mrs. Zufeldt was in possession of the defective premises, she was merely a tenant from month to month, and there was, in contemplation of law, a reletting at the beginning of each month. The legal fiction that there is a reentry and a reletting at the beginning of every month is too refined to meet our approval. It is true, our statute declares that where premises are rented for an indefinite time, with monthly rent reserved, the tenancy shall be construed to be a tenancy from month to month. But the statute further provides that the tenancy shall continue until terminated by a notice, and, unless so terminated, the tenancy is a continuing one. 'In case of periodical tenancies, the better doctrine seems to be that the tenancies for the several recurring periods are to be considered as constituting a continuing tenancy, and not a renewal of the lease for each new period, and therefore the liability of the landlord depends upon the condition of the premises at the time of the beginning of the first periodical tenancy.' 18 Am. & Eng. Encyc. of Law, p. 244.

"For the foregoing reasons, the appellants were not responsible for the defective condition of the demised premises at the time of the injury complained of; and, inasmuch as no attempt was made to charge them with liability for such defect at any other time, the court should have instructed the jury, as requested, to return a verdict in their favor. For this error the judgment is reversed, with directions to dismiss the action."

Sales: Order Countermanded: Remedy of Seller.

The Kinnear Manufacturing Company obligated itself to manufacture for Werrell & Williams a certain number of steel shutter doors.

The day after accepting the offer of the company, Werrell & Williams withdrew their acceptance of the contract and entered into a similar contract with a rival company. The Kinnear Manufacturing Company then sued Werrell and Williams for breach of contract, and were allowed to maintain a judgment for the difference between the contract price of the articles and what it would have cost to produce them. In proving the cost of the articles, proof was made as to the cost of the raw material, the necessary labor, and the freight, and to these items were added the "fixed charges" connected with the manufacturing. This last item was fixed at twenty-five per cent. of the sum of the other items.

The court said in part:

"It is settled law that the measure of damages for an unqualified annulment, without reasonable cause, by the vendee in an executory contract for the sale of an article not manufactured at the time of the breach, is the difference between the cost of manufacturing and delivering the article and the contract price. Morrison v. Mayor of City of Brooklyn, (N. Y.) 42 Am. Dec. 38; Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224); Kelso v. Marshall, 24 App. Div. 128, 48 N. Y.

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Supp. 728; Dryfoos v. Uhl, 69 App. Div. 118, 74 N. Y. Supp. 532; Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; Indiana Canning Co. v. Priest, 16 Ind. App. 445, 45 N. E. 618; Beardsley v. Smith, 61 Ill. App. 340; Kingman v. Hanna Wagon Co., 74 Ill. App. 22; Rice Co. v. Penn Plate Co., 88 Ill. App. 407; Kimball v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Hauser & Co. v. Tate, 105 Ky. 701, 49 S. W. 475.

"That the trial court properly exercised its discretion in refusing to allow the witness to be subjected to the inquisitorial examination proposed, in the light of the surrounding circumstances, cannot be doubted. Plaintiff was the owner of an extensive manufacturing establishment, engaged in various kinds of work, and manufacturing a variety of articles on a large scale, with the buildings, machinery, capital, officers, and employees incident to a business of that magnitude. The entire 'fixed charges' of such a business would necessarily have afforded unsatisfactory data to a jury from which to estimate the proportional part of such 'fixed charges' proper to be borne in the manufacture of an isolated article. Besides, it is contrary to the policy of the law to permit a person, who, without cause, has violated his contract and been sued for the breach, under the guise of determining 'fixed charges' to unduly pry into and expose the private business methods of the injured party to the scrutiny of a vigilant competitor.

"'Fixed charges,' as remarked, constitute an element of the cost of manufacture, and were the subject of proper inquiry in this case; but, as shall be seen presently, they were susceptible of approximate ascertainment without unnecessary exposure of the plaintiff's trade secrets. To entertain a suit or only on the terms of such business disclosures would tend to deter one who had suffered wrong from resorting to the court for redress.

"In this connection the witness, who, in response to a question had stated that the cost of steel to his company, under continuing contracts, was three cents per pound.

"Finally in regard to the contention that the court erred in excluding testimony tending to show the amount which ought to have been deducted for 'fixed charges.' The record shows that the court permitted the introduction of admissible evidence on the subject, and also that the jury made some allowance for such charges in arriving at their verdict.

"While the vice-president and factory manager of the Wilson Manufacturing Company testified that from thirty-five to forty per cent. of the aggregate cost of material and labor was the customary percentage to be deducted for fixed charges, an intelligent and disinterested witness declares twenty-five per cent. to be the usual allowance for such charges in determining profit.

"As to the propriety of basing a recovery upon this character of evidence, in the leading case of Masterson v. Mayor of City of Brooklyn, supra, the court said: 'The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates.

"It appears, therefore, that the defendant has no ground to complain of the mode adopted for ascertaining 'fixed charges' in this instance, and the rule in this State is that 'a new trial will not be

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granted for refusal to permit certain evidence to be introduced when substantially the same evidence was received without objection at a later stage of the trial.' Norfolk, etc., R'y Co. v. Marpole, supra; Taylor v. Mallory, supra.

"The evidence on behalf of the plaintiff shows that the cost of necessary labor and material to have performed the contract on its part would have amounted to..... $3,172 43
25% of that sum is..... 793 10

$3,965 53
Freight charges..... 153 79

$4,119 32

Contract price of article delivered..... $5,553 90
Cost of manufacture and delivery..... 4,119 32

Profit $1,434 58

Amount of verdict..... $1,647 14
Profit 1,434 58

Excess of verdict over profit..... $ 212 56

"It thus appears that, while it was competent for the jury to have adopted twenty-five per cent. of the aggregate cost of labor and material for 'fixed charges,' they have, in assessing the damages, exceeded that estimate by the sum of $212.56.

"For that reason the judgment of the trial court must be reversed; but, inasmuch as that is the only error which the record discloses, the case will be remanded, with directions that, unless the plaintiff enter of record its election to release the sum of $212.56, the verdict shall be set aside, and a new trial awarded. But if the plaintiff shall accept a recovery of $1,434.58 as the true measure of its damages in the case, then the motion of the defendant for a new trial will be overruled, and judgment rendered for said sum of $1,434.58, with interest and costs."

49 S. E. 988.

Sales: Rights of Seller as to Disposition of Property Not Paid For.

The following statement as to the various rights of the seller of personal property, which is yet in his possession, as to its disposition, is from 85 S. W. 402.

"There is no difference in the rights and remedies of vendors of personal property in enforcing payment of purchase money in executory contracts and in contracts executed, when possession of the property sold is unchanged. They [the vendors] in both cases have what is generally called a common-law lien, but which is in fact a higher and more efficient right than a mere lien upon the property sold, so long as they retain possession, to secure and enforce payment

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of the purchase money, which cannot be destroyed save by compliance with the terms of the sale. Their rights in both cases grow out of their possession of the thing sold, and are not affected by the vestiture of the title. These rights are well settled. Where the vendee refuses to complete the sale by accepting delivery and making payment, the vendor has the choice of three methods to indemnify himself against loss:

"He may store or retain the property of the vendee and sue him for the entire purchase or contract price.

"He may sell the property upon notice to the vendee, and recover the difference between the price obtained on such resale and the contract price.

"He may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price.

"Cole v. Zucarello, 104 Tenn. 65, 66, 56 S. W. 850; Dustan v. McAndrew, 44 N. Y. 72–78; Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; Schouler's Per. Prop., vol. 2, §§ 546–549; Sedgwick on Damages, vol. 2, § 753; Am. & Eng. Encyc. of Law (2d Ed.), vol. 24, §§ 1113, 1118, 1139.

"The case of McClure & Crozier v. Williams, supra, although not referred to in Cole v. Zucarello, supra, is overruled by that case.

"The law allows the vendor to retain possession of the property, and subject it by these cheap and expeditious methods to the payment, in part, of his claim against the vendee, who has breached his contract, to obviate the risk of insolvency of the vendee, and, as far as possible, the delays and expense incident to litigation.

"The measure of damages, in the event the property is retained for the vendee, is the contract price; if it is sold upon notice at public sale, it is the difference in what it brings at such sale and the contract price after payment of expenses; and, if sold at private sale, or used by the vendor, it is the difference in its market value and the contract price. The only difference between a public sale of the property and a private sale or use of it is that in the latter the burden is upon the vendor to prove that he has accounted for the market value when sold or used. A fair public sale is competent, and ordinarily satisfactory, evidence of the value of the thing sold."

Sales: Warranty.

The following statement as to the rule of warranty where one orders a special aritcle from the manufacturer, is from 59 Atl. 1108.

The matter in litigation was an order, from the manufacturer, for a quantity of metal "Home Savings Banks."

"In the case now before us, the first order given by the defendant was for 500 clock banks, and 400 of these were shipped prior to January 9, 1904, at which date the defendant gave a second order for 2,000 more of the clock banks. It directed that they be shipped at the earliest convenience of the plaintiff — 500 of them the following week, and all within sixty days from date. It appears that, in so

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far, at least, as the first order was concerned, all of the banks were delivered and accepted, and payment made upon account thereof. An inspection would certainly have disclosed the defects, had they existed, of which complaint is now made. The second order was for a known, described, and definite article. And where such an aritcle is supplied, there is not, under the authorities, any warranty that it shall answer the particular purpose intended by the buyer. See Jarecki Mfg. Co. v. Kerr, 165 Pa. 529, 30 Atl. 1019, 44 Am. St. Rep. 674; Seitz v. Refrigerating Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837. This latter case has been approved and followed in Pullman Palace Car v. Street R'y Co., 157 U. S. 94, 15 Sup. Ct. 503, 39 L. Ed. 632. It is true that if a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. But this principle is limited to cases where a thing is ordered for a special purpose, and must not be applied to those where a special thing is ordered, although this be intended for a special purpose. Port Carbon Iron Co. v. Groves, 68 Pa. 149. We do not see in the allegations of the affidavit of defense sufficient to support the theory that the representations made by the agent of the plaintiff amounted to a warranty. But in any event, the defendant has not rescinded the contract. It received and has retained and used the clock banks, so that, if entitled to damages, the measure would be the difference between the value as warranted and the real value of the goods as delivered. Himes v. Kiehl, 154 Pa. 190, 25 Ala. 632; Seigworth v. Leffel, 76 Pa. 476.

"But upon the broad ground that it is sought to vary a written contract by parol representations previously made by one of the parties, we think the affidavit was insufficient to prevent judgment. As was said by our Brother Brown, in Krueger v. Nicola, 205 Pa. 38, 54 Alt. 494: 'To contradict or vary the terms of a written contract by an oral, contemporaneous agreement between the parties, there must be allegation, as well as proof, not only of it, but of its omission, through fraud, accident, or mistake, from the writing. This has been ruled so frequently that reference is hardly needed to one or two of the many authorities on the subject.' Citing Wodock v. Robinson, 148 Pa. 503, 24 Atl. 73; Hunter v. McHose, 100 Pa. 38. The affidavit of defense contains no allegation that by means of fraud or mistake the real agreement of the parties was not expressed in the written order for the goods."

Gift of Certificates of Stock to Take Effect After Death of Donor.

"In October, 1892, deceased was ill, suffering from a paralytic stroke, and under the care of a nurse and physician. She sent for Arthur M. Noble, told him that she had about $15,000 in money, and wanted his advice as to what was best 'for her to do so as to produce her some income, and still have control of it while she lived.' Noble advised her to take stock in the San Joaquin Valley Building & Loan Association, a corporation, of which he was secretary; that the stock would pay dividends, and that she could draw the principal,

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or any part of it, at any time she pleased. She said to Noble, 'Suppose I am sick a long time, and want to use more money, how can I get the money?' Noble explained to her that the money would be represented by the different certificates in different denominations, and that she could surrender any certificate at any time and get the money. She replied: 'I want to be sure that this does not go out of my control. I have bills to pay and expenses to meet, and I want money available for that purpose.' Noble told her that it would be under the conditions desired by her; that the by-laws of the association provide that the money represented by the certificates can be withdrawn at any time, but that she would lose the interest since the last dividend was paid, in case she desired the money before a dividend became due. Deceased told Noble to issue the certificates in her name, and they were so issued; nineteen in all. She also gave Noble a list of persons to whom she wanted the certificates assigned. Noble prepared the certificates and assignments as requested, and delivered them to deceased, who kept them a few days, and again sent for Noble, and gave him the certificates, with the remark: 'I want you to take these certificates, and keep them in your safe, and when anything happens to me, if I should pass away, whatever is left from these certificates, deliver them to the people to whom they have been assigned.' Among the certificates were Nos. 467, 468, and 481, being those in controversy; 481 being for twenty-five shares of the capital stock, and 467 and 468 for ten shares each. On the back of certificate 481 was the following writing: 'For valuable consideration I do hereby transfer and set over unto Clara D. L. Garden 25 shares of the stock of the San Joaquin Valley Building and Loan Association standing in my name as per the books of the corporation. Certificate No. 481, issued October 17, 1902. Witness my hand this 17th day of October, 1902' — the same being duly signed by deceased, and witnessed. The certificate also contained the clause: 'No transfer shall be valid unless the passbook of the shareholder transferring is also surrendered, and the association is not bound except for the value of the shares as shown by the passbook, of even number with the certificate.' The assignments of Nos. 467 and 468 were in the same form, except one of these was assigned to Helen L. Garden and the other to David L. Garden. The passbook was delivered to Noble, and thereafter remained in his possession. In the early part of February, 1903, Noble took all the certificates, and went to see deceased, who was still bedridden, and rapidly failing. He then, at her request, paid her the accrued dividends on the entire stock, $159, and she surrendered and had canceled two of the certificates, one for $100 and the other for $1,000, and received the money therefor. She handed the remaining certificates back to Noble, and asked

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him to keep them safely for her and in case of her death to deliver them to the persons to whom they were respectively assigned. On March 12, 1903, deceased died, without having revoked said assignments, or any of them. The certificates were then in the safe in the possession of Noble, who afterwards delivered them to the parties named in the respective assignments.

"Gifts donatio mortis causa had their origin in the civil law, and were adopted with slight modifications into the common law. Ward v. Turner, 2 Ves. Sr. 431. Justinian defines mortis causa as 'that which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given.' It was much doubted by the early jurists whether such disposition of property should be considered as a gift or as a legacy. In some respects it is similar to a legacy. A legacy is always given in view of the possible death of the donor, and so must a gift causa mortis be given; but in the former case the donor need not be sick and in present peril or death, while in case of the latter it must be given in anticipation of a speedy death from a present sickness or impending peril. In either case the absolute title to the property does not become vested in the donee, and in either case the gift or legacy may be revoked at any time before the death of the donor. Thornton on Gifts, § 20, and cases cited. It is there said: 'But in a gift causa mortis a written instrument is not necessary. It may be, and usually is, made by parol; and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and the donee. . . . The most characteristic mark of distinction between a legacy and such a gift is the change of possession. From the nature of the donatio, it is apparent that the infallible test which must distinguish it from a testamentary gift is delivery, a change of dominion in præsenti. Without this there is really nothing to distinguish it from an ordinary testamentary bequest.' In the early case of Ward v. Turner, supra, it was held that an actual delivery is indispensable to vest the property, if the subject-matter is capable of delivery. The Lord Chancellor traces the rule in its early stages, and concludes: 'Therefore, from the authority of Swinburne and all these cases the consequence is that by the civil law, as received and allowed in England, tradition or delivery is necessary to make a good donation mortis causa.' In Keniston v. Sceva, 54 N. H. 36, the court said: "The essential requisites of a valid gift causa mortis are well known and perfectly understood. They have in no respect changed since they were established and declared by the civil law, except in this particular: that under the civil law delivery of the property was not absolutely essential to the validity of the gift — an element which, in our law, cannot be dispensed with. Sanders' Justinian, 228, 229; 1 Williams on Executors and Administrators, pt. 2, B 2, c. 2, § 4, p. 544; 1 Story's Equity Jur., § 607a; Smith v. Kittridge, 21 Vt. 244.' In Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, the question is elaborately discussed, and the authorities collected. The Supreme

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Court of the United States there said: 'If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will. . . . But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. . . . Without delivery the transaction is not valid as an executed gift; and without consideration it is not valid as a contract to be executed. The decision in Wight v. Wight was founded on a supposed distinction between a gift inter vivos and a donatio mortis causa. But there appears to be no such distinction. A delivery of possession is indispensable in either case. . . . A delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation according to its terms, will not suffice. A delivery in terms which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift.' This court has laid down the same rule in the late case of Pullen v. Placer County Bank, 138 Cal. 170, 71 Pac. 83, 94 Am. St. Rep. 19, where it is said: 'A gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or (except in case of a gift causa mortis) is subject to his revocation, his gift is not complete. There is no difference, however, in this particular between a gift inter vivos and a gift causa mortis. In either case it is not complete unless there is an actual or symbolic delivery to the donee of the thing to be given.' Our Code, in article 3 (Civ. Code, § 1146 et seq.), provides certain rules as to gifts inter vivos and causa mortis, and that 'a verbal gift is not valid unless the means of obtaining possession and control of the thing given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.' See, further, Anderson's Dic. of the Law, tit. 'Donatio Causa Mortis;' Thornton on Gifts, § 21 et seq.; Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Bedell v. Carll, 33 N. Y. 585; Ruiz v. Dow, 113 Cal. 497, 45 Pac. 867; Calkins v. Equitable B. & L. Ass'n, 126 Cal. 534, 59 Pac. 30.

"We do not think there was any delivery of the certificate of shares of stock made in the lifetime of the deceased. She retained control and dominion of them, and expressly stated to Noble that she wanted to be sure that the property did not go out of her control. He told her it should it not. As her agent he kept the certificates, and brought them to her when she had two of them canceled, and received $1,100 for them. She expressed to Noble her intention when she said: 'If I should pass away, whatever is left from these certificates deliver them to the people to whom they have been assigned.' The title certainly did not vest in the parties to whom the assignments were made, because it was expressly stated that it should remain in deceased. If the title remained in deceased, the transaction shows only an intention to make a gift. By the terms, understanding, and intention of deceased, the gift was not to take effect until her death. In such case the disposal is testamentary, and not a gift.

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Hart v. Ketchum, 121 Cal. 429, 53 Pac. 931. However much we may desire to carry out the intentions of deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of her property. The Code has provided the kinds of wills that may be made and the essential requisite of each kind. The oral directions to Noble by deceased did not constitute any one of the kinds of wills authorized by the Codes.

"It follows that the judgment should be reversed."

79 Pac. 883.

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DECISIONS.

Decision No. 775.

UNION TRUST CO. v. PRESTON NAT. BANK OF DETROIT.

99 N. W. 349.

(Supreme Court of Michigan. April 26, 1904.)

CERTIFIED CHECKS — BONA FIDE HOLDER.

1. A certified check is valid, in the hands of a bona fide holder, though the books showed no funds to the credit of the drawer when it was certified, and Comp. Laws 1897, § 6108, declares it unlawful to certify a check under such circumstances, and sections 6103, 6107, and 6147 make such certification a crime.

Error to Circuit Court, Wayne county; Joseph W. Donovan, Judge.

Action by the Union Trust Company, receiver of the City Savings Bank, against the Preston National Bank of Detroit. Judgment for plaintiff, and defendant brings error. Reversed.

Geer, Williams & Halpin and H. R. Martin, for appellant.

Bowen, Douglas, Whiting & Murfin (John C. Donnelly and Frederick W. Whiting, of counsel), for appellee.

Walker & Spalding, for City Savings Bank.

CARPENTER, J. Plaintiff brought this suit to recover a conceded balance of $21,581.11 owing by defendant to the City Savings Bank at the time plaintiff was appointed receiver. Defendant sought to set off against this indebtedness the sum of $100,000, represented by a check drawn on said City Savings Bank January 24, 1902, by F. C. Andrews, payable to defendant's order, and certified in due form by the teller of the insolvent bank. It appeared that at the time this check was certified, its maker, Andrews, instead of having funds to his credit in said bank, had overdrawn his account, as shown by the bank's books, "to the amount of $405,000." The defendant offered to prove that it received said check, after certification, on the day it was drawn, in the usual course of business, and paid to said Andrews, the maker, full value therefor, and at that time had no notice or knowledge of any infirmity in said check, or of the fact that the account of said Andrews was overdrawn. This evidence was excluded, on the ground that said check

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was invalid in the hands of a bona fide holder, and a verdict directed for the plaintiff for the amount of the deposit in defendant's hands. The sole question presented by this record relates to the correctness of this holding.

It is authoritatively settled and conceded that at common law the fact that the maker of a certified check had no funds in the bank affords no defense, if the check, negotiable in form, as in this case, has passed into the hands of a bona fide holder. See Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678. This case is not, however, to be determined solely by common-law principles. The correctness of the holding of the trial court depends upon the proper construction of certain statutory provisions in our Banking Act relative to the certification of checks. Section 6108, Comp. Laws 1897, being section 19 of the general Banking Act, reads: "It shall not be lawful for any officer, clerk, agent, or employee of a bank to certify a check, unless the amount thereof actually stands to the credit of the drawer upon the books of the bank, or to resort to any device, or receive any fictitious obligations, direct or collateral, in order to avoid the provisions of this prohibition; and any officer, clerk, agent, or employee who shall attempt any such evasion shall, upon conviction thereof, be deemed guilty of a misdemeanor, and punished as provided in section 14 of this act." Other sections of the Banking Act, viz., section 14 (§ 6103, Comp. Laws 1897), section 18 (§ 6107, Comp. Laws 1897), an dsection 58 (§ 6147, Comp. Laws 1897), make the violation of section 19 a crime.

In construing this act we have not the benefit of decisions of other courts construing a precisely similar act, for, with the exception of the National Banking Act, which will be hereafter referred to, there is no similar act.

It will thus be seen that the certification in question was forbidden by law, and punishable as a crime. The statute does not, however, expressly declare that the check so certified shall be void in the hands of a bona fide holder. Indeed, it does not expressly declare that it shall be void in the hands of one who is not a bona fide holder. The fact, however, that the certification is forbidden and made a crime, compels the inference that the Legislature intended to avoid such certification between the original parties (see Heffron v. Daly, 95 N. W. 714); and this, it is almost unnecessary to say, avoids it in the hands of every one not a bona fide holder. It by no means follows, however, because a contract made in violation of law — common or statutory — is void between the original parties, that, if given the form of negotiable paper, it is void in the hands of a bona fide holder. Indeed, it is the distinguishing characteristic of the law of negotiable paper that when a contract takes that form it is not, in the hands of a bona fide holder, subject to the defense which avoided it in the hands of the original parties. Negotiable paper in the hands of a bona fide holder is not open to the defense that the contract from which it arose was illegal or forbidden by the principles of the common law. A note given to compound a felony is good in the hands of a bona fide holder. Clark v. Ricker, 14 N. H. 44; Wentworth v. Blaisdell, 17 N. H. 275. Nothing less than a statutory enactment will subject negotiable paper in the hands of a bona fide holder to the defense of illegality in its inception. What, then, is the effect of a statute which merely prohibits the making of a particular contract, and punishes

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its making as a crime? How shall we determine what consequences the Legislature intended should follow a violation of this law? Manifestly by applying in its construction the principles of the common law. "Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed, like other compositions, to be interpreted by the common learning of those to whom they are addressed — especially by the common law, in which they become at once enveloped, and which interprets their implications and defines their incidental consequences. That which is implied in a statute is as much a part of it as what is expressed." Sutherland on Statutory Construction, § 334.

In accordance with these principles we would assume, and, as heretofore stated, we do assume, that the Legislature intended to make such contract void between the parties; and we would likewise assume that it did not intend, if the contract took the form of negotiable paper, to affect its validity in the hands of a bona fide holder. But plaintiff's counsel contends that it is settled by authority that, when a contract is prohibited and made a crime by statute, such a contract, if it takes the form of negotiable paper, is void in the hands of a bona fide holder; and he relies upon the following authorities: Clark & Marshall on Corporations, § 225; Enlitch on Interpretation of Statutes, § 449; Sutherland on Statutory Construction, § 336; Anson on Contracts, 172; Heffron v. Daly, (Mich.) 95 N. W. 714; State Life Ins. Co. v. Strong, 127 Mich. 346, 86 N. W. 825; Loranger v. Jardine, 56 Mich. 518, 23 N. W. 203; Bowditch v. New England Life Ins. Co., 141 Mass., at page 293, 4 N. E. 798, 55 Am. Rep. 474; Union Nat. Bank of Chicago v. Railway Co., 145 Ill. 208, 34 N. E. 135; Cincinnati Mutual Health Ins. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Milford v. Milford Water Co., (Pa.) 17 Atl. 185, 3 L. R. A. 122; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679; Woods v. Armstrong, 54 Ala. 152, 25 Am. Rep. 671; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Texarkana & Ft. Scott Ry. Co. v. Bemis Land Co., 67 Ark. 542, 55 S. W. 944; Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918. None of these authorities, except Texarkana & Ft. Scott Ry. Co. v. Bemis Land Co. and Snoddy v. Bank, which will receive attention later in this opinion, related to a case of negotiable paper in the hands of a bona fide holder. All that can justly be claimed for these authorities, with the exceptions above referred to, is that they hold that, when the making of a contract is prohibited and made a crime by statute, it is void as between the original parties, or — what is the same thing — as between parties who do not stand in the attitude of a bona fide holder of negotiable paper arising therefrom. It is true that many of these decisions say that such a contract is void, and one of them (see Milford v. Milford Water Co.) says that it "is utterly void, and there is no power that can breathe life into such a dead thing." This language must, however, in accordance with every just principle of construction, be understood as applying to the case before the court. It may not be improper to describe the particular contracts under consideration as void, and as utterly void. But it by no means follows that negotiable paper issued on such contract would be void in the hands of a bona fide holder for value. These authorities cannot be regarded as authority for the proposition for which plaintiff's counsel cites them. They are not inconsistent with the rule (which we deem it our duty to undertake to show is well settled by authority) that, though a contract is prohibited and made a crime by statute, that con-

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tract, if it takes the form of negotiable paper, is valid and enforceable in the hands of a bona fide holder. Says Mr. Daniels, in his work on Negotiable Instruments, § 197: "The bona fide holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed 'mala in se,' and those founded in positive statutory prohibition, which are termed 'mala prohibita.' The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect." In Vinton v. Peck, 14 Mich. 287, defendant was an accommodation maker of a negotiable promissory note, dated on Monday, but in fact made on the preceding Sunday, contrary to the statute expressly prohibiting, under penalty of a fine, "any manner of labor, business, or work, except work of necessity and charity." See Comp. Laws 1857, § 1574. It was held that the note was valid and enforceable in the hands of a bona fide purchaser, because "the statute has not declared that notes made contrary to the Sunday law shall be void under all circumstances. Their invalidity is only to be implied from the prohibition of Sunday business, and under such a statute a bona fide holder is protected." State Capital Bank v. Thompson, 42 N. H. 369, is almost precisely like the above case. In New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40, a negotiable note was taken in violation of a statute requiring, under a penalty, to be stated therein, "Given for a patent right." The court held this note valid in the hands of a bona fide holder, saying (pages 374, 375, 108 Ind., page 391, 9 N. E., 58 Am. Rep. 40): "Our opinion is that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority." Citing, among other cases, Palmer v. Minar, 8 Hun, 342, and Cook v. Weirman, 51 Iowa, 561, 2 N. W. 386, which are similar to the principal case. In Smith v. Columbus State Bank, 9 Neb. 31, 1 N. W. 893, the court expressed its disapproval of a statement in Kittle v. De Lamater, 3 Neb. 325. "Or, if the note be founded upon an illegal consideration, prohibited by some positive statute, no recovery can be had, though the indorsee may not be privy to the original transaction." In Hart v. Foundry Co., 72 Miss. 809, 17 South. 769, it was held that negotiable paper issued in violation of a statute of Tennessee forbidding corporations doing business in that State without compliance with its provisions was valid in the hands of a bona fide holder, the court saying (pages 833, 834, 72 Miss., page 775, 17 South.): "The statute, while forbidding foreign corporations from doing business in the State without compliance with its conditions, does not declare, by express terms, that any contracts made with delinquent corporations shall be void, nor does it denounce as invalid any securities given by or to its under such contracts. The English and some of the American statutes against usury and gaming declared that all assurances and securities given in consideration thereof should be void. Under such declarations, it has very generally been held that negotiable paper, even in the hands of a bona fide holder, is void, because of the language of the law. But where only the contract is declared void, and there is no declaration of

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nullity against securities, it is held that while, as between the parties, and those taking with notice or after maturity, no recovery can be had, a bona fide holder will be protected." In Press Co., Ltd., v. City Bank of Hartford, 7 C. C. A. 248, 58 Fed. 321, notes issued in violation of a statute forbidding foreign corporations doing business except in compliance with its terms were held valid in the hands of a bona fide holder, the court saying (page 249, 7 C. C. A., page 322, 58 Fed.): "It is urged that public policy forbids a recovery; that to hold otherwise will nullify the statute. We do not think so. If the Legislature intended the consequences claimed, we should expect it to say so." In Lynchburg National Bank v. Scott, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827, 50 Am. St. Rep. 860, it was contended that a note obligating the maker to pay usurious interest was void in the hands of a bona fide holder. The court answered that contention by saying (page 659, 91 Va., page 489, 22 S. E., 29 L. R. A. 827, 50 Am. St. Rep. 860): "If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void." So it has been held: "If a statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration — and it is immaterial whether it be illegal at common law or by a statute — and no statute says it shall be void, the security is good in the hands of an innocent holder, or one claiming under such holder." Glenn v. Farmers' Bank of North Carolina, 70 N. C. 191; Smith v. Columbus State Bank, 9 Neb. 31, 1 N. W. 893; Grimes v. Hillenbrand, 4 Hun, 354; Hill v. Northrup, 4 Thomp. & C. 120; Converse v. Foster, 32 Vt. 828; Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. 894, 29 C. C. A. 473; Hatch v. Burroughs, 1 Woods, 439, Fed. Cas. No. 6,203. Other authorities hold that, "when a statute expressly or by necessary implication declares the instrument absolutely void, it gathers no vitality by its circulation, in respect to the parties executing it." Daniels on Negotiable Instruments, § 197; Pope v. Hanke, 155 Ill., at page 625, 40 N. E. 839, 28 L. R. A. 568 et seq.; Thompson v. Samuels, (Tex.) 14 S. W. 143.

We have already referred to the fact that two of the authorities cited by plaintiff's counsel, viz., Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918, and Texarkana & Ft. Scott Ry. Co. v. Bemis Land Co., 67 Ark. 542, 55 S. W. 944, arose upon negotiable paper in the hands of a bona fide holder. Snoddy v. Bank is authority for this proposition: "Notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands." This, as we have already shown, and as we understand plaintiff's counsel to concede, is opposed to almost unanimous authority, and cannot, therefore, be accepted as a correct declaration of the law. In Texarkana & Ft. Scott Ry. Co. v. Bemis Land Co., 67 Ark. 542, 55 S. W. 944, suit was brought upon a negotiable promissory note made by the plaintiff corporation, contrary to the Constitution and statutes of the State of Texas, for the accommodation of its president. It was held that this note was void in the hands of a bona fide holder. The argument of the court in support of this contention is this: "A contract prohibited by the Constitution or statute of a State, although negotiable

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in form, is not so in fact, and no innocence or ignorance on the part of the holder will make it enforceable. It is an absolute nullity." Citing 1 Daniels, Neg. Inst. § 807, and decisions of the Supreme Court of the United States and of the Supreme Court of Texas. The decisions referred to do not sustain the proposition for which they are cited. The section of Daniels cited has reference to cases where an express statutory provision declares a note void. We cannot follow this authority without repudiating our own decision of Vinton v. Peck, supra, and the almost unanimous authority of other courts.

Plaintiff's counsel assert that the case at bar is not ruled by decisions which hold that negotiable paper based upon an illegal consideration is valid in the hands of a bona fide holder. They insist that such cases are not authority, because the statute under consideration in this case did not merely make the consideration illegal; it actually "prohibited and penalized" the making of the contract itself. We are unable to see that this circumstance, if it affords a sound distinction, distinguishes the case at bar from several of the cases above referred to. In Vinton v. Peck, 14 Mich. 287, the particular act which was prohibited and punishable by fine was the making of the note in suit. It is true that the statute did not in express terms prohibit the making of the note, but when it prohibited the doing of any business it did prohibit the making of the note, for, as was expressly said by the Supreme Court of New Hampshire in State Capital Bank v. Thompson, 42 N. H., at page 370, "Under the construction of our statute prohibiting unnecessary labor on Sunday has been declared 'business of a person's secular calling,' . . . and as such is prohibited under a penalty." So, in New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40, a bona fide holder was allowed to recover on a note given for a patent right in violation of a statute which prohibited, under a penalty, the delivery of the note without the insertion of the clause that it was "given for a patent right." It is idle to say that the making of this note was not prohibited by a penal statute. See, also, Palmer v. Minar, 8 Hun, 342; Cook v. Weirman, 51 Iowa, 561, 2 N. W. 386. The only distinction that can be drawn between those cases and the case at bar is in the nature and extent of the punishment for making the contract prohibited by law. Such an inconsequential distinction will not change a rule of law.

We conclude, therefore, that, though the making of a contract is prohibited and made a crime by statute, yet that contract, if it takes the form of negotiable paper, is valid in the hands of a bona fide holder for value. We think it also settled that negotiable paper in the hands of a bona fide holder for value is not subject to any defense which would avoid it in the hands of the original holder, unless some statute, either expressly or by necessary implication, so declares. We affirm the proposition, denied by plaintiff's counsel, that though the statute, "by necessary implication, make the contract made in violation thereof absolutely void as to non-negotiable contracts and as to negotiable contracts in the hands of persons having knowledge of the defects, yet . . . the statute will not be considered to have that effect, should the contract be negotiable in form, and be found in the hands of a bona fide holder."

No strength is added to the foregoing proposition by saying that the statute, by implication, makes void all non-negotiable contracts and nego-

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tiable contracts in the hands of persons having knowledge of the defect. For it follows from elementary legal principles that all such contracts are unenforceable if the original contract in the hands of the first parties thereto cannot be enforced. Nor is strength added to the proposition by saying that such contracts are "absolutely void." If they cannot be enforced in the hands of the original holders, we see no reason for quarreling with a person who chooses to call them absolutely void, though others might describe them as voidable. See Thompson v. Samuels, (Sup.) 14 S. W. 143. It follows that plaintiff's counsel deny that negotiable paper can be enforced in the hands of a bona fide holder for value, if it arises from a contract which by implication of law is void or unenforceable between the original parties. In our judgment, the principle so denied is a correct statement of the law. It it were otherwise, all negotiable paper arising out of illegal and forbidden transactions would be void in the hands of bona fide holders for value, and yet nothing is better settled, by principle and authority, as we have already shown, than that such paper is valid.

There remains to be considered this question: Does the statute, by necessary implication, or by implication, even, make the check void in the hands of a bona fide holder for value? We have already seen that such implication cannot be found from the circumstance that the certification is prohibited and made a crime. It is insisted, however, that the intent of the Legislature to make the check void in the hands of a bona fide holder is indicated by other circumstances. It is contended that the purpose of the Legislature in enacting this law was "to protect the citizens, depositors, and stockholders against just such an act as was committed in the case at bar," viz., an attempt to withdraw the funds of the bank by means of a check falsely certified, and that, to make this purpose effectual, the check must be held void in the hands of a bona fide purchaser. It if were true that the sole purpose of the statute was to protect the depositors and stockholders of a bank against the criminal acts of its own officials, this argument would be very forcible. Are we warranted in declaring that the sole purpose of the Legislature in passing this statute was to protect banks and their depositors from the consequences of criminal misconduct of their officials, and that there were not other purposes, which would fall if plaintiff's construction of the act prevails? We must bear in mind that the Legislature, in passing this statute in 1887, had not learned the lessons taught by the disastrous failure of the City Savings Bank in 1902, which occasions this litigation, though counsel do not agree as to precisely what lessons are taught by this failure. We shall not, therefore, be materially aided — indeed, we are rather likely to be misled — if we look to that disaster to throw light upon the legislative purposes. The Legislature has not, by this statute, expressly declared its purpose. Its purpose, then, is to be inferred. While we are bound to infer that one of its purposes was to protect the bank and its depositors from the criminal conduct of its officials, it is likewise to be inferred that there was a broader purpose, viz., to promote safe banking generally. We may infer the legislative purpose on the assumption that the law was made to be observed, as well as on the assumption that it would be violated. If the law is observed, we can readily see that it will benefit, and thus infer the legislative purpose to benefit, not merely the depositors and stockholders of banks whose officers are called upon to certify checks, but

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all persons taking such checks. In other words, the observance of this law tends to increase the certainty of the payment of certified checks and to promote safe banking.

In the case at bar the allowance of the certified check will inure to the benefit of the stockholders of defendant bank, and to the damage of the depositors of the City Savings Bank, represented by plaintiff. But the law we declare in this case will certainly apply to a case, if such a case should, as it may, arise, where the allowance of such a check inures to the benefit of the depositors of the bank which takes it, and damages no one but the stockholders of the bank whose officials criminally certified it. Such a case would be presented here if the payment of the check under consideration would not sensibly impair the capital of the City Savings Bank, and if the funds withdrawn by its means from defendant had rendered it impossible for the latter to pay its depositors. And in such a case, under plaintiff's contention, the court should say that the Legislature intended to prefer the interest of the stockholders of the bank whose officers were guilty of criminal misconduct to that of the depositors of another bank damaged by such misconduct. We do not think we are warranted in imputing to the Legislature such an intent. We think it not improper to protect the interests of the stockholders and depositors of all banks, and not merely the stockholders and depositors of particular banks whose officials might be guilty of criminal misconduct.

The language of the statute prohibiting the certification does not compel the conclusion that its sole purpose was to protect the bank and its depositors against the criminal misconduct of its officials. Certification of a check is prohibited and made a crime "unless the amount thereof actually stands to the credit of the drawer upon the books of the bank." It will thus be observed that certification is forbidden even though the drawer has funds in the bank which do not stand to his credit upon the bank's books, and certification is not forbidden if the amount of the certified check is credited upon the books, though that credit is fictitious. In making the last statement, we have not forgotten that plaintiff contends that the statute does not forbid certification where the entry upon the book is fictitious. But as stated above, we do not agree with this contention. The statute in such case forbids the fictitious entry. It does not forbid the false certification resulting therefrom. In many cases the distinction might be unimportant. In others it might be very important. Suppose the bookkeeper or cashier of the bank made the fictitious entry, and the teller, acting in the best of faith, relying thereon, certified a check. No reasonable construction of the act would make this certification a crime, or bring it within the statutory prohibition. It will thus be seen that certification is prohibited in a class of cases where the depositors and stockholders of the bank whose officers violated the law cannot be injured, and it is permitted in a class of cases where they are injured. If the sole purpose of the act had been to protect the depositors and stockholders of the bank whose officers were guilty of this misconduct, different language would have been used. We are not, therefore, warranted in saying that this act was passed solely for the purpose of protecting the bank and its depositors from the criminal misconduct of its officers. We are not warranted in declaring that there was not a legislative purpose in passing this act which would be defeated by the construction contended for by plaintiff.

If the section is construed as plaintiff contends — if checks duly certi-

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fied are void in the hands of bona fide holders because the amount thereof did not stand to the credit of the drawer on the books of the bank — this consequence follows: Certified checks instead of being, as heretofore, the negotiable paper of the bank, and passing as current upon the faith of the bank's credit, will pass, if at all, only upon the credit of the particular bank official who certified it. Every person to whom a certified check is offered will be called upon to determine, not the credit of the certifying bank, not the authority of the certifying official, but the integrity and diligence of that official. Though one may have all confidence in such integrity and diligence, he may hesitate to take the check, because he fears that others to whom he may wish to transfer it lack such confidence. It will result, therefore, that certified checks, instead of being regarded in commercial circles with credit and favor, as heretofore, will be regarded with a degree of suspicion, and are likely to be discredited. If the Legislature intended this consequence — and they must have intended it if they intended that the act should receive the construction contended for by plaintiff — it seems strange that they left their intent to be ascertained as a matter of doubtful inference; it seems strange that they still left to banks the power of certifying checks, without any clear suggestion that such power was so greatly limited. "If the Legislature intended the consequences claimed, we should expect it to say so." Press Co., Ltd., v. Bank, 7 C. C. A., at page 249, 58 Fed. 322.

It is suggested, rather than urged, by plaintiff's counsel, that on the authority of Spitzer v. Village of Blanchard, 82 Mich. 234, 46 N. W. 400, the statute under consideration should be construed as denying to the teller authority to bind his principal, the bank, by the certificate under consideration. In Spitzer v. Blanchard, supra, it was held that bonds issued by a village in excess of the amount authorized by its incorporation act are void in the hands of a bona fide holder, the court saying (page 246, 82 Mich., page 403, 46 N. W.): "The amount of the bonds to be issued was known, and appears upon the face of the bonds. The assessed valuation and the vote of the electors are matters of public record, and are open to all the world for inspection and ascertainment, and are as accessible to intending purchasers as other persons. The limitation of power upon the common council appears in the public statute, and is presumed to be known to all dealing with corporate authorities or in corporate bonds." To show the distinction between that case and the case at bar, we quote from other language in that opinion (page 244, 82 Mich., page 403, 46 N. W.): "Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders; the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive." If it were necessary to further distinguish that case from the case at bar, we cannot do better than quote the language of distinguished jurists. Said Mr. Justice Selden in Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 135, 69 Am. Dec. 678: "It is, I think, a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has, or is presumed to have, any knowledge, with the terms of the power, he may take the representations of the agent as to any extrinsic

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fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it." Said Justice Davis in New York & New Haven R. R. Co. v. Schuyler, 34 N. Y., at page 73: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power may rely upon the representation." If authority is needed for the proposition, which seems obvious, that the certification in question related to an act peculiarly within the teller's knowledge, we refer to Oakland County Savings Bank v. State Bank of Carson City, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463.

It is also urged that it was the intention of the framers of the general Banking Act to follow generally the provisions of the National Banking Law, and that we are warranted in inferring an intent to avoid a check falsely certified, in the hands of a bona fide holder, from certain changes — particularly from the fact that, when section 19 was framed, language was omitted which in the corresponding section of the National Banking Law, viz., section 5208, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3497), clearly indicated the purpose of Congress to make such checks valid. This contention deserves attention. Section 5208, Rev. St. U. S., makes it unlawful to certify any check, not, as provided in section 19, unless the amount actually stands to the credit of the drawer on the books of the bank, but unless the drawer "has on deposit . . . an amount of money equal to the amount specified in such check." Then follows the provision omitted from section 19: "Any check so certified by duly authorized officers shall be a good and valid obligation against the association." It will be observed that the language omitted in framing section, in form, at least, and possibly in reality (see Morse on Banking, [4th ed.] vol. 1, § 414), makes the prohibited check valid, even though not in the hands of a bona fide holder. The omission of this sentence, therefore, in section 19, may well be attributed to some other purpose than the intent to make such checks void in the hands of a bona fide purchaser. We can well understand the reluctance of a Legislature to use language which, even by inference, made such checks valid in whosesoever hands they might be.

It results from these views that the trial court erred in denying defendant the right to prove that it received this check after certification, on the day it was drawn, in the usual course of business, and paid full value therefor, without notice or knowledge of any infirmity, or of the fact that the account of the drawer was overdrawn.

The court has received unusual aid from the excellent arguments and briefs of counsel representing the parties interested in this litigation. Without such aid, we could have not reached so speedy a decision.

Judgment reversed and new trial ordered.

GRANT, J., did not sit. The other justices concurred.

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Decision No. 776.

WHITE et al. v. HARRIS et al.

48 S. E. 41.

(Supreme Court of South Carolina. April 29, 1904.)

NEGOTIABLE INSTRUMENTS — ATTORNEY'S FEE — ALTERATION — SPOLIATION — QUESTION FOR JURY.

1. Provision in a note to pay ten per cent. attorney's fees for collection does not render the note non-negotiable.

2. Where the indorsers of a note alter it after delivery by striking a clause providing for the payment of attorney's fees for collection, it is a material alteration, relieving the maker of liability.

3. Where a stranger to a note strikes out a clause therein providing for payment of attorney's fees, it is a spoliation, and does not relieve the maker of liability.

4. Where the evidence is conflicting as to whether striking out the clause in a note was an alteration or a spoliation, the question is for the jury.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Union county; Buchanan, Judge.

Action by T. H. White and M. S. Lewis against I. S. Harris and others. Judgment for plaintiffs, and defendants appeal. Reversed.

The following are the exceptions:

"(1) Because the presiding judge erred in refusing to admit testimony of one of the defendants as to a conversation between him and one Cross, one of the payees named in the notes, in reference to the transaction in which the notes were given, on the ground that defendant could not 'invalidate that note,' thus precluding the defendants from defenses they might have set up against the payees, Cross & Camp; and thereafter the presiding judge refused motion of defendants for direction of a verdict on the ground that the defendants did not set up failure of consideration, it being not sufficient to set up fraud only, and at the same time held that the owner of the notes simply stepped into the shoes of the payee.

"(2) Because the presiding judge erred in refusing to hold that a note providing for ten per cent. attorney's fees is a non-negotiable note, giving an indorsee no right to sue the maker, and in refusing to direct a verdict for the defendants thereon, or to allow the issues to go to the jury.

"(3) Because the presiding judge erred in refusing to hold that the striking out of the provision for ten per cent. attorney's fees in the notes was a material alteration, and changed the character of the notes, and should therefore avoid them.

"(4) Because the presiding judge erred in holding that the plaintiffs were not responsible for alterations in the notes made by one Cross, to whom they had been intrusted for the purpose of securing a change by consent of the makers, whereas the presiding judge should have held that, from the testimony, Cross was the agent of plaintiffs, and they were bound by acts of Cross, or otherwise he should have allowed the jury to determine from the testimony whether or not Cross was such agent.

"(5) Because the presiding judge erred in holding that an altered note was no note at all, and thereafter directed a verdict for the plaintiffs on notes in this case

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proved to have been altered while in possession of plaintiffs, whereas presiding judge should have held that an altered note was no note at all, and that the alteration after notes came into possession of plaintiffs avoided the instruments.

"(6) Because the presiding judge erred in holding that one in possession of a note bearing prima facie evidence of alteration must rebut the presumption that the note was altered while in his possession, and thereafter directing a verdict in favor of plaintiffs, when the testimony showed conclusively that the notes in this case were altered while either actually or constructively in possession of plaintiffs, and said issue should have been submitted to the jury.

"(7) Because the presiding judge erred in holding that striking out the provision for ten per cent. attorney's fees was a benefit to the defendants, and in holding that it must be shown that defendants had been injured by the alteration in these notes before they could avoid them by reason of such alteration.

"(8) Because the presiding judge erred in directing a verdict in favor of plaintiffs when the proof was clear that the notes had been materially altered while in possession of plaintiffs, and, whether or not said notes had been so altered by plaintiffs being purely a matter of fact, the question was one exclusively for the jury to determine from the testimony."

V. E. De Pass and J. G. Hughes, for appellants.
W. W. Lewis, for respondents.

POPE, C. J. The defendants made their joint and several notes to Camp & Cross on the 22d May, 1901, in these words:

"$125.00. Union, South Carolina, May 22, 1901. September 1st, 1901, after date, we either of us promise to pay to the order of Camp and Cross, one hundred and twenty-five dollars at the banking house of Wm. A. Nicholson & Son, bankers, at Union, S. C., value received with interest after maturity at the rate of eight per cent. per annum until paid. We agree in default of payment after maturity, to pay ten per cent. for attorney's fees for collection. J. S. Harris, W. C. Nelson and R. N. Harris."

"$125.00. Union, South Carolina, May 22d, 1901. November 1st, 1901, after date, we or either of us promise to pay to the order of Camp and Cross one hundred and twenty-five dollars at the banking house of Wm. A. Nicholson & Son, bankers, Union, S. C., value received with interest after maturity at the rate of eight per cent. per annum until paid. We agree, in default of payment, after maturity, to pay ten per cent. attorney's fees for collection. J. S. Harris, W. C. Nelson and R. N. Harris."

On the 14th of June, 1901, Camp & Cross, for value received, in writing, indorsed said two notes to T. H. White and M. S. Lewis. A few days after said notes had been transferred to T. H. White and M. S. Lewis, one Cross, of the firm of Camp & Cross, who had indorsed the two notes to White and Lewis, came to White and stated that he had seen in the Charleston News and Courier, a newspaper printed in the city of Charleston, S. C., that the words, "We agree in default of payment after maturity to pay ten per cent. attorney's fees for collection," inserted in a note otherwise negotiable, would render such note unnegotiable. Cross then stated that he did not wish to have any trouble about this in the future, and that, if White and Lewis would turn over the two notes to him, he would go to Union, S. C., and obtain those words stricken out from each note by the makers of said notes. He receipted to White and Lewis for the two notes, and went to Union to

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see the makers. He only saw one of the makers, as hereinafter mentioned. But Cross did not go any further as to the makers, but with his own hand ran the pen through those words in each note, and carried the notes thus altered to the new holders, White and Lewis, and delivered them up. Both White and Lewis always protested that, if the words erased were not the act of the makers, they disclaimed any right thereto. Not being paid at maturity, White and Lewis had the notes duly protested for nonpayment, and they thereafter brought this action against the three makers, as defendants. These defendants denied their liability, insisting that the notes had been altered after they signed them, by striking out the words from said notes we have already described, which words in the two notes rendered them unnegotiable. The defendants also claimed that, being unnegotiable notes, they were entitled to show that the same in the hands of the present plaintiffs were subject to any defense they had against Camp & Cross, and they pleaded that said notes were procured by gross misrepresentation and fraud. So that the matters came on for trial before Judge Buchanan and a jury. Both sides to the controversy asked the judge to instruct the jury to bring a verdict for the plaintiffs or defendants, respectively. The judge directed the jury to return a verdict for the plaintiffs for principal and interest and the costs of protest. This was done, and judgment was entered upon such verdict. The defendants now appeal. The grounds of exception will be reported.

It must be apparent that this whole controversy is mainly hinged upon the determination of the question, were these two notes negotiable or non-negotiable? The decisions of the Supreme Court of this State have not as yet settled what effect the insertion of the words, "we agree in default of payment after maturity to pay ten per cent. attorneys' fee for collection," in a note, will have upon it — that is, whether it is still a negotiable note, or does it become an unnegotiable note? In the case of Sylvester, Bleckley & Co. v. Alewin et al., 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, this identical question was presented. Two justices — Mr. Justice Gray and Mr. Chief Justice McIver — there held that the note becomes unnegotiable, while Mr. Justice Jones held to the contrary, and Mr. Justice Pope expressed no opinion on this question; holding that a new trial had to be ordered because of the mistake of the trial judge in improperly sustaining a demurrer. The two decisions of Bank v. Gary, 18 S. C. 282, and Bank v. Strother, 28 S. C. 505, 6 S. E. 313, are in no way decisive of this question. A promissory note is said in 2 Am. & Eng. Ency. 314, to be "a written engagement by one person to pay another absolutely and unconditionally a certain sum of money at a time specified therein." These two notes here sued on certainly fill all the requirements of promissory notes, down to the words we have already quoted. Do these words change the character of these notes? We think not. The ten per cent. attorney's fees are not to be paid until after the maturity of the notes. Besides, it has always been held in this State that a provision in a note for the payment of protest fees never alters the character of a promissory note. It is true that it is held in this State that a provision in a promissory note for the payment of the cost of exchange will change it to a non-negotiable note. Why? Because the cost of exchange is an ever-varying matter. But look at these words: "We agree if this note is not paid at maturity we will pay ten per cent. attorney's fees." Are they not definite and certain? Very

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different are these words from those used in Bank v. Strother, supra, where a provision was inserted in the note to pay "reasonable attorney's fees and costs." Nothing could be more uncertain than the words used in the latter case. Now, we would use words of no uncertain sound or meaning. We wish to hold a definite and distinct promise to pay five or ten per cent. attorney's fees in an otherwise clear promissory note will not change its character from a promissory note.

With reference to exceptions alleging error in holding that striking out said provisions for attorney's fees is not a material alteration: The material alteration of a note extinguishes all liability thereon as against parties not consenting. Sanders v. Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743. Whatever changes the legal effect of the instrument is a material alteration. "The test is not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract — whether it will have the same legal effect and operation after the alteration as before." Am. & Eng. Ency. Law. (2d ed.) 224, 225, and notes. The stipulation as to attorney's fees is not material in so far as the question of negotiability is concerned, but it is certainly material in so far as the contract liability of the parties is concerned. To add such words to a contract would certainly be a material change. To strike them out must also be material, if the test is whether the legal effect of the instrument is altered. In 2 Ency. Law, 238, it is stated: "Any alteration in the amount of the principal of an instrument conditioner for the payment of money is material, whether such alteration increases or decreases the amount. Thus it has been considered a material alteration of an instrument to insert therein (Monroe v. Paddock, 75 Ind. 422) or erase therefrom (Bank v. Laughlin, 4 N. D. 391 [61 N. W. 473]) a provision for the payment of attorney's fees in the case of suit brought, or to change the amount of the fee which is provided for in such clause (Burwell v. Orr, 84 Ill. 465)." See also Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; 2 Daniel, Neg. Inst. (3d Ed.) § 1375; Sanders v. Bagwell, supra.

Now, with reference to whether the case should have been submitted to the jury: It does not appear that there was any evidence that defendants J. S. Harris and R. N. Harris ever consented to the alteration of the note by Cross, but it was a matter proper for the jury to consider whether defendant W. C. Nelson consented to such alteration. It is true, he testified that he did not consent; but, on the other hand, he testified to the effect that the change was made by Cross in his presence, and that he told Cross "if he wanted, to change it." It was for the jury to say whether Cross made the change in the presence of W. C. Nelson, and with his acquiescence. If so, Nelson would be bound, whether the other defendants are released or not.

Furthermore, touching the question whether the change in the notes was an alteration or a spoliation, the case should have been submitted to the jury, under proper instructions as to the law. Contrary to the rule in England, the authorities in the United States generally hold that if a stranger to the contract, without any complicity with the grantee or obligee, materially alters an instrument in writing, that is a spoliation, and does not prevent a recovery on the original contract. 2 Dam. Neg. Inst. (3d Ed.) § 1373; 2 Ency. Law (2d Ed.) 214. Was Cross a stranger to the contract, having indorsed the same to the plaintiff? What was the character of the indorsement; was it without recourse, and was he liable to pay the notes in

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any contingency at the time he made the change? Then, if we should suppose that Cross was a stranger to the contract, it must still be determined whether there was any privity between plaintiffs and Cross with respect to such alteration — a question proper for the jury in this case.

For these reasons, we think the judgment should be reversed, and the case remanded for a new trial, and it is so adjudged.

GARY, A. J. (dissenting). I adhere to the views expressed by me in the case of Sylvester, Bleckley Co. v. Aleine, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, and therefore dissent on the ground that the note was non-negotiable.

Decision No. 777.

OEXNER v. LOEHR et al.

(St. Louis Court of Appeals. Missouri. April 26, 1904.)

BILLS AND NOTES — ANOMALOUS INDORSER — LIABILITY OF INDORSER — SPECIAL AGREEMENT — EVIDENCE — PRIMA FACIE CASE.

1. In the absence of evidence that one who signed a note on the back before delivery, being neither maker nor payee, signed unedr an agreement between herself and the payee that she should be regarded as an indorser, such signature rendered her liable as a joint maker.

2. Where the note sued on was taken before delivery to the payee to D. by one of the makers, who asked D. to indorse the note, and told her that she would be notified by the payee if it was not paid at the proper time, and one of the makers testified that when the note was delivered to plaintiff he told him the conditions on which D. signed it, namely, that it must be paid when due, and if not plaintiff would notify her, such facts were sufficient to sustain a finding that D. signed the note as an indorser, and not as joint maker.

3. Where, in an action on a note against the makers and an indorser, the indorser's signature was admitted, the introduction of the note in evidence established a prima facie case in favor of plaintiff, without proof that such indorser signed before delivery.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by Michael Oexner against Fred Loehr, Jr., and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

W. H. Clopton, for appellant. W. H. Cocke, for respondents.

GOODE, J. Action on two promissory notes, one for $1,000, dated January 2, 1900, the other for $500, dated March 11, 1900, both due one year after their respective dates. Plaintiff was the payee of the notes, and they were signed on their faces by Fred Loehr, Jr., and Wendlin Oexner, and across their backs by Mrs. Emily Donk. The petition was in two counts of the usual form. The answer stated that the defendant Emily Donk signed the notes on the back as indorser, and that plaintiff failed to notify her of the default of the makers, or to take any step required by law to make her liable as indorser. A replication put that defense in issue.

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The question is as to the capacity in which Mrs. Donk signed the notes. She signed them both before delivery to the plaintiff, and, as she was neither payee nor indorsee, the presumption is she did so as maker, which presumption could be disproved by showing an agreement was made between her and the plaintiff that she as to be regarded as indorser, and entitled to the rights of one who occupies that status on a promissory note. Otto v. Bent, 48 Mo. 26. Neither of the notes was paid at maturity, and, as demand for payment was not made or notice of dishonor given to the defendant, she stands exonerated from liability if she was an indorser and not a joint maker or surety. The law concerning what must be proven by a party who is prima facie a maker of a promissory note (of which he was neither payee nor indorsee) from having written his name on the back of it before delivery, to clothe himself with the character of an indorser, has been frequently reiterated by the appellate courts of this State. He must show an agreement that he was to be liable as indorser instead of as maker; a "special contract" to that effect, some of the opinions say; others, an "express understanding." Otto v. Bent, supra; Boyer v. Boogher, 11 Mo. App. 130; Malting Co. v. Miller, 38 Mo. App. 251. We understand those decisions to mean simply that a positive agreement must be shown to relieve such a signer of the character of maker, and that no agreement of the sort will be implied. The use of the word "indorser" or "indorsement," in a conversation between the parties anterior to the signing of the instrument, is not decisive of the obligation of the party who signed across the back, for both words are used popularly to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term. Rossi v. Schawacker, 66 Mo. App. 67.

Plaintiff's counsel insists a peremptory instruction should have been given to the jury to return a verdict for his client on both notes. His position is that there was no evidence to prove an agreement between plaintiff and Mrs. Donk that she was to be held as an indorser merely. Probably this position is well taken as to the second note, for several perusals of the record have failed to disclose any substantial testimony to prove an agreement regarding it. It was delivered to the plaintiff by his brother, Wendlin Oexner, with defendant's name on it, and without any statement to plaintiff that she contracted as indorser. If there was an understanding of that kind between her and the principals on the note when she signed it, plaintiff was not notified of the agreement, and did not assent to it. Whatever passed between her and the principals on the subject could not affect or bind the plaintiff unless it was communicated to him at or prior to the delivery of the note. Certain evidence was admitted in regard to the obtention of her signature to the second note, over the objection of the defendant. Loehr, who is Mrs. Donk's son-in-law, was permitted to state that she "agreed to indorse the note." As it was not shown this agreement was made known to the plaintiff, Loehr's testimony was hearsay and incompetent. The response proffered by the defendant's counsel to this assignment of error is that no exception was saved to that testimony, but the record does not bear him out. Plaintiff's counsel objected, and the court overruled the objection on the ground that the conversation occurred when the

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note was signed, and, therefore, was relevant and material. Doubtless it would have been material if it had been communicated to the plaintiff, but that was not proven.

The first note was given under these circumstances: The principal makers, Wendlin Oexner and Fred Loehr, desiring to engage in business, applied to plaintiff for a loan of $1,000. Plaintiff was willing to lend the money, provided they would furnish security. Loehr said his mother-in-law, Mrs. Donk, would sign the note, and plaintiff agreed to accept her as security. Plaintiff's testimony shows clearly that he had no thought of accepting Mrs. Donk in the capacity of a technical indorser, and that he did not know the difference between an indorser and a surety. He used the word "indorsement" in his talk with Loehr in no technical sense, but as signifying a surety. However, there was testimony that Mrs. Donk signed the first note as an indorser, and that plaintiff was notified of the fact. Loehr swore he and Wendlin Oexner went to Mrs. Donk's house, asked her if she would indorse the note, as they wanted the money to use in business, and stated to her that if it was not paid at the proper time she would be duly notified by the plaintiff. Loehr also swore he told plaintiff, when the note was delivered to him and the money advanced, the condition on which Mrs. Donk signed it, namely, that it had to be paid when due, and if it was not he was to notify her. There are other statements in the testimony going to show Mrs. Donk signed the first note as indorser, and that plaintiff was informed of the capacity in which she signed it. While it is apparent plaintiff did not understand her relation to the note was that of indorser, he cannot be awarded a recovery in the face of an agreement with her which was communicated to him when the note was delivered, merely because he failed to comprehend its force. The above selections from the testimony warranted a finding by the jury in favor of Mrs. Donk on the first note. But there are many discrepancies and inconsistencies in Loehr's testimony, as well as in the defendant's, and the conviction is irresistible to our minds that she signed both notes as surety for Wendlin Oexner and Loehr, without stipulating for the peculiar rights of an indorser, or understanding that she had reserved those rights. In one part of her testimony she declared there was nothing said about the note when she signed it, and, again, that she thought the parties who borrowed the money — her son-in-law and Wendlin Oexner — ought to notify her if the note was not paid; but she said, also, she understood the plaintiff was to notify her. It looks very much like the defense was an afterthought, but we must hold there was evidence for the jury in support of the defense to the first count of the petition.

The trial of the two counts was so connected that the admission of the incompetent evidence in regard to the conversation with Mrs. Donk when she signed the second note was likely to injure the plaintiff's case on the first count, for it tended to show Mrs. Donk signed the second note as an indorser, and to create or strengthen an impression in the minds of the jury that she sustained that relation to both notes. Mrs. Donk's signature was admitted; so plaintiff rested after introducing the notes in evidence, but was compelled, under penalty of a nonsuit, to prove she signed them before delivery. An exception was saved to this ruling. According to the opinion in Schmidt v.

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Miller, 38 Mo. App. 251, a case identical with this one in its facts, the introduction of the notes made a prima facie case for the plaintiff, and threw the burden on the defendant. We adhere to that ruling. This case is one which especially calls for care in the admission of testimony and in instructing the jury, as the rights of the plaintiff may be sacrificed to a misconception by the jury concerning the defendant's contract; a misconception easy to derive from the use of the word "indorsement" by the plaintiff while discussing with Loehr the security he wanted for his money. There was no evidence tending to establish a defense to the second note, except some hearsay testimony of Loehr as to what Wendlin Oexner had told him. It was not objected to, however.

For the errors noted the judgment is reversed and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

Decision No. 779.

REED v. FLEMING et al.

70 N. W. 667.

(Supreme Court of Illinois. April 20, 1904.)

NOTES — EXECUTION BY PRESIDENT OF CORPORATION — INDIVIDUAL LIABILITY — EFFECT OF SEAL — BURDEN OF PROOF.

1. Defendant signed certain notes, his signature being followed by the words, "Prest. Mt. Carmel Lgt. & Water Co.," and the imprint of a seal showing the words, "The Mt. Carmel Light & Water Company, Mt. Carmel, Illinois. [Seal.]" The notes recited that they were payable "as per agreement on reverse side," and by this agreement they were to be paid in first mortgage bonds, at par value, of the corporation, as soon as they could be issued in the regular and legal way, without reference to the date of the note. Held, that the notes were the obligations of the corporation, and not of defendant individually.

2. Where a defendant is sued on notes bearing his signature, followed by words indicating his presidency of a corporation, and having the corporate seal attached, the burden is on the plaintiffs to prove the obligations to be individual promises of the defendant.

3. Where a defendant is sued individually on notes which on their face appear to have been executed by him as president of a corporation and under its seal, it is immaterial to his taking advantage of the variance that the authenticity of the seal is not established.

Error to Appellate Court, Second District.

Action by Frank C. Fleming and Ashley R. Cadwallader, partners under the firm name of Fleming, Cadwallader & Co., against William S. Reed. Judgment of the Appellate Court, Second District (102 Ill. App. 668), affirming on writ of error a judgment for plaintiffs, and defendant brings error. Reversed.

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Francis M. Lowes (George N. B. Lowes, of counsel), for plaintiff in error. Charles E. Woodward (Lincoln & Stead, of counsel), for defendants in error.

CARTWRIGHT, J. Frank C. Fleming and Ashley R. Cadwallader, partners under the firm name of Fleming, Cadwallader & Co., brought their suit in the Circuit Court of La Salle county against William S. Reed, plaintiff in error, and filed their declaration in the common counts in assumpsit. There was a plea of the general issue by the defendant, and, a jury having been waived, the cause was submitted to the court for trial. Plaintiff, to maintain the issue on their part, offered in evidence two written instruments, viz.:

"$2,500.00. Chicago, May 6th, 1893. On or before July 15th, after date, we promise to pay to the order of Fleming, Cadwallader & Co., as per agreement on reverse side, twenty-five hundred and No/100 Dollars, at Central State Bank, West Lebanon, Inda. Value received, with interest at 6 per cent. per annum. William S. Reed, Prest. Mt. Carmel Lgt. & Water Co." Seal as follows: "The Mt. Carmel Light & Water Company, Mt. Carmel, Illinois, Seal."

Upon the back appears the following: "May 6th, 1893. It is agreed & understood between the parties to this contract that this note is to be paid in 1st Mortg. Bonds of the par value of the Mt. Carmel Light & Water Co., Mt. Carmel, Ill., as soon as the bonds can be issued in the regular & legal way without reference to the date of the note."

"$2,500.00. Chicago, May 6th, 1893. On or before July 15, 1893, after date —— promise to pay to the order of Fleming, Cadwallader & Co., as per agreement on reverse side, twenty-five hundred and No/100 Dollars, at Central State Bank, West Lebanon, Inda. Value received, with interest at 6 per cent. per annum. William S. Reed, Prest. Mt. Carmel Lgt. & Water Co." Seal as follows: "The Mt. Carmel Light & Water Company, Mt. Carmel, Illinois, Seal."

Upon the back appears the following: "May 6, 1893. It is agreed and understood between the parties to this contract that this note is to be paid in 1st Mortg. Bonds at par value of the Mt. Carmel Light & Water Co., Mt. Carmel, Ill., as soon as the bonds can be issued in the regular way and legally without reference to the date of the note."

To the introduction of these instruments defendant objected, but the objection was overruled, and he excepted. The defendant then offered the articles of incorporation of the Mt. Carmel Light & Water Company, and a certificate of increase of capital stock of said corporation under seal, showing that defendant acted as president thereof. The defendant submitted to the court propositions of law that the notes introduced in evidence were, as matter of law, the notes of the Mt. Carmel Light & Water Company, and not the individual notes of the defendant, and that when the seal of the corporation is attached to a note, and the name of the president of the corporation is signed to the note, with his official designation and the name of the corporation, the note is prima facie the note of the corporation. These propositions were refused, and the court found the issues for the plaintiffs, and entered judgment against the defendant for $7,312 and costs. The defendant excepted to the refusal of said propositions,

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the ruling of the court, and the judgment, and removed the record by writ of error to the Appellate Court for the Second District. The Appellate Court affirmed the judgment, and the writ of error in this case is prosecuted to review the judgment of the Appellate Court.

There was no extrinsic evidence as to the consideration for the notes, or by whom it was received, or of any facts or circumstances connected with their execution, and the objection to them, when offered in evidence, raised the question whether they appeared upon their face to be obligations of the defendant or of the Mt. Carmel Light & Water Company. That question was to be determined by looking into the terms and provisions of the instruments, and the manner of their execution, for the purpose of interpreting them according to the intention of the parties. When an officer of a corporation enters into a contract which he is authorized to make, and which purports to be the contract of the corporation, he assumes no liability. In such a case the contract is the contract of the corporation, and not of the officer; but he may pledge his own credit when in fact acting for the corporation, if by the language of the contract he binds himself to its performance. If, instead of attempting to bind the corporation, he uses words to charge himself he will be personally liable, although he adds to his name descriptive words identifying himself. In such a case his mere official designation will not exempt him from liability. So it has often been held that mere words of description of the maker of the note will not relieve him from liability unless it appears that he acted as agent for a disclosed principal, intending to bind that principal. Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; McNeil v. Shober & Carqueville Lithographing Co., 144 Ill. 238, 33 N. E. 31; Hately v. Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304. The fact that the intention of the parties is generally discoverable upon examination of the instrument was stated in Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624, as follows (page 642): "Most generally there is that on the face of the instrument itself, and especially where the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation." And again: "It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the individual note of the officers whose names are attached to it. It needs no extrinsic evidence to show such a note is the obligation of the corporation. Such is the common understanding from what appears on the face of the instrument itself." In this case the instruments were signed by the defendant, William S. Reed, president of the corporation, and under its corporate seal. The words, "Prest. Mt. Carmel Lgt. & Water Co.," might be regarded as words of mere personal description if nothing more appeared, but the seal of the corporation could not possibly be regarded in that light. The seal of the corporation is in no way descriptive of the president or any other officer, but is used to evidence and authenticate papers and obligations of the corporation. It belongs to the corporation as such, and cannot properly be attached to the obligations of an individual. The seal of a corporation appearing upon an instrument is prima facie

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evidence of the assent of the corporation and of authority to execute the instrument. Springer v. Bigford, 160 Ill. 495, 43 N. E. 751.

But counsel say that the authenticity of the seal was not established, and that it did not prove itself, and therefore the obligation was personal. In Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357, it was held that the execution of an instrument by the president of a bank with the seal affixed afforded prima facie evidence that it was the seal of the bank; and that this rule does not dispense with the evidence that a seal is the seal of a corporation, but adopts a rule of prima facie evidence of the fact. Whatever the correct rule may be on that subject, the question before the court was whether the instruments appeared upon their face to be the individual obligations of the defendant. The burden was on the plaintiffs to allege and prove an individual promise of the defendant, and it was not for him to show that the obligation was not his. He might become personally liable for acting without authority when he assumed to act as though he was authorized, but that question was not presented by pleading or proof. The instruments, when offered without any proof, appeared upon their face to have been executed by the defendant as the president of a corporation, under the seal of that corporation. They therefore appeared upon their face to be the obligations of the corporation. It was afterward shown, without contradiction, that the Mt. Carmel Light & Water Company was a corporation and that defendant acted as its president.

There are other, and perhaps stronger reasons for the conclusion that the instruments were obligations of the corporation. In considering whether the corporation or the defendant was expected to perform the agreement it is important to consider which would be able to perform it. The promise was to pay, according to the agreement on the reverse side, the sum of $2,500, with interest at six per cent. The agreement upon the back was thereby incorporated into the face of the instrument, and the obligation was to pay $2,500, with six per cent. interest, in the first mortgage bonds of the Mt. Carmel Light & Water Company, at their par or face value, as soon as the bonds could be issued in the regular way, and legally, without reference to the date of the notes. The instruments did not call for $2,500 in value of the bonds, but for bonds amounting to that sum on their face, regardless of value. There was no provision as to time of payment of the bonds or the rate of interest, and if they were issued on long time, without interest, they might be worth very much less than par, or with other conditions they might perhaps be worth a premium. The agreement, then, was to deliver mortgage bonds, with a certain face value, which had never been issued, and which the corporation alone could issue. They could not have been the property of the defendant when the instruments were executed, nor did he have it in his power to issue or deliver them. It was not in the power of the defendant to fix the maturity of the bonds, the rate of interest, or anything else affecting their value. That power rested in the corporation itself, which could fulfil the obligation. It would hardly be supposed that an individual would bind himself to pay $2,500, with six per cent. in cash, on a failure to deliver bonds which might be worth much less, where there was no provision as to maturity of the bonds or rate of interest, and where he would have no absolute right

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to control the terms, issue the bonds, or obtain them in the market. It seems, from the terms of the instruments, to have been intended that the corporation should perform the promise, and we think the court erred in admitting the instruments in evidence, and refusing the propositions of law.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court. Reversed and remanded.

Decision No. 780.

NATIONAL BANK OF NEW JERSEY v. BERRALL.

58 Atl. 189.

(Court of Errors and Appeals of New Jersey. June 20, 1904.)

MONEY PAID — ACTION TO RECOVER — MISTAKE — CHECKS — RIGHT OF HOLDER — APPEAL — ENTRY OF JUDGMENT.

1. The payee of a check drawn upon a bank in New Brunswick indorsed it generally, and deposited it to his account in a bank in Washington. The Washington bank forwarded it to the New Brunswick bank for collection. The latter bank paid it — by mistake, as alleged. Held, that there was no privity between the New Brunswick bank and the payee of the check to support an action by the former against the latter to recover the amount of the check as for money paid by mistake.

2. The holder of a check has no contract with the bank on which it is drawn, and no legal right to exact its payment. Creveling v. Bloomsbury National Bank, 46 N. J. Law, 255, 50 Am. Rep. 417, approved.

3. Where a bank receives in the ordinary course of business a check drawn upon it, presented by a bona fide holder, who is without notice of the fact that payment thereof has been stopped, and the bank pays the amount of the check to such holder, it cannot afterwards recover back the money as paid by mistake, on the ground that payment of the check had been countermanded by the drawer.

4. Where an agreed state of facts, adopted by the trial court as the basis of its findings and spread upon the record, includes all facts essential to the determination of the controversy between the parties, it will be treated as a special verdict, upon which the court of review will render the same judgment that the trial court ought to have rendered.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the National Bank of New Jersey against James Berrall. Judgment for plaintiff. Defendant brings error. Reversed.

Edwin B. Goodell, for plaintiff in error. Alan H. Strong, for defendant in error.

PITNEY, J. This was an action to recover money alleged to have been paid by mistake. It was tried by consent before a justice of the Supreme Court, without a jury, upon an agreed state of facts, and

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resulted in a finding and judgment in favor of the plaintiff. Exceptions having been taken to the conclusions of the trial justice in matters of law, the writ of error presents the question whether, upon the admitted facts, the plaintiff is entitled to judgment against the defendant. The essential facts are as follows: One Kilpatrick delivered to defendant, Berrall, his check drawn upon the plaintiff bank, payable to defendant's order. Plaintiff's banking house is at New Brunswick, in this State. The check was forwarded to defendant, who resided in Washington, D. C., and was with reasonable diligence indorsed by him and deposited to his account in the Columbia National Bank of Washington, and by that bank immediately passed to his credit. The check was thereafter forwarded by the Columbia National Bank to the plaintiff bank, at New Brunswick, for collection, and was paid by the latter in due course of business. Before the check was presented to the plaintiff for payment, however, Kilpatrick, the drawer, had instructed the plaintiff not to pay the check, and plaintiff's employee who afterwards paid it did so in ignorance or forgetfulness of this instruction. Subsequently the plaintiff communicated with the defendant by letter, stating that the check had been paid by mistake, since payment thereof had been stopped by Kilpatrick; that, in consequence, the plaintiff had been compelled to make good the amount to Kilpatrick, return of which it thereupon demanded of defendant in exchange for the check. The demand was refused, whereupon this action was instituted.

In this situation there is, in our opinion, no right of recovery, for two reasons:

1. For want of privity between the parties to the action. It will be observed that the suit is in no wise based upon the check as a commercial instrument. The paper was not protested, and the conditional liability of Berrall, as indorser, to pay the amount to the holder in the event of dishonor of the check upon presentation, followed by notice to him, has never become fixed. Nor does the case present an instance of the attempt to follow money that is impressed with a trust into the hands of a third party, who has taken it with notice of the trust, or without parting with value in exchange. The money that Berrall received was the money of the Washington bank, placed by that bank to his credit upon the deposit of the check to his account. That transaction was in effect a sale of negotiable paper by Berrall to that bank. The money that the plaintiff bank afterwards paid for the same paper went to the Washington bank, and not to Berrall. The two transactions were separate and distinct. Under such circumstances, the right to recover money paid by mistake exists only as against the party to whom the payment in question was made. In this case the Washington bank was the recipient of the disputed payment, not Berrall. If Berrall had deposited the check in the Washington bank for collection for his account, the action of that bank in forwarding it to New Brunswick for collection would have been stamped with agency in behalf of Berrall, and payment by the New Brunswick bank (now plaintiff) to the Washington bank would have been payment to Berrall, within the rules of privity. But Berrall did not deposit the check for collection. His indorsement was general, and its purpose was unqualified, for the amount of the check was immediately passed to his credit by the Washington bank. That

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constituted that bank the owner of the check. Hoffman v. First National Bank of Jersey City, 46 N. J. Law, 604. What that bank afterwards did in forwarding the check for collection was done for its own account, and the payment received by it from the plaintiff bank was received as principal, and not as agent. The authorities cited to the contrary are not in point. In 3 Am. & Eng. Encycl. Law (2d Ed.) tit. "Banks and Banking," the language on page 817, that "the fact that a depositor's account is credited with the amount of the items *taken for collection* does not of itself operate to transfer the title to the paper, for, by the custom of bankers, the collection is charged back at once, if not made," is limited by the force of the words italicized. In Appleton Bank v. McGilvray, 4 Gray, 518, 64 Am. Dec. 92, the payee of a note empowered an agent to collect it for him, and the payee was, of course, held liable as principal. Merchants' Ins. Co. v. Abbott, 131 Mass. 397, was a case where an insurance loss was paid to the assignee of the insured at his request, in discharge of his debt, and on his fraudulent proof of loss. There the insured was, of course, held liable to refund.

2. But even if the want of privity were no obstacle, in our opinion the case shows no ground for recovery, because the money was not paid by mistake, within the meaning of the legal rule that permits a recovery. There was no legal obligation on the part of the plaintiff to pay the check, and this aside entirely from the fact that it had received notice to stop payment. We concur in the view expressed by the Supreme Court in Creveling v. Bloomsbury National Bank, 46 N. J. Law, 255, 50 Am. Rep. 417, that the holder of a check has no contract with the bank on which it is drawn, and no legal right to exact payment. In this case, therefore, the check was voluntarily paid by the plaintiff to the Washington bank. Since the present controversy arose, the rule of the Creveling Case has been established in statutory form by the general act of 1902 relating to negotiable instruments (P. L. 1902, p. 614, c. 184, § 189). As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds, and whether the order for payment evidenced by the check has subsequently been revoked. Therefore, where a bank receives in the ordinary course of business a check drawn upon it, and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment. Boylston National Bank v. Richardson, 101 Mass. 287; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; National Bank v. Burkhardt, 100 U. S. 686, 689, 25 L. Ed. 766; Manufacturers' National Bank v. Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381; Riverside Bank v. First National Bank, 74 Fed. 276, 20 C. C. A. 181. Other cases will be found cited in 22 Am. & Eng. Encyc. Law (2d Ed.) p. 623. Of the cases cited to the contrary, only two require notice. Merchants' National Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120, seems to have turned upon the effect of the rules of a clearing house association, and was distinguished by the same court in the case of Boylston National Bank v. Richardson, 101 Mass. 287, decided at the same time

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and already cited. In Northampton National Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283, the only question presented was whether the action for recovery of the money could be maintained without first tendering the check to the defendant. The court answered this question in the negative. Whether after such tender the action could be maintained was not passed upon. The rule that holds a bank bound to know the state of the depositor's account, and to take cognizance of this and other transactions between it and the depositor before making payment of a check duly presented, has even been extended so far as to require the bank to pass upon the genuineness of the depositor's signature to the check, so that, where it pays out money on a check upon which its depositor's name has been forged, to a bona fide holder for value, it has been held that the bank cannot recover back the money. This topic is fully treated in 5 Am. & Eng. Encyc. Law (2d Ed.) tit. "Checks," p. 1071, where will be found an ample citation of authorities. See also 22 Am. & Eng. Encyc. Law (2d Ed.) tit. "Payment," p. 623, etc. The question of a forged check is, of course, not presented in this case. Obviously, also, the case raises no question of the right of the drawer of a check after it has been passed to a bona fide holder. See 5 Am. & Eng. Encyc. Law (2d Ed.) tit. "Checks," p. 1079.

The judgment under review must be reversed. And as the agreed state of facts adopted by the trial judge as the basis of his findings and spread upon the record includes all facts essential to the determination of the controversy between the parties, it should be treated as a special verdict, upon which this court will render the same judgment that the trial court ought to have rendered. Sullivan v. Visconti, 68 N. J. Law, 543, 551, 53 Atl. 598, affirmed 69 N. J. Law, 452, 55 Atl. 1133.

Therefore let judgment final be entered in favor of the defendant, with costs.

Decision No. 778.

WESTERN WHEELED SCRAPER CO. v. McMILLEN.

99 N. W. 512.

(Supreme Court of Nebraska. April 21, 1904.)

PRINCIPAL AND AGENT — NOTE OF AGENT — LIABILITY OF PRINCIPAL — PAROL EVIDENCE.

1. The court is fully committed to the doctrine that, in order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent.

2. Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose.

(Syllabus by the Court.)

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Commissioners' Opinion. Department No. 3. Error to District Court, Thomas County; Paul, Judge.

Action by the Western Wheeled Scraper Company against J. M. McMillen. Judgment for defendant, and plaintiff brings error. Reversed.

C. H. Holcomb, for plaintiff in error. H. M. Sullivan, for defendant in error.

DUFFIE, C. Plaintiff in error brought suit against the defendant in error upon three promissory notes, all in the following form:

"$84.00 Thedford, Nebraska, November 20, 1893.

"One year after date we promise to pay to the Western Wheeled Scraper Company or order at Thedford Bank of Thedford, Nebraska, Eighty-four and no/100 Dollars with interest at seven per cent. per annum payable annually, for value received, and if action is commenced hereon, attorneys fees for collection.

"(Sign Officially.)

"Directors of Thedford
"Irrigation & Power
"Co. (Limited).

J. M. McMILLEN.
G. W. MILLER.
G. L. MATTHEWS."

McMillen and Matthews alone answered. Their answer consists, first, of a general denial. Second. They allege that the notes sued on were executed and delivered to the plaintiff by, for, and on behalf of the Thedford Irrigation & Power Company, Limited, a corporation organized under the laws of Nebraska, by their then duly qualified and acting board of directors, of whom the defendants were at that time members, and were signed by them in their official capacity, and for the purchase of a grading machine bought of the plaintiff for the use and benefit of the Thedford Irrigation & Power Company, Limited; that the defendants never had or claimed any interest in said machine except as members and stockholders of said irrigation company, and that the consideration of said notes moved from said Western Wheeled Scraper Company to the said Thedford Irrigation & Power Company, Limited, and that the plaintiff had always so considered and treated said notes that defendants never received any value for said notes except as members of said corporation, and have never assumed or agreed to assume any personal liability on said notes. To this answer there was a reply which is, in effect, a general denial of the allegations of the answer. The evidence tended to show that the defendants were members of the board of directors of the Thedford Irrigation & Power Company, Limited, at the time of the execution of said notes; that prior to the making of the notes defendants negotiated with an agent of the plaintiff for the purchase for the use of the irrigation company of a wheeled scraper to be used in the construction of its ditch; that it was finally agreed a scraper should be sent for and tested, and if it worked as represented by the agent the irrigation company would purchase the same, giving notes of the company therefor; that the test proved satisfactory to the directors, who purchased the machine for the company, and executed the notes in suit in the form above set out, supposing that they were binding the company, and with no intent to make themselves individually

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responsible for their payment, and that the agent of the plaintiff taking said notes so understood.

The court, in its seventh instruction, told the jury: "You are further instructed that if you should believe from a preponderance of all the evidence in this case that the three notes set out in plaintiff's petition were made and executed by the Thedford Irrigation & Power Company, Limited, and if said notes were signed by said defendants with the intention and understanding to bind the Thedford Irrigation & Power Company, Limited, and not the signers of said notes as individuals, and if you should find from a preponderance of all the evidence that it was so understood by and between the agent of plaintiff and these defendants at the time said notes were executed and delivered, then your verdict should be for the defendant, 'No cause of action.'" The jury returned a verdict for the defendants, and the plaintiff has brought the record to this court for review.

The petition in error, among other matters, alleges "that the court erred in permitting the defendants to introduce oral testimony tending to prove a different contract than that set out in the written contract, namely, the notes sued upon," and in giving the instruction above quoted and other instructions, which it is unnecessary to discuss. The general rule undoubtedly is that, on account of the qualities which the law annexes to negotiable instruments, none are bound except those who appear on the face of the instrument as bound, and accordingly that extrinsic evidence cannot be admitted to charge parties whose names do not appear on the face of the instrument. In Thompson on Corporations, § 5141, it is said: "The modern doctrine seems to be that, where individuals subscribe their proper names to a promissory note, they become prima facie liable personally upon the same, although they add a description of the character in which the note is given; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as agents of a corporation, for a debt of the corporation, due to the payee, and that they were lawfully authorized to make such note as agents of the corporation; and such facts may be pleaded in bar of the action against the makers personally, averring knowledge on the part of the payee." He states further: "It is no objection to such a defense that the name of the corporation is not correctly stated in the description attached to the signature. It is enough if it appear that the makers did not intend to be personally bound. But it should be shown that the payee of the note had knowledge, or at least the full means of knowledge, that the makers of the note were promising as agents, duly authorized, of the corporation; for it is well settled that a man contracting with another cannot shield himself as agent unless he gives notice at the time that he is so, or it be known in some other way to the person with whom he deals." It is undoubtedly true that the modern cases are more liberal than was formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting for another, who received all the benefits of the consideration for which the note was given. Keidan v. Winegar, 95 Mich. 430, 54 N. W. 501, 20 L. R. A. 705, is a case in point, and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this

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court had not put itself on record we should be disposed to follow the modern decisions, but as early as 1886, in Webster v. Wray, 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754, the court, after a full review of the authorities, held that "no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed;" and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation who had received the benefit of the consideration. This case was followed by Andres v. Kridler, 47 Neb. 585, 66 N. W. 649, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that, "where the pleadings disclose a cause of action against a defendant personally, superadded words, such as 'agent,' 'executor,' or 'director,' should be rejected as descriptio personæ." We think this court is now fully committed to the doctrine that, in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. There was evidence which would fully support a finding that in executing these notes the defendants did not intend to bind themselves personally, and that the plaintiff's agent was not only fully aware of that fact, and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties. Western Wheeled Scraper Company v. Stickleman et al., (Iowa) 98 N. W. 139, and authorities there cited.

We recommend, therefore, that the case be reversed, and remanded to the District Court, with directions to allow the defendants to amend their answer if they so elect; otherwise to enter judgment for the plaintiff for the amount due upon the notes.

KIRKPATRICK and LETTON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed and remanded to the District Court, with directions to allow the defendants to amend their answer if they so elect; otherwise to enter judgment for the plaintiff for the amount due upon the notes.

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Decision No. 781.

COMMERCIAL NAT. BANK OF BEEVILLE v. FIRST NAT. BANK OF CUERO.

80 S. W. 601.

(Supreme Court of Texas. May 12, 1904.)

BANKS AND BANKING — NATIONAL BANKS — POWERS — REPRESENTATIONS OF PRESIDENT — AUTHORITY — LIABILITY OF BANK.

1. Representations made by an officer or agent of a corporation will not create a liability against the corporation, unless the representation be made by the agent concerning a business which the corporation is empowered by its charter to do, and unless the agent is at the time acting within the scope of his authority.

2. Under the national banking law, which empowers national banks to exercise all the incidental powers necessary to the business of banking, by discounting and negotiating notes and evidences of debt, receiving deposits, giving in exchange coin and bullion, lending money and circulating notes, the procurement of a signature to a note for another bank, in order that it may lend money to a third person, and a representation that the signature is genuine, are not within the powers of a national bank, and it is not liable where the note turns out to be a forgery.

3. Under the national banking law, which authorizes banks to elect boards of directors to which are committed the management and control of the bank, and which are empowered to select one of their number as president, in the absence of any by-law or any other fact extending the authority of the president elected by the directors, a statement by him that a note which was in fact a forgery was properly signed by the purported signer is without authority from the bank and not binding upon it.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by the First National Bank of Cuero, Tex., against W. H. Smith and another, and the Commercial National Bank of Beeville, Tex. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff against defendant bank (for opinion, see 77 S. W. 239), and it brings error. Reversed.

John C. Beasley, for plaintiff in error. Davidson & Bailey and Lackey & Lewright, for defendant in error.

BROWN, J. We copy the statement of the case and conclusions of fact of the Court of Civil Appeals, as follows:

"This action was brought in the District Court of De Witt county by the appellee, against W. H. Smith and J. F. Ray, to recover upon a promissory note for the sum of $2,066.66, dated November 27, 1901, payable at Cuero, Tex., and alleged to have been executed by them to the appellee. The appellee also made the appellant a party to the suit and sought to recover against it, alleging that the appellant had undertaken, as the agent of appellee, to have the note sued on signed by Smith and Ray, and had sent the same to appellee with the representation that it had been so signed, and that appellee had acted on such representation and had advanced the sum of $2,000 on the note to Smith, against whom no recovery could be had on account of his

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insolvency; that Ray was solvent, but claimed that the note as to him was a forgery; and that in the event the note was a forgery appellant was liable to appellee for the amount so advanced by it to Smith on account of its deceitful representations. Defendant Smith filed no answer. Defendant Ray answered under oath, denying the execution of the note by him. The appellant pleaded in abatement to the venue of the suit, asserting its privilege to be sued in Bee county, where it had its domicile. It also pleaded the general demurrer, a special demurrer to the venue, a special demurrer raising the question of misjoinder, and in bar the general denial.

"The pleas to the venue and the general demurrers were overruled by the court, and afterwards the cause was submitted for trial to the court without a jury, and resulted in a judgment in favor of the appellee for the amount of the note and costs against Smith and the appellant, and in favor of the defendant Ray. The questions presented to this court on appeal are: (1) The sufficiency of the petition to show a cause of action for deceit against the appellant; (2) the misjoinder of parties defendant; (3) venue of the suit as to the appellant; (4) the sufficiency of the facts to show that the appellant is liable. The facts upon which the suit is founded transpired in the making of a loan of $2,000 by the First National Bank of Cuero, Tex., to W. H. Smith. Smith, who resided at Mineral City, in Bee county, wrote to the bank at Cuero requesting the loan, and offered as surety James F. Ray, who was a wealthy stockman of Bee county, and resided at Pettus, in that county. Ray was vice-president and director of the appellant bank, and an uncle by marriage of Smith. The Cuero bank wrote to the First National Bank of Beeville, in Bee county, its correspondent, stating that Smith had applied for the loan and had offered Ray as surety; that it was unacquainted with them, and asked about their responsibility. The First National Bank of Beeville replied in due course of mail, saying that the parties were good for the amount of money, that Smith was a merchant in good standing, that Ray was a man of property and an official of the Commercial National Bank, that Smith was a former patron of that bank, and that it was acquainted with their signatures. The Cuero bank then prepared for signature the note sued on in Cuero, and mailed it, with a letter to the Commercial National Bank, saying: 'A few days since we had a letter from Wm. H. Smith, of Mineral City, Texas, making application for a loan of $2,000.00, and offering as security James F. Ray, vice-president of your bank. Will you do us the kindness to hand the enclosed note to Mr. Ray for signature by himself and Mr. Smith? Thanking you in advance,' etc. Upon receipt of this letter and the note, the appellant, by its president, John W. Flournoy, mailed the note in a letter to Wm. H. Smith at Mineral City, requesting him to get Mr. Ray's signature and return to the writer. A letter was received returning the note, as follows: 'Pettus, Texas, 11-30-01. The Commercial National Bank of Beeville, Beeville, Texas. Dear Sirs: Enclosed find note as per request. You will please forward to the Cuero bank and tell them to place to my credit. Respectfully, Wm. H. Smith.' The letter was opened by Flournoy in presence of the bookkeeper of the appellant bank, and the signatures to the note were examined and pronounced genuine by both of them. Flournoy at once wrote a letter from Beeville to

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the appellee at Cuero, in which he enclosed the note and mailed it. The letter was as follows: 'Commercial National Bank of Beeville, Beeville, Texas, 12-2-01. First National Bank of Cuero, Cuero, Texas. Dear Sirs: Enclosed you will find note of Wm. H. Smith, properly signed up. He wants the proceeds of said note placed to his credit. Yours truly, John W. Flournoy, President.' The note was received, and the money was advanced by the appellee to Smith. The signature of Ray to the note was found to be a forgery, but was pronounced to be a most clever one. Both Flournoy and the bookkeeper, Miller, testified that 'if the signature of Ray to this note is a forgery, then it is a most expert and adroit one, and calculated to deceive the most careful, and greatly did deceive this witness.'

"Smith belonged to a family of people who stood high in Bee county, well known for probity and honesty, and who had occupied positions of public honor and trust. Wm. H. Smith himself had been a young man of excellent habits, and at the time of this transaction, and for a number of years prior thereto, he was engaged in a mercantile business in Mineral City, in Bee county, a small village about seventeen miles northwest of Beeville. His standing and credit among business men were of the highest order. His business seemed to be successful and profitable and of large volume, and for some years he had done business with the appellant, his transactions amounting in the year 1900 to $70,000. He had the confidence of the officers of the bank, and it carried him without security sometimes for as much as $10,000. Not long before this transaction the bank had loaned him $500, with Ray as surety, and the note for the money was prepared and mailed to him at Mineral City, with the request to sign and get Ray's signature and then return to the bank, and the money was paid to Smith on return of the note by him. Ray lived at the little village of Pettus, about sixteen miles north of Beeville, and did business with the appellant bank, and was personally and intimately known to the officers of the bank. The correspondence of Smith and Ray with the bank had been voluminous, and Flournoy and Miller had seen them write, and both testified that they were familiar with and knew their signatures, and that they had no reason or ground to suspect that either of them was forged, but believed they were genuine. The Cuero bank was not acquainted with Smith or Ray, and did not know their signatures. It trusted the appellant bank to get the note signed, and believed its representation that it had been properly signed, and on that account alone let Smith have the money. Appellee would not have loaned the money on Smith's signature alone. No charge was made by the appellant for the service it rendered, and the appellee did not offer or expect to pay for it, but would have done so if required. The appellant is a national bank duly incorporated under the national banking act of Congress, with its domicile at Beeville, in Bee county, Tex., and the appellee is also a national bank duly incorporated under the national banking act, with its domicile at Cuero, in De Witt county, Tex."

Representations made by an officer or agent of a corporation will not create liability upon the corporation, unless the representation be made by the agent concerning a business which the corporation is empowered by its charter to do, and the agent must at the time be acting within the scope of his authority. Cooley on Torts, 136.

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The facts alleged in the petition show that the plaintiff in error is a corporation created under the national banking laws enacted by the Congress of the United States, hence to that law we must look to determine the kind of business in which a bank may engage. That act provides:

"Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate a body corporate, and as such, and in the name designated in the organization certificate, it shall have power: . . .

"Seventh: To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits, buying and selling exchange, coin, and bullion, by lending money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this title." Act June 3, 1864, c. 106, § 8, 13 Stat. 101 [U. S. Comp. St. 1901, p. 3456].

"The business of banking" is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, receiving deposits, buying and selling exchange, coin, and bullion, lending money on personal security and obtaining, issuing and circulating notes; and to these specified powers, and those necessary to the exercise of the powers expressed, the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation. Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Merchants' Natl. Bank v. Armstrong, (C. C.) 65 Fed. 934; Cooley on Torts, 136. The facts alleged against the plaintiff in error do not show a transaction embraced in the provisions of the law above quoted; on the contrary, it was a matter in which the Beeville bank was not interested in fact; it was a mere courtesy between the officers of the two banks, performed gratuitously by Flournoy for the accommodation of the officers of the Cuero bank to aid them in making a loan to Smith. If it were held that procuring the signature to a note in order that the Cuero bank might lend money to a third party was within the power and authority of the bank at Beeville, the president of the Beeville bank was not authorized to transact such business for his bank, and did not bind it by the statements he made. Under the national banking law the corporation was authorized to elect a board of directors, to which was committed the management and control of the bank, and the board was empowered to select one of its number as president of the bank, of whom it is said: "It is his duty to preside at the meeting of the board of directors, and he has charge of the litigation of the bank, and other than these he has no power inherent over and beyond another director." National Bank Act, by Bolles, § 53. The board could have adopted by-laws conferring larger powers upon the president, but the petition does not allege the existence of such by-laws, nor any fact which would extend the authority of the president so as to embrace the act upon which this action rests.

The statement made by Mr. Flournoy that the note returned was signed up by Mr. Ray was without authority of the Beeville bank,

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therefore not binding upon it. United States v. Bank of Columbus, 21 How. 556, 16 L. Ed. 130; Weckler v. Natl. Bank, 42 Md. 581, 20 Am. Rep. 95; Merchants' Bank v. Marine Bank, 3 Gill (Md.) 96, 48 Am. Dec. 300; Crawford v. Mercantile Co., 67 Mo. App. 39; H. & T. C. R. R. Co. v. McKinney, 55 Tex 176. United States v. Bank of Columbus, before cited, involved a state of facts much like this case. The cashier of the defendant bank gave to one of its directors, Mr. Miner, a statement that he was authorized, on behalf of the bank, to "contract with the Treasury Department of the United States for the transfer of money from the East to the South or West for the government," and upon the faith of the statement of the cashier the Secretary of the Treasury contracted with the party named for the transfer of $100,000 from New York to New Orleans. Miner received and cashed the draft, but the government did not receive the money at New Orleans. Upon suit by the United States against the bank, the Supreme Court of the United States held that the cashier had no authority to make such representations on behalf of the Columbus bank, and that it was not liable for the loss sustained in consequence of reliance upon the false statement. Crawford v. Mercantile Co. is much like this case. A firm of merchants secured from the cashier of a bank a statement to the effect that the firm was "solvent and would pay for all that they would buy." Upon this statement the firm obtained credit, and, having failed in business, it was sought to hold the bank responsible for the loss. The court held that the cashier had no authority to give such statement, therefore the bank was not responsible for the damages. The act of Flournoy, who signed the statement as president of the Beeville bank, was a mere personal transaction of his own, and if any liability was created thereby it rested upon him individually, and not upon the bank. We do not, however, wish to be understood as intimating that the facts would give a cause of action against Flournoy; that question is not now before us.

The allegations in the plaintiff's petition presented no cause of action against the Commercial National Bank of Beeville, and the general demurrer should have been sustained. It is therefore ordered that the judgments of the District Court and of the Court of Civil Appeals be reversed as to the Commercial National Bank of Beeville only, and this cause be remanded for further trial as to said bank, but the judgments as to Ray and Smith remain in force.

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Decision No. 782.

INTERSTATE NAT. BANK v. CLAXTON.

80 S. W. 604.

(Supreme Court of Texas. May 16, 1904.)

BANKS AND BANKING — RELATION WITH DEPOSITORS — TRUST FUNDS — MISAPPROPRIATION BY DEPOSITOR — LIABILITY OF BANK — AGENCY — INSOLVENCY OF AGENT — EFFECT.

1. Where, by their general authority as factors and by their course of dealing, commission merchants had authority to make deposits in bank for their principals, such deposits were rightfully made and received, and created the relation of banker and depositor, though at the time of making them the commission merchants, to the knowledge of the bank, were insolvent, and had committed an act of bankruptcy, on account of which they were subsequently adjudged bankrupt.

2. A depositor, though holding money in a fiduciary capacity, may draw it out of the bank at his pleasure, and the bank is bound to honor his checks, and incurs no liability in so doing so long as it does not participate in any misappropriation of funds or breach of trust, though the conduct or course of dealing of the depositor may charge the bank with notice that he is violating his trust.

3. Where a bank permitted a factor who deposited with it to overdraw his account, and, after he became insolvent, applied to the payment of his debt to it funds which the bank knew belonged to the factor's principal, it was liable to the principal to the extent of the funds so applied.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by the Interstate National Bank against W. N. Claxton. There was a judgment of the Court of Civil Appeals affirming a judgment for defendant (77 S. W. 44), and plaintiff brings error. Reversed.

Browning, Madden & Truelove, for plaintiff in error. Turner & Boyce, for defendant in error.

WILLIAMS, J. Plaintiff in error brought this suit to recover of defendant in error upon his note executed to Tamblin & Tamblin, and assigned by them to plaintiff. The defendant's liability upon the note is not disputed, but he claims that plaintiff is liable to him for certain moneys of his which were deposited with it by Tamblin & Tamblin, and partly applied by plaintiff to their indebtedness to it, and partly drawn out by them and appropriated to their own purposes. This contention is based on the following facts: Tamblin & Tamblin were live-stock commission merchants in Kansas City, and plaintiff was engaged in the banking business in the same place. The business of Tamblin & Tamblin consisted chiefly in selling live stock consigned to them as factors, the amount done by them on their own account being inconsiderable. They kept an account with plaintiff, their deposits consisting almost wholly of the proceeds of property thus sold for others, including their charges, which were deposited and checked out in their own name. As factors, they were

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so employed by defendant, who resides in Texas, in selling his stock shipped to them from time to time, the proceeds of which, as of sales for others, were deposited and drawn out as stated, and this course of business had been followed for a long time before the transaction out of which the present controversy arose. Plaintiff also allowed Tamblin & Tamblin to overdraw their account, taking security for their indebtedness, and large balances stood against them from time to time. On the 28th of October, 1901, plaintiff learned that Tamblin & Tamblin had sold and not accounted to it for a large number of cattle covered by one of its mortgages, so impairing its security that it demanded and received a note for $30,000 with a mortgage on other property to secure it. The evidence warrants the conclusion that at that time Tamblin & Tamblin were, to plaintiff's knowledge, insolvent, all of their property being incumbered to secure amounts due to plaintiff, and the giving of this mortgage was an act of bankruptcy on account of which, at the suit of the creditors, Tamblin & Tamblin were on the 29th of November, 1901, adjudged bankrupts. On said 28th of October, 1901, they had for sale some cattle belonging to defendant and other people, which they sold for $4,525.65, of which $1,604.40 were the gross proceeds of defendant's property. Payment was made by the check of the purchaser for the whole amount, payable to Tamblin & Tamblin, which check had on its face the notice, "Good only in payment for live stock and when drawn in favor of a Kansas City live stock commission office." This check and others were deposited with plaintiff by Tamblin & Tamblin, and were credited to them upon their account, late in the day, after the transaction of the mortgage before stated had taken place. Defendant was present when his cattle were sold, received $50 from his factors, and instructed them out of the net proceeds to pay off the note here sued on, of the assignment of which to the bank he was ignorant, and to remit the balance to him. Instead of doing this, Tamblin & Tamblin, on the 28th, 29th, and 30th of October, drew checks as they had been accustomed to do in favor of third parties against this deposit, by which the larger part of it was exhausted. The bank, on the 30th, applied $160.94 to the payment of an indebtedness of Tamblin & Tamblin's to it, and subsequently paid over the remainder of the fund to the referee in bankruptcy. On the 30th day of October, 1901, the plaintiff refused to receive and credit further deposits to Tamblin & Tamblin individually, but formed what is termed a "trust fund," to which moneys tendered by them were credited, and thereafter a number of deposits were made by them into that fund for defendant, which were paid to him and are not in question. By the judgments of the District Court and the Court of Civil Appeals the bank was held liable to defendant, not only for the amount applied to the indebtedness of Tamblin & Tamblin to it, but also on account of the payment of their checks in favor of persons other than defendant. For reasons appearing in the course of this opinion, we think the judgment is correct as to the first item, but not as to the second. The reasons urged for the last-named liability may be stated thus: Tamblin & Tamblin were insolvent at the time of the deposit, and this was or ought to have been known to the bank. They had committed an act of bankruptcy of which the bank had knowledge, and upon which their bankruptcy was afterwards adjudicated. This

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revoked any authority they previously had as factors to deposit in their own names money of their customers. The bank had the means of knowing, when it received the deposit, that the moneys so deposited belonged to others than the depositors, and, when it paid their checks, that they were misapplying the funds, and could have learned by proper care who were the owners of such funds. From these facts the conclusion was deduced that the bank became liable (1) by permitting Tamblin & Tamblin to deposit in their own names, without authority of its owner, the money of another, and (2) in paying their checks in favor of others than such owner when it had the means of knowing that by such checks they were applying the funds to their own use. If it were true that the deposit was made by the factors in their own names without authority, and that the bank knew that the money belonged to others, and that such a deposit was wrongful, a different question would arise from that upon which we think the decision depends.

The opinion of Judge Wheeler in the case of Bank v. Jones, 18 Tex. 811, is relied on to support the position that such a transaction would amount to a conversion participated in by the bank. But in that case the money, with the knowledge of the bank, was placed in the hands of an agent for the sole purpose of being deposited to the credit of the principal. Upon this point the opinion says: "It cannot be doubted that Dye had authority to deposit this money in bank on account of the plaintiffs — if not conferred in express terms, at least impliedly from the nature of the transaction. It was intended that it should be so deposited. That was the purpose for which it was consigned to Dye. He was but the instrument of the plaintiffs, used by them for the purpose of employing in their behalf the agency of the bank. There was a privity between the bank and the plaintiffs, and the bank became directly and immediately responsible to the plaintiffs, and not merely to the agent employed by the plaintiffs in making the deposit. Being so responsible, there can be no clearer proposition than that they had no right to pass the deposit to the private account of Dye. Whenever they did so they were guilty of a fraudulent conversion," etc. In that case the bank applied the money to its claim against Dye, and it was upon that ground that the liability was at last rested, for, on page 824, the opinion further says: "If not before, there clearly was such a conversion when the defendant permitted him to appropriate it to the payment of his indebtedness, and the balance of his account with the bank." We make these quotations, not for the purpose of questioning the soundness of anything that was said in the case referred to, but only to show that the views there expressed do not conflict with other authorities upon which we shall base our decision.

The present case is not one in which the deposit was made to the credit of the agents without authority. Their general authority as factors, as well as their long course of dealing with defendant and with the bank, plainly support the conclusion that such deposits were rightfully made. Upon this the bank had the right to rely in receiving the money. That such authority had existed is not questioned, but it is claimed that it was revoked by operation of law upon the facts which had arisen before the deposit in question was made. Authorities are cited to the effect that insolvency of a principal or

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agent operates a dissolution of the relation, and, in case of the agent, revokes his authority. Mechem on Agency, §§ 263–267; Ewell's Evans on Agency, pp. 92, 401; Audenried v. Betteley, 8 Allen, 302; Hudson. v. Granger, 5 Barn. & Ald. 27; Ex parte Snowball, L. R. 7 Ch. 548; 1 Am. & Eng. Encyc. Law, 1227; Story on Agency, §§ 482, 486. Of this Mechem says: "Mere insolvency or inability of the principal to pay his debts when due would not have this effect. It only results from the operation of the law, when, either voluntarily or involuntarily, the principal surrenders and the law assumes control of his affairs." The cases cited in these various authorities as enforcing the doctrine relied on have been examined, and in all of them the bankruptcy or insolvency referred to was of the character stated by this author. In none of them did any question like that before us arise, all of them involving questions as to rights or titles arising between assignees in bankruptcy or insolvency and others. The proposition that the agency of Tamblin & Tamblin had ceased, or that its character had changed when this deposit was made, does violence to the facts then existing. The business of their customers was still in their charge; cattle were being sold, and money handled uninterruptedly, as always before. The defendant himself still employed and trusted them, and they were engaged in the active transaction of his business committed to their charge. There is no law that we know of which would forbid their employers from so employing them because they were financially embarrassed, or even insolvent, in the sense that they had not assets with which to discharge their liabilities. To say that the bank could not treat with them as still possessing the authority upon which they had always dealt is to ignore the fact that the principal himself so recognized and dealt with them. The bank could neither terminate the agency nor limit its scope. The law might do so, to a large extent, by seizing the estate of the agent, but it had not moved at the time the rights of these parties, inter sese, became fixed. The act of bankruptcy presented itself to the parties as a fact which might or might not be taken advantage of. Bankruptcy declared upon it might affect rights of the bank as between it and those representing the bankrupt estate, but not those of these parties fixed as between themselves before any adjudication. If it be true, as urged, that if this money had remained in the bank and been paid to the assignee in bankruptcy the defendant would have had the right to reclaim it, that does not affect this case. It might be conceded that if there had been no bankruptcy, and the money still remained in the bank, defendant could recover it; but that would not establish his right to recover it after it has been paid away on checks regularly drawn. We therefore hold that the deposit made by Tamblin & Tamblin was within their authority, and that they thereby became depositors; and the further questions must depend upon the rules of the law regulating the relation existing between banks and such customers.

The principles governing are clearly stated in the opinion of the chief justice in the case of Coleman v. Bank, 94 Tex. 607, 608, 63 S. W. 867, 86 Am. St. Rep. 871, with copious citations from leading authorities. From these authorities it is clear that a depositor, although holding the money in a fiduciary capacity, may draw it out of the bank ad libitum. The bank is bound to honor his checks, and

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incurs no liability in so doing, as long as it does not participate in any misapplication of funds or breach of trust. The mere payment of the money to, or upon the checks of, the depositor, does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty or give it the right to institute an inquiry into the conduct of its customer, in order to protect those for whom the customer may hold the fund, but between whom and the bank there is no privity. This is clearly brought out in the leading case of Gray v. Johnson, L. R. 3 Eng. & Ir. App. Cas. 1, in which an executrix, by a check signed by her as such, in favor of a mercantile firm of which she was a member, drew out of a bank a fund belonging to the estate. In the opinion of Lord Chancellor Cairns the law is thus stated: "On the one hand, it would be a most serious matter if bankers were to be allowed, on light and trifling grounds — on grounds of mere suspicion or curiosity — to refuse to honor a check drawn by their customer, even although that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and, looking to their position as bankers merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your lordship's bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a check as an executor, there must, in the first place, be some misapplication — some breach of trust — intended by the executor, and there must, in the second place, as was said by Sir John Leach in the well-known case of Keane v. Robarts, be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." In the only other opinion, by Lord Westbury, this statement of the principle occurs: "The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a jus tertii against the order of the customer, or to refuse to honor his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally

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aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a check for that purpose; the banker, not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed jus tertii as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit." The law is stated to the same effect in Morse on Banks & Banking, and he cites many cases the opinions in which sustain him. Section 317 and cases cited.

This case is to be distinguished from those in which a bank undertakes to acquire title to, an interest in, or benefit from a fund held in trust by a depositor. In attempting to acquire such a right or benefit the bank becomes a party to the action of the trustee, and stands as any other person dealing with one holding property in a fiduciary capacity. The question of notice of the title of the person holding the property and his power over it arises, and a bank cannot, any more than any other person, acquire that which belongs in equity to another, if it have notice of his rights; and, if it thus aid a trustee in diverting trust property from the beneficiary, it becomes liable as a wrongdoer.

Other cases to be distinguished are those in which a principal is the depositor, and occupies a contractual relation to the bank, but an agent is given authority to draw checks against the deposit for the benefit of the principal or of his business. In such cases the bank is not authorized to pay checks drawn by the agent for his own benefit if it know, or, it is sometimes said, if it have good reason to know, the fact. It is mainly from expressions in opinions discussing these two classes of cases that the courts below reached the conclusion that it was the duty of the bank to avail itself of the means it had of knowing of the misappropriation of defendant's money by his agents. Wolffe v. State, 79 Ala. 201, 206, 58 Am. Rep. 590; Gerard v. McCormick, 130 N. Y. 266, 29 N. E. 115, 14 L. R. A. 234; Duncan v. Jaudon, 82 U. S. 165, 21 L. Ed. 145; Bank v. Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; Duckett v. Bank, (Md.) 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; Bank v. Moore, 79 Fed. 705, 25 C. C. A. 150; Bank v. Mfg. Co., (S. C.) 33 S. E. 755.

In other cases cited money was deposited to the credit of one person and drawn out by another without authority, and in still others the original deposits were held to have been wrongfully entered in the name of one who was not the owner of and not authorized to so deposit the fund. This case is distinguishable from all of those by the fact that the deposit was rightfully entered in the name of Tamblin & Tamblin, from which arose the power in them, which the bank was bound to recognize, of drawing it out by their personal checks. The principles laid down clearly make the bank liable for the sum applied

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to the debt of Tamblin & Tamblin. As to the sums paid out on checks, the most that is claimed is that the facts brought to the attention of the bank furnished it with the means of knowing that the money in question belonged to defendant, and that, in checking it out, his agents were misappropriating it. That, as we have seen, is not enough to make the bank liable further than stated. The judgment will therefore be reversed, and judgment will be here rendered for plaintiff for the amount of the note, less a credit of $160.94, applied as of date October 30, 1901, and for all costs of suit.

Decision No. 783.

McAREAVY v. MAGIRL.

99 N. W. 193.

(Supreme Court of Iowa. April 14, 1904.)

PARTNERSHIP — DISSOLUTION — LIABILITY FOR DEBTS — ARRANGEMENT BETWEEN PARTNERS — EFFECT ON CREDITORS.

1. Members of a partnership are equally bound as principal debtors to the payee of a firm note.

2. A partner who takes the assets and assumes payment of the partnership debts becomes, as between himself and another partner, liable on a firm note as sole principal, the other partner becoming merely his surety.

3. An agreement between partners, by which one assumes payment of firm debts, has no effect whatever on the rights of a creditor, and does not, as to him, render the absolved partner a mere surety.

4. Mere indulgence by a creditor to one joint debtor will not discharge another joint debtor.

Appeal from District Court, Delaware County; H. C. Platt, Judge.

Action in equity to enjoin collection of a judgment. Decree for plaintiff, and defendant appeals. Reversed.

Bronson & Carr, for appellant. Ransier & Everett, for appellee.

WEAVER, J. The nature of the controversy here presented may be stated as follows: In the year 1889 one D. R. Magirl and the plaintiff, McAreavy, were partners in business. The firm borrowed the sum of $200 from Julia McEnany (now Julia Magirl, the defendant herein), and made to her a promissory note for that amount, signed in the firm name. Thereafter, and while said note was still outstanding and unpaid, the partnership was dissolved, D. R. Magirl taking the firm property and agreeing to pay the firm debts, of all which the defendant had notice. Later Magirl married the defendant. On July 28, 1898, about eight years after the maturity of the note, Mrs. Magirl brought suit thereon against McAreavy, without making her husband a defendant, and obtained judgment thereon in the sum of $416 and costs. The judgment has never been paid. On Novem-

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ber 9, 1900, more than ten years after the maturity of the note, which had been put in judgment against McAreavy, the latter began this suit, alleging that by virtue of the terms of dissolution of partnership by which Magirl assumed and agreed to pay this debt the latter became the principal debtor, and plaintiff thereafter stood in the relation of surety only. He further alleges that, plaintiff having failed to put the note in judgment against her husband, her right of action therein has become barred by the statute of limitations, and, having thus negligently allowed the principal debtor to escape liability, the plaintiff, as surety, is also released, and upon this theory he asks to have the collection enjoined, and the judgment canceled.

As members of the partnership, both plaintiff and D. R. Magirl were equally bound as principal debtors to the payee of the note. When Magirl took the partnership assets and assumed payment of the partnership debts, then, as between him and the plaintiff, he became liable as the sole principal, and plaintiff became his surety for the payment of said note. This proposition is upheld by all the authorities, and is not denied by the appellant. When we advance the next step, and inquire whether this change in the relations existing between the partners affects in any manner their relation to the holder of the note, we find a marked variance of views. The courts of several States — notably New York and Michigan — hold to the view that when a partner retires from a firm under such an agreement, and notice thereof is brought home to the creditor, the latter is bound to recognize the new relations between the members of the late partnership, and any indulgence thereafter shown to the partner assuming the debt which would have the effect to discharge an original surety will operate to discharge the retiring partner from further obligation. Millard v. Thorn, 56 N. Y. 402; Colegrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. See, also, Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Brandt on Suretyship (2d Ed.) § 36; Stearns on Suretyship, p. 24; Baylies on Suretyship, pp. 40, 481; Shumaker on Partnership, 341, 342. The reasoning by which this view is supported is very forcibly stated by Folger, J., in the Colegrove Case, and by Cooley, C. J., in the Smith Case, and the writer of this opinion would be content to accept it as authoritative. The majority of the court prefers to follow the other line of authorities as announcing the sounder principle, and the result arrived at cannot be said to be essentially unjust. It is in accord with the views expressed by many courts and law writers, and is bottomed upon the proposition that, the liability of the partners as principal debtors being fixed by the terms of the original contract, it is not competent for them by any agreement between themselves to change the nature of that liability, or impose upon the creditor, without his consent, any new or additional obligation or duty, a neglect of which may work a discharge of one of such debtors from his obligation to pay. The agreement between the partners by which one of them assumes to pay the entire debt is regarded res inter alios acta as respects the creditor, who is neither benefited nor prejudiced thereby. Barnes v. Boyer, 34 W. Va. 303, 12 S. E. 708; Buchanan v. Clark, 10 Grat. 164; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; 2 Collyer on Partnership, c. 24, § 596; 1 Collyer on Partnership, c. 17, § 407; Story on

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Partnership, § 334; Parsons on Partnership (4th Ed.) §§ 296, 313, 324; Shapleigh v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; Hall v. Jones, 56 Ala. 493; White v. Boone, 71 Tex. 712, 12 S. W. 51. The case of Rawson v. Taylor, supra, is like the one at bar, so far as the relationship to the parties to the debt is concerned. A partnership had been dissolved, and the debts assumed by one of the members. The other member defended against an action upon a partnership note on the ground that by the terms of his withdrawal from the partnership he became a surety only, and that he had been discharged from liability by reason of certain dealings between the creditor and the principal debtor. To this defense the court says: "When the note was executed and delivered to Mrs. Rawson for a valuable consideration, the liability thereon of each partner became fixed. Their relations to that contract and their liabilities therein could, by no act between themselves, be changed." It was therefore held that, while notice to the creditor of the change in the relations between the debtors might impose upon her the duty of acting in good faith and with reasonable diligence in the management of securities placed in her hands for the payment of her claim, in the preservation of liens, and the applications of payments, it did not impose upon her the obligations attaching to the ordinary relation of creditor and surety. The same conclusion is announced in varying forms, but with unanimity of doctrine, in all of the books last above cited, as well as in many more which are therein referred to.

Counsel do not cite and we now recall no decision of our own directly in point to the present controversy as applied to a case of partnership debtors. The principle is affirmed, however, in James v. Day, 37 Iowa, 164. In that case two parties — Day and Close — made their joint promissory note as principals. Thereafter, by an arrangement between themselves, Close assumed the payment of the debt, and Day sought to avail himself of a defense based on the theory that he thus became a surety only. To this proposition we said: "The original relation of the parties could not be changed so that Day would become a surety instead of a principal debtor, unless by some valid agreement to that effect entered into by the parties. No such agreement is alleged. The alleged promise of Close to pay the entire debt created no obligation on the part of the plaintiff to release Day from his liability as a principal debtor. . . . Both Close and Day were originally principal debtors. They remained such as to the plaintiff, unless the latter, for a valid consideration, agreed to release Day or accept him as surety only." There is a class of cases of which Lauman v. Nichols, 15 Iowa, 161, is an example, in which it is held that a person signing a note or other obligation as a joint maker may, nevertheless, allege and prove that he joined in the execution of the instrument as surety only, and, upon notice of that fact being given to the holder of such obligation, even after it is delivered, he is bound to recognize the true relations of the makers; but until such notice is received he may enforce payment against all makers as principal debtors. At first blush these two lines of cases may seem inconsistent, but they are clearly distinguishable. In the former the debtors seek, by an agreement between themselves alone, to change their relations to the debt without the consent of the creditor; while in the latter the original and true relation of the makers to the debt

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is unchanged, and the rights and position of the surety are protected and made effectual from the time notice of such relation is brought home to the creditor. This distinction is recognized and explained in Shapleigh v. Wells, supra, and Rawson v. Taylor, supra.

Having found that plaintiff herein is not entitled to the rights of a surety as against Mrs. Magirl, it is unnecessary to consider other matters presented in argument. It is elementary that mere indulgence by the creditor to one joint debtor will not serve to discharge another joint debtor from his obligation to pay. The claim has been put in judgment against the plaintiff, and, save upon the theory of his suretyship, which we find is unsound, he offers no reason why it should be canceled or annulled.

The decree of the District Court is therefore reversed.

Decision No. 784.

PRESTON v. GARRARD.

48 S. E. 118.

(Supreme Court of Georgia. July 14, 1904.)

PARTNERSHIP — DISSOLUTION — LIABILITY FOR FIRM DEBTS — RELEASE OF RETIRING PARTNER.

1. Where a partnership is dissolved by the retirement of one of the partners, and the continuing partner agrees to assume the debts of the firm, the retiring partner becomes a surety for his copartner.

2. A creditor of the partnership, who has notice of the dissolution and of the agreement by the continuing partner to assume the debts, is bound thereafter to accord to the retiring partner all the rights of a surety. Hence if, without his knowledge or consent, the creditor takes from the continuing partner a renewal of the firm indebtedness, and extends the time of payment thereof, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner.

(Syllabus by the Court.)

Error from Superior Court, Putnam county; H. G. Lewis, Judge.

Action by E. H. Garrard against J. W. Preston and another. Judgment for plaintiff, and defendant Preston brings error. Reversed.

Garrard brought suit against J. W. Preston and E. M. Brown, as partners, on a promissory note dated February 24, 1899, and due one year after date. Preston filed a plea setting forth that the firm was dissolved on December 27, 1900, all of the debts of the firm being assumed by Brown; that the dissolution was known to plaintiff's agent, who acted for her in making the loan for which the note was given, and that the fact that Brown had assumed the debts of the firm was also known to this agent, who recognized Brown as the principal debtor by treating him as such thereafter; that on June 18, 1902, plaintiff, through her agent, agreed with Brown, upon a sufficient consideration, that she would extend the time of payment of the note sued on to February 24,

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1903; that this extension was granted without the knowledge or consent of the defendant. The plea alleges that by reason of these facts the defendant became, after the dissolution of the firm, merely a surety for Brown upon the debts of the firm which he had assumed to pay; and that the extension of the time of payment of the note sued on without the defendant's knowledge or consent released him from all liability on the debt. The court struck this plea on oral motion, and the defendant excepted.

Turner & Adams, for plaintiff in error.
W. B. Wingfield, for defendant in error.

COBB, J. It is well settled that, where a partnership is dissolved by the retirement of one of the members, and the continuing partner assumes the payment of the debts of the firm, the retiring partner, as between himself and his copartner, is no longer a principal debtor, but merely a surety for the latter upon the debts of the firm. See 22 Am. & Eng. Ency. L. (2d ed.) 185; Shumaker on Part., p. 342; 1 Bates on Part., § 532. Some disagreement among the courts has arisen in fixing the rights of creditors after dissolution by the retirement of one member and the assumption of the debts by the other. Of course, if a creditor is a party to the agreement made between the partners, he will be bound by it, and must deal with the retiring partner as a surety. All are agreed as to this. The difficulty has arisen in determining whether mere knowledge by the creditor of the dissolution and the agreement of the partners would require him to deal thereafter with the retiring partner as a surety with reference to past transactions of the firm. The case of Oakeley v. Pasheller, 4 Cl. & F. 207, a decision made by the House of Lords in 1836, was supposed to have held that mere knowledge of these things by the creditor would require him to treat the retiring partner as a surety, and that, if he extended the time of payment of his debt without the retiring partner's knowledge or consent, he would be released. But in the case of Swire v. Redman, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakley v. Pasheller, intend to rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners. Some American courts have followed what was supposed to be the ruling in Oakley v. Pasheller, and others have adopted the decision in Swire v. Redman, which was to the effect that something more than mere knowledge on the part of the creditor is required — that he must expressly consent to the arrangement between the partners before he will be bound by it; and that in the absence of such consent he can deal with the retiring partner as a principal debtor and as an active partner so far as past transactions are concerned. Cases like Swire v. Redman proceed on the theory that when a creditor's rights once become fixed by contract no agreement on the part of the other parties to the contract can affect those rights or change their relation to the creditor so far as he is concerned; that it is wholly immaterial that the creditor was informed of such an agreement; that the partnership still continues relatively to his debt; and that any arrangement which he makes with the continuing partner in behalf of the partnership will be binding on the other. The other line of decisions holds that whenever the relationship of principal and surety arises between partners after dissolution and the assumption

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by one partner of the debts of the firm, every one having notice of the dissolution and the agreement between them is bound to take notice of the relationship which the law creates, and act accordingly; that while a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as his debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and the agreement, does anything which would release an ordinary surety, the retiring partner will be entirely released from his obligation; that this is no hardship on the creditor, because he can protect himself by granting no indulgence to the continuing partner, who has become alone the principal debtor, or doing anything without the retiring partner's consent which would affect the status of the claim to the prejudice of the surety partner. The following are some of the decisions dealing with the subject: Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Gates v. Hughes, 44 Wis. 332; Millerd v. Thorn, 56 N. Y. 402; Ridgley v. Robertson, 67 Mo. App. 45; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Maier v. Canavan, 8 Daly, 272; Johnson v. Young, 20 W. Va. 614; Williams v. Boyd, 75 Ind. 286; Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Whittier v. Gould, 8 Watts, 485; Wilde v. Jenkins, 4 Paige, 481; Thurber v. Corbin, 51 Barb. 215; National Cash Reg. Co. v. Brown, 19 Mont. 200, 47 Pac. 995, 37 L. R. A. 515, 61 Am. St. Rep. 498; Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. Strong arguments can be made in support of either view of this question, and we would experience some difficulty in determining on principle what the rule ought to be. Previous decisions of this court have, however, settled that the rule to be followed in this State is the one supposed to have been announced in Oakeley v. Pasheller. The earliest case on the subject is that of Stone v. Chamberlin, 20 Ga. 259. It was there held that where a creditor of a partnership, with knowledge that it had been dissolved by the retirement of one of the members, took a note in renewal of another given by the firm before the dissolution, and extended the time of payment of the original indebtedess, without the knowledge or consent of the retiring partner, he would be discharged. There was nothing to show that the renewal note was expressly taken in settlement of the old indebtedness. See, in this connection, Phillips v. Nash, 47 Ga. 218 (6), 229; Venable v. Stevens, 94 Ga. 281, 21 S. E. 516; First National Bank v. Cody, 93 Ga. 148, 19 S. E. 831. The only effect of the new note, therefore, so far as the retiring partner was concerned, was to extend the time of payment of the old indebtedness; and this extension operated as a release of the retiring partner. While the word "surety" is not used in the opinion, the decision was evidently based on the theory that the retiring partner was a surety, and as such released by the extension. This came out more clearly when the case was again before this court. Chamberlain v. Stone, 24 Ga. 310. There Judge Benning said: "The taking of the new note by the plaintiff was at least a suspension of the right to demand payment of the debt until the new note fell due; and therefore the effect was to put the debt in such a condition that Stone would not longer have the right to pay it up immediately and demand contribution from Johnson, but would have to wait till the note fell due before he could pay it up and demand contribution." To the same effect, see Louderback v. Lilly, 75 Ga. 855; Silas v. Adams, 92 Ga. 350 (2), 17 S. E. 280. See, also, First National Bank v. Cody, 93 Ga.

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128 (6), 148, 19 S. E. 831. The Code provides that after dissolution a partner has no power to renew or continue an existing liability of the partnership. Civ. Code 1895, § 2659. It was accordingly held in First National Bank v. Ells, 68 Ga. 192, that where a creditor, with knowledge of the dissolution, allowed one of the partners to make a payment on a draft which had been accepted by the firm, and substitute a new draft in its place, without the knowledge of the other partner, the latter was released. See, also, Hughes v. Treadaway, 116 Ga. 669, 42 S. E. 1035. Under these decisions mere notice of the dissolution and of the agreement between the partners that the continuing partner was to assume the payment of the firm debts prevented the plaintiff in this case from accepting from the continuing partner, Brown, a new note, and extending the time of payment of the original indebtedness, without the knowledge or consent of the defendant Preston. Notice to the creditor must, however, be actual. See Richards v. Butler, 65 Ga. 593. The taking of this new note, under the circumstances alleged in the plea, had the effect of releasing the defendant; and the court erred in striking the plea.

Judgment reversed. All the justices concurring.

Decision No. 785.

COCHRAN v. FOX CHASE BANK.

(Supreme Court of Pennsylvania. April 11, 1904.)

Appeal from Court of Common Pleas, Philadelphia county.

NEGOTIABLE INSTRUMENTS — THEFT — RIGHTS OF TRUE OWNERS.

1. One who had stolen coupon bonds payable to bearer pledged the same to a bank in the ordinary course of business, without any circumstances placing the bank on inquiry. Held, that the bank took a good title thereto as against the true owner.

Action by Louisa T. Cochran against the Fox Chase Bank. Judgment for plaintiff, defendant appeals. Reversed.

Argued before DEAN, FELL, MESTREZAT, POTTER, and THOMPSON, JJ.

Edward W. Magill, for appellant.

Edmund Randall, James A. Flaherty, and H. Gilbert Cassidy, for appellee.

DEAN, J. We are all of opinion that judgment must be reversed. However, the importance of the case to the parties, and to many others in like business transactions, as well as the judicial weight to which the opinion of the experienced judge who tried the issue is entitled, renders it proper for us to again put upon record our view of the law — a course we do not usually adopt when the case is clear, and we are all of one mind.

The question involved is "whether or not a bank, to which stolen coupon bonds payable to bearer have been pledged as collateral security

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for a loan by the thief in the ordinary course of business, without notice to the bank of any infirmity in the title, and without any circumstances to put the bank on inquiry, takes a good title thereto as against him from whom they were stolen."

The Fox Chase Bank is a banking corporation, incorporated under the laws of the State of Pennsylvania, doing business at Fox Chase, a suburb of Philadelphia. On July 17, 1900, William A. Douglas opened an account with the bank. Douglas at this time was a reputable and respected resident of Fox Chase, well known to the officers of the bank. He held responsible and lucrative positions with reputable financial institutions of the city of Philadelphia, being assistant receiving teller of the Guarantee Title & Trust Company, and treasurer of the Chestnut Street Trust & Saving Fund Company. From the time of opening the account until November 21, 1901, his balances varied from several hundred to several thousand dollars. A few days prior to the last-named date, Douglas applied to the cashier of the Fox Chase Bank for a loan of $2,500 on $4,400 of coupon bonds, payable to bearer, of the Wellsbach Light Company, as collateral security. Mr. Pence, the cashier, regularly brought the matter to the attention of the board of directors, who, being satisfied with the responsibility of Douglas and the sufficiency of the collateral, directed the cashier to make the loan. Douglas' note for $2,500 was accordingly discounted, and the amount thereof, less discount, to wit, $2,461.25, placed to his credit on March 21, 1901. This sum of money was subsequently drawn out of the bank by Douglas in the ordinary course of business, and his account closed. Some months after this transaction it was discovered that Louisa T. Cochran, the plaintiff, had placed for safe-keeping with the Chestnut Street Trust Company certain shares of stock of the Wellsbach Light Company; that Douglas had stolen this stock, and exchanged it for these coupon bonds of the company, and pledged them for the loan. He was prosecuted, convicted, and sentenced to prison. On these facts the learned judge of the court below, being of opinion the question was one purely of law for the court, peremptorily directed a verdict for plaintiff, and this appeal by defendant followed the judgment entered on the verdict.

These three facts are established by the evidence: (1) The bonds were stolen from the plaintiff; (2) they were transferred by the thief to the bank; (3) they were accepted by the bank in the ordinary course of business, in good faith, wihout knowledge that they had been stolen.

The bonds were ordinary bonds, payable to bearer, with coupons attached. At a not very remote period in our judicial history such a bond would not have been considered negotiable, as a note or bill of exchange, and the holder would have taken it subject to the burden, if called upon, of proving his title to it, as against one claiming to be the real owner; but at least as early as 1824, in Georgier v. Mieville, 3 B. & C. 45, such instruments were placed in England on the same plan as notes and bills of exchange, and were held negotiable. The distinction between such a negotiable instrument and ordinary goods and chattels, such as horses, pictures, and the like, is that it is valuable only as entitling the holder to receive at some future time a certain sum of money, which is precisely the value of a note or bill of exchange. It is of itself neither useful nor valuable, as other chattels, is but a representative of money, and therefore subject to the same rules which regulate the transfer of money. A learned and conclusive discussion of the whole subject

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of the negotiability of such instruments by Justice Read, of this court, is given in County of Beaver v. Armstrong, 44 Pa. 63. He gives the history of the decisions both in England and this country, and shows conclusively that by the settled law such bonds are negotiable, and that the title passes by delivery. There has not been the slightest departure since, at least in this State, from the law as announced in that case.

It is also settled that a bona fide holder of such an instrument, for value, before maturity, taken in the usual course of business, acquires a good title thereto, even as against him from whom it was stolen. 2 Cook on Corporations, p. 1731, says, "A bona fide purchaser of a bond which has been stolen takes a good title." He gives ample authority in his notes supporting this text. Mason v. Frick, 105 Pa. 162, 51 Am. Rep. 191, held to the same rule. In that case, like the one before us, the bond was that of a private corporation, payable to bearer. The plaintiff, Mason, kept it in his safe. The safe was broken open and the bond stolen. The thief transferred it to one Freeman, who knew when he took it that it had been stolen. Freeman pledged it as collateral security for a loan to Frick, the defendant, who took it in good faith. The rule that the bona fide holder of a stolen negotiable security is protected against a claim of the real owner was not even contested by the owner, but it was argued that the bond, being that of a private corporation, was not negotiable, and that the holder took it subject to the equitable rights of the real owner. It was held by this court that the law governing the case was that announced in County of Beaver v. Armstrong, supra, and that the bona fide holder was protected against the claim of the real owner. The same rule was held by Judge Sharswood, sitting in the District Court of Philadelphia (Carpenter v. Rommel, 5 Phila. 34), where the defendant had purchased at the open board of brokers a lot of stolen negotiable railroad bonds.

It is further argued by appellee that the circumstances here proven show that defendant acted in bad faith when it took the bonds, and therefore is not a bona fide holder. Good faith is defined to be honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. The circumstances pointed to here as calculated to arouse inquiry are the facts that Douglas, although reputable, was a young, unmarried man, living with his mother at the village of Fox Chase, not engaged in large business; that he held a subordinate position as clerk in a trust company. Therefore it was improbable he would be the actual owner of this amount of bonds. The argument answers itself. If he was a reputable young man, living inexpensively and without ostentation with his mother, the conclusion would be that he did possess, from accumulations, securities worth $2,500, and that, if he occupied a position of responsibility in a large trust company, he was honest and worthy. That he offered them in pledge for a loan at a small village bank, instead of to a larger institution, only showed that, like many others — especially those of limited means — be preferred just that kind of business. There does not seem to us to be a single circumstance in the case, or anything in all of them together, which was calculated to arouse suspicion or put the defendant upon inquiry.

Appellant's first assignment of error — that the court below erred in directing a verdict for plaintiff — is sustained. The judgment is reversed, and judgment entered for defendant.

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Decision No. 786.

ROUSS v. KING et al.

48 S. E. 220.

(Supreme Court of South Carolina. May 11, 1904.)

CONTRACT OF SURETYSHIP — CONSTRUCTION — RELEASE OF SURETY.

1. Defendants signed a note promising to pay to the order of plaintiff a certain sum; the note stating that it was given as collateral security for a debt represented by the open account of one of the parties and by any notes given therefor, and waiving notice and protest. A contract was executed at the same time, reciting that, whereas plaintiff, on the security of the note and the agreement, had extended to one of the makers of the note a credit in merchandise to the amount of the note, and has also extended the privilege of ordering an amount of goods equal to the remittances sent, thus granting a continuous credit therefor, to secure the payment of the same, the signers of the note "have become joint and several makers and sureties thereon," and further providing that, on default, the plaintiff could enforce payment of the note. Held, that the maker other than the debtor was a surety, and not a guarantor, and was not released by the fact that the creditor extended credit in excess of the amount stipulated in the contract and extended time of payment of the balance.

2. Where a contract of suretyship provided for the extension of credit to a third person, described as K., of B., the fact that the debtor afterwards removed his business to C. did not release the surety.

3. Where credit is given on an agreement of suretyship, the fact that the surety thereafter asks the creditor to take certain collaterals of the debtor, and he refuses so to do, does not release the surety.

Appeal from Common Pleas Circuit Court of Richland County; J. H. Hudson, Special Judge.

Action by W. W. Rouss, executor of Chas. Broadway Rouss, against J. B. King and R. B. King. From order of nonsuit, plaintiff appeals. Reversed.

J. S. Muller, for appellant. D. W. Robinson, for respondents.

WOODS, J. This action was brought by Charles B. Rouss, a wholesale merchant, against J. B. King and R. B. King, for a balance of $1,500 and interest, due by J. B. King, a retail merchant, which it is alleged in the complaint R. B. King by his written contract agreed to pay before the credit was extended. As the decision of the questions involved in the appeal depend entirely on the construction of the notes and contracts, it is necessary to set them out in full.

"$500.00. September 12, 1897.

"On demand, for value received, we jointly and severally promise to pay to the order of Charles Broadway Rouss, of New York City, the sum of five hundred dollars. It is understood and agreed that this note is given to and shall be held by the said Rouss as collateral security for the payment of the indebtedness represented by the open account for goods and merchandise delivered by him at any time to J. B. King, of Bishopville, S. C., and by any notes, bills, etc., given therefor; and

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the drawers, indorsers, and sureties on this note severally waive demand, notice, and protest, and the benefit of all exemption laws of every description, including homestead, as against any liability arising hereunder. [Signed]

"J. B. KING.
"R. B. KING."

"Whereas, Charles Broadway Rouss, upon the security of this agreement and note, has extended or is about to extend to J. B. King a credit in merchandise to the amount of five hundred dollars, for which he has, or they have, promised and agreed to remit weekly, at the rate of 10 per cent. per week, of the open account of indebtedness, whatever it may be. And said Rouss upon said security has also extended to said J. B. King the privilege of ordering an equal amount of goods to the remittance sent, thus granting a continuous credit running collaterally and equally with the remittance. Therefore, to secure said Rouss in the payment of the above-mentioned indebtedness, the undersigned have become joint and several makers and sureties hereon. In the event of a failure to comply with the above promise and agreement, and should said weekly payments remain unpaid for as much as four weeks, then the said Rouss is hereby authorized to proceed with the collection of this note, and, should it become necessary to institute legal proceedings to enforce the payment hereof, we promise and agree to pay all costs of suit and a reasonable attorney's fee in the premises. But it is distinctly understood and agreed that nothing in this instrument shall be construed as binding said Rouss to extend or to continue said line of credit; on the contrary he shall have the right at all times to decline and refuse further credit or delivery of merchandise, and to demand additional security, as in his judgment he deems it expedient or necessary. The sureties hereon waive notice of the acceptance of this guaranty, and of any credit extended on the faith thereof, and consent that the said Rouss may, in his discretion, grant extensions of time to the principal debtor without notice to the sureties. The word 'sureties' shall apply to a single surety if there be but one, and the paper shall be binding upon the surety or sureties who have signed at the time of the receipt thereof by the said Rouss, without respect to any intention or expectation that any other surety should sign. [Signed]

"J. B. KING.
"R. B. KING."

The second note and contract sued on is in precisely the same terms, except the date, which is August 5, 1898, and the amount of the credit, which is $1,000.

Upon the close of the plaintiff's testimony the circuit judge granted a nonsuit as to R. B. King on the following grounds: "(1) It appears that the principal creditor extended to the principal debtor credit far in excess of the amount guarantied, and that said principal creditor has received payments applicable to the guarantied debt far in excess of an amount sufficient to pay off and discharge the guaranty. (2) It appears that the plaintiff has extended credit to the principal debtor in excess of the amount stipulated in the contract of guaranty, and this without the knowledge, consent, and approval of the guarantor. (4) The said principal creditor received payments from the principal debtor after his removal to Columbia more than sufficient to pay off and discharge any and all amounts which were due from said debtor to said creditor at the time of his removal to Columbia."

1. In considering the appeal from this order, it is only necessary to decide whether the defendant R. B. King is discharged from liability by reason of the course of the account between Rouss and J. B. King,

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the principal debtor. By the terms of the contract R. B. King became surety, and not guarantor. "A surety undertakes to pay the debt of another. A guarantor undertakes to pay if the principal debtor does not or cannot. A surety joins in the contract of the principal and becomes an original party with the principal. The guarantor does not join in the contract of his principal, but engages in an independent undertaking. A surety promises to do the same thing the principal undertakes. The guarantor promises that the principal will perform his agreement, and if he does not, then he will do it for him." Stearns on Suretyship, § 6.

The following is a summary of the account between Rouss and J. B. King:

	Dr.	Cr.
September 12, 1897	$391 23	$85 00
August 5, 1898	2,537 70	2,001 08
September 5, 1898	5,910 72	2.055 05
October 5, 1898	6,204 40	2,925 05
November 5, 1898	7,722 88	4,355 05
December 5, 1898	8,235 [illegible]	5,200 05

From this summary it appears that Rouss extended credit to J. B. King far beyond the $1,500 secured by the two written contracts, and received payments aggregating much more than $1,500; and the circuit judge held that the surety was thereby discharged. That the notes and contracts were given to secure a line of credit of $1,500 whenever the balance of debits and credits might be struck, and not simply the first $1,500 advanced, is obvious from the language used. In the notes the makers say: "This note is given to and shall be held by the said Rouss as collateral security for the payment of the indebtedness represented by the open account for goods and merchandise delivered by him at any time to J. B. King, of Bishopville, S. C., and by any notes, bills, etc., given therefor." In the contract it is provided: "And said Rouss, upon said security, has also extended to said J. B. King the privilege of ordering an equal amount of goods to the remittance sent, thus granting a continuous credit running collaterally and equally with the remittance. . . . But it is distinctly understood and agreed that nothing in this instrument shall be construed as binding said Rouss to extend or to continue said line of credit." The fact that the credits exceeded the first $1,500 advanced under the notes and contracts did not discharge the liability of R. B. King as surety. The case is much stronger than Pelzer, Rogers & Co. v. Steadman, 22 S. C. 279; for there the surety was held liable for the balance when the credits exceeded her obligation, and when there were no such words in her contract as we find in this, indicating an intention to secure the balance of a current account, and not one in advance of the amount specified in the contract. It is true by the contracts the parties "agreed to remit at the rate of ten per cent. per week of the open account of indebtedness, whatever it may be;" but there is no evidence that remittances were actually made on the secured portion of the debt, and Rouss was in terms authorized "in his discretion to grant extensions of time to the principal debtor without notice to the sureties." This implied that Rouss could extend the time for the payment of the secured debt, and apply any

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payments to other debts, in the absence of express direction to the contrary. This he could do, even if the contract had been silent as to extensions. Bell v. Bell, 20 S. C. 34. We think, therefore, that the nonsuit cannot be sustained on the first or fourth grounds.

The nonsuit was based on the further ground that Rouss extended a much larger line of credit to the principal debtor than the contract contemplated, and that the surety was released by this variation. We are unable to find a word in the contracts or notes indicating that Rouss and J. B. King should not deal as seller and purchaser beyond the amounts secured by these instruments. A surety is discharged by any material change in the contract, but obviously not by other dealings between the creditor and the principal debtor, even though such dealings are in the same line of business as that to which his contract relates. Cases may be found where sureties were held released because the creditor advanced a larger sum than that stated in the contract, but these rest on the controlling fact that the contract expressly prohibited a larger advance. On this point the case of Pelzer, Rogers & Co. v. Steadman is conclusive. Douglass v. Reynolds, 7 Pet. 115, 8 L. Ed. 626, seems equally strong. There the obligation was in these words: "Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so." Advances were made very far beyond $8,000, and the payments aggregated much more than that sum. The aggregate indebtedness at the close of the account was $22,573.23. The guarantors were held liable for $8,000 of this amount.

The defendant R. B. King submits, however, that the third and fifth grounds upon which the motion for nonsuit was made, and which were overruled by the circuit judge, should have been sustained. The third ground, in brief, is that the surety was discharged by the fact that Rouss, without notice to him, continued to advance to the principal debtor after he removed his business from Bishopville to Columbia, for the reason that the contracts provided the goods were to be sold to "J. B. King, of Bishopville." These words were merely descriptio personæ, and it would be a manifest extension and distortion of language to hold that they implied the business between the parties was to be confined to the sale of goods to be sold from a store at Bishopville.

2. It remains to consider whether the circuit judge was in error in not sustaining the fifth ground upon which the motion for nonsuit was based. This ground was as follows: "It appears from the evidence that the principal creditor required the debtor to surrender and release certain insurance policies, and himself released a policy, which were taken for security of said principal creditor, which policies were more than sufficient to have paid the amount guarantied by R. B. King, and this surrender and release was made without the knowledge, consent, or approval of the guarantor." It appears that J. B. King, the principal debtor, sent to Rouss two policies of insurance, which the answer alleges were to be held by him as collateral to the notes and contracts sued on and any indebtedness of J. B. King

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to Rouss. Rouss returned them for the reason, as witnesses for the plaintiff say, that they contained provisions which Rouss knew J. B. King could not comply with. Rouss then took out two policies in New York, in different companies, for $1,500 each. One of the companies afterwards became insolvent, upon which Rouss wrote J. B. King it would be advisable to cancel its policy and take out other insurance. J. B. King answered that he could not afford to pay the premium, and for this reason no other insurance was taken. Afterwards a fire occurred. It is too clear for argument that a surety has no right to require a creditor to accept additional security. If he wishes protection he must seek it for himself. Therefore R. B. King's obligation was not affected by the refusal of Rouss to accept the insurance policies, and it is quite immaterial whether his reason for refusing to receive them was sound or not. The policy surrendered by Rouss had become valueless without fault on his part, and its surrender could not affect the release of the surety.

The judgment of this court is that the judgment of the Circuit Court be reversed and the cause remanded for trial.

Decision No. 787.

STEWART v. KNIGHT & JILLSON CO.

(No. 4,674.)

71 N. W. 182.

(Appellate Court of Indiana, Division No. 2. May 24, 1904.)

GUARANTY — CONSTRUCTION OF INSTRUMENT — ACTION ON GUARANTY — PLEADINGS — BILL OF PARTICULARS — VARIANCE — AMENDMENT.

1. Where a complaint is amended by inserting words therein so as to make it conform to the evidence, it is not necessary to file the pleading as an amended complaint.

2. Where a demurrer to a pleading is overruled, and subsequently the pleading is amended, the original goes out of the record, and on appeal such original pleading cannot be tested by the ruling on the demurrer thereto.

3. A writing reading, "Please let the bearer, L., have whatever he wants at any time, and I will see that it is paid for," amounted to a collateral undertaking.

4. A guarantor for the purchase price of goods could not be held liable, without an acceptance of the undertaking, and a notice of default on the part of the one to whom the goods were sold.

5. Where, in an action on a guaranty, the complaint alleged that plaintiff relied on the guaranty in furnishing goods to Corvin Larkin, all of which were shown by a bill of particulars made a part of the complaint, and the bill of particulars showed that goods were sold to Larkin & Co., the bill was controlling, and the complaint was insufficient.

Roby, P. J., dissenting in part.

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Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by the Knight & Jillson Company against Moses J. Stewart. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. W. McBride, C. S. Denny, and Geo. L. Denny, for appellant D. P. Williams, for appellee.

WILEY, J. Action by appellee upon the following instrument: "Indianapolis, Ind., 6-23-1900. Knight & Jillson — Dear Sirs: Please let the bearer, Corvin Larkin, have whatever he wants at any time, and I will see that it is paid for. M. J. Stewart." Complaint in one paragraph, to which a demurrer was overruled. Answer in eight paragraphs, to the third, fourth, seventh, and eighth of which a demurrer was sustained. Reply in general denial. Trial by jury. Verdict for appellant for $1,312.76. Motions for a new trial and in arrest of judgment, each overruled, and judgment on the verdict. All the rulings against appellant are assigned as errors. The complaint avers that appellee is a corporation engaged in dealing at wholesale in plumbers', gas fitters', and steam fitters' supplies; that on the 23d of June, 1900, appellant executed the writing above set out, whereby he agreed to pay to appellee, under the name of Knight & Jillson, for any and all goods, etc., it might furnish and deliver at any time to Corvin Larkin; that said instrument was addressed to appellee under the name and style of Knight & Jillson, and was by appellant delivered to Larkin, who, in person, delivered it to appellee at its office and place of business; that, relying upon the promise therein contained, appellee furnished and delivered to said Larkin at different times between the 23d of June, 1900, and the 31st day of August, 1901, goods, merchandise, wares, and supplies of the aggregate value of $1,352.84; that, after deducting all credits, there remained due $1,259.68. It is averred that, before the commencement of this action, appellee demanded of appellant payment of the amount due, which was refused; that the amount, $1,259.68, is due and wholly unpaid. The order given by appellant, and a bill of particulars of the goods, etc., sold and furnished Larkin, are filed as exhibits. The bill of particulars shows that the goods and supplies were sold and charged to Larkin & Co. Pending the trial the appellee asked and was granted leave to amend its complaint so as to conform to the evidence. The amendment to the complaint was made by inserting therein at two different places the words "under the name and style of Knight & Jillson." This amendment was rendered necessary by reason of the fact that the order given by appellant was given to Knight & Jillson, as a firm, and not to Knight & Jillson Company, as a corporation. The record does not show the filing of an amended complaint, but only that the above quoted words were inserted therein, and the amendment is shown by a bill of exceptions, by which the original complaint and the complaint as amended are exhibited. After such amendment was made, it was not necessary to file the pleading as an amended complaint. Cleveland, etc., R. R. Co. v. Miles, (Ind. Sup.; decided May 13, 1904) 70 N. E. 985.

The demurrer is from want of sufficient facts, and defect of parties defendant, in that Larkin should have been made a defendant. It is

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urged by appellee that, as no demurrer was filed to the complaint as amended, no question is presented by the demurrer. It is the rule that where a demurrer to a pleading is overruled, and subsequently such pleading is amended, the original goes out of the record, and on appeal such original pleading cannot be tested by the ruling upon the demurrer thereto. Tague v. Owens et al., 11 Ind. App. 200, 38 N. E. 541; Travellers' Ins. Co. v. Martin, 131 Ind. 155, 30 N. E. 1071; Hedrick et al. v. Whitehorn et al., 145 Ind. 642, 43 N. E. 942; Weaver et al. v. Apple, 147 Ind. 304, 46 N. E. 642. Whether this rule applies to an amendment pending trial, so the pleading may conform to the evidence, we do not decide, for, under the twelfth assignment, that the complaint does not state facts sufficient to constitute a cause of action, its sufficiency is reviewable.

The controlling question as to the sufficiency of the complaint is to determine whether the writing sued on, by which appellee seeks to fix liability upon appellant, is an original or collateral undertaking. The learned counsel for appellant concede that if it is an original undertaking, by which their client agreed to pay for all goods, supplies, etc., purchased of appellee by Larkin, then notice of formal acceptance by appellee, and notice of default on the part of Larkin, was not required. As to what constitutes an original or collateral undertaking is not always easily determinable. While there is some confusion in the authorities, we think in this case that the character of the writing under consideration is readily ascertainable from the authorities, and its plain language and meaning. The writing must be regarded as a letter of credit. If so, it was a collateral undertaking. In Smith v. Bainbridge, 6 Blackf. 12, the appellant, by letter to appellee, stated that he would be entirely safe in making sales of goods to Bark & Campbell to any reasonable amount, and that he would stand as security for them until they should secure the confidence of the appellee by their own punctuality. Appellee sued appellant directly upon his promise. The pivotal question in the case was whether the letter was a collateral or an unconditional obligation. The court said: "Letters of credit, to be sure, frequently state in express terms that if the third party do not pay the writer will, but the insertion or omission of such statement is not the test by which to determine the character of the contract. If the writer state that he will guaranty the payment of goods to be afterward sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. The purchaser, under these circumstances, for whose use the goods are furnished, is himself liable in the first instance, and it is only after his default that the surety becomes liable." In the case from which we have just quoted it was held that it was necessary to a right of recovery that a demand be first made on the original debtors, and notice to the surety or guarantor of nonpayment, and that these were indispensable to constitute a casus fœderis. Chitty on Contracts, 397 et seq., announces the same rule. Parsons on Contracts declares that a contract of guaranty, like any other contract, implies two parties, and requires the agreement of two parties to make it valid, and that a promise to pay the debt of another is not valid unless accepted by the promisee. In discussing the rule applicable to a guaranty relating to future operations, the author says: "But if the guaranty were for a future opera-

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tion, perhaps for one of uncertain amount, and offered by letter, there should then, according to the weight of authority, be a distinct notice of acceptance, and also a notice of the amount advanced upon the guaranty, unless that amount be the same that is specified in the guaranty itself. The reason of this is that the guarantor may know distinctly his liability, and have the means of arranging his relations as he would with the party in whose favor the guaranty is given, and take from him security or indemnity. From the reason of the thing, we may state the rule to be that every guarantor must have this opportunity; and, unless the transaction is such that of itself it gives him all the knowledge he needs, at a proper time, then this knowledge must be given him by specific notice. The principle which underlies the whole law of guaranty is that this contract, like every other, must be known to the parties to it." 2 Parsons on Contracts (2d Ed.) pp. 12–15. In Milroy v. Quinn et al., 69 Ind. 406. 35 Am. Rep. 227, the action was upon the following writing: "Delphi, Ind., Jan. 14, '74. Gents: Allow me to say to you, that any cigars that C. Conover of Logansport, Ind., may order from you for the next six months, if he fails to pay for them, I will stand responsible to you for them." Signed, "Samuel L. Milroy," and addressed to appellee at Eaton, Ohio. The appellees received this writing, and upon the faith thereof, and within the six months next succeeding, upon Conover's order, sold and delivered to him $1,000 worth of cigars, for which he failed to pay. Appellees brought an action upon this guaranty, and recovered judgment against the guarantor, appellant, in the sum of $976.80. In deciding the case the Supreme Court said, in substance, that guaranties are expressed in so many different forms, and are applicable to so many different conditions of things, that it sometimes becomes difficult to give them their true interpretation. The court said: "Guaranties are capable of classification, however, and have fixed rules of interpretation, but which are not always easy of application to given cases. For these reasons the authorities do not always harmonize. But the rule seems to be settled that when the guaranty is direct, and the thing guarantied definite in its amount, and known to the guarantor at the time he gives his guaranty, neither notice of the acceptance of the guaranty, nor of the default of his principal, need to be given to the guarantor, for he knew when he made the guaranty the full extent of his liability. But when the guaranty is collateral, and the debt guarantied yet to be created, the amount of which is uncertain, and may be variable, and cannot be known to the guarantor at the time he makes the guaranty, notice within a reasonable time, to the guarantor by the guaranty, of his acceptance of the guaranty, and of the default of the principal, is necessary, or the guarantor will be discharged, for he cannot, without such notice, know that the guaranty is accepted, nor of the default of his principal, nor the extent of his liability, and cannot protect himself from the loss by the principal debtor." It was there held in specific terms that the guaranty sued on was a collateral one. It may be remarked that the guaranty in that case, in all of its legal aspects, was substantially the same as the one in the case now under consideration. In the case of Gaff et al. v. Sims et al., 45 Ind. 262, at page 264, the Supreme Court said: "The contract of a guarantor, on the other hand, is his own separate contract. It is the nature of a warranty by him that the

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thing guarantied to be done by the principal shall be done, and not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance, and therefore the creditor shall give him notice." In the case of Wills v. Ross et al., 77 Ind. 1, 40 Am. Rep. 279, at page 5, 77 Ind., 40 Am. Rep. 279, the court used the following language: "There is a well-recognized and plainly marked distinction between the cases where the proposal is to guaranty the payment of a liability existing at the time and known to the guarantor, and those where the proposal is to guaranty the payment of a debt not incurred, and the character and amount of which are not known to the guarantor. In the first class of cases no notice of acceptance is required, for the guaranty becomes at once effective and operative. It is said by the author of a recent work upon this subject that 'the rule seems to be that if the guaranty is absolute in terms, definite as to amount and extent, notice is dispensed with.'" See also Baylies, Sureties & Guarantors, p. 195; Brandt, Suretyship, etc., § 164. The converse of the proposition as decided by the case last cited and the two text-writers seems to be equally well settled. In the courts of the United States, and in nearly all of the courts of New England, also Pennsylvania, Ohio, Missouri, Texas, Alabama, Kentucky, and many other States, it is the settled and established rule that notice of acceptance is necessary to complete the obligation of prospective and contingent guaranties. Davis v. Wells-Fargo Co., 104 U. S. 159, 26 L. Ed. 686; Reynolds v. Douglass et al., 12 Pet. 497, 9 L. Ed. 1171; Central Savings Bank v. Shine, 48 Mo. 456, 8 Am. Rep. 112; Smith v. Anthony, 5 Mo. 504; Douglass v. Reynolds, 7 Pet. 113, 8 L. Ed. 626; Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271; Tuckerman v. French, 7 Me. 115; Craft v. Isham, 13 Conn. 28; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583; Lowry v. Adams, 22 Vt. 166; Babcock v. Bryant, 12 Pick. 133; Mayfield v. Wheeler, 37 Tex. 256; Lawson v. Townes, 2 Ala. 373; Claflin v. Briant, 58 Ga. 414; Kellogg v. Stockton, 29 Pa. 460; Cahuzac v. Samini, 29 Ala. 288. Baylies on Sureties & Guarantors, at page 195, says: "The rule seems to be that if the guaranty is absolute as to terms, definite as to amount and extent, notice is dispensed with; but if the guaranty be for future advances, credits, or payments, it is the duty of the party making the advances to give notice to the guarantor of his acceptance, and of his consent to make the advancements on the credit of the guaranty." In support of this proposition the author cites, under note 4, many adjudicated cases to which reference has been made. In determining whether a guaranty is original or collateral, the contract of the parties and the manner of transacting the business may be considered. Thus the entry in the books of the seller, if the guaranty involves the sale of goods, is of great importance in determining whether the promise be original or collateral. In 2 Parsons on Contracts (9th Ed.) p. 11, the author illustrates the proposition as follows: "Suppose that A. promises to pay B. if B. will sell goods which C. is to receive. The question may occur whether they were sold to A. for C.'s benefit, or to C. on the guaranty of A. If, on examination of the books of B., it appears at

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the time of the sale he charged the goods to C., or sold to him, it would be almost decisive against B.'s claim on A. as the original purchaser." The author says this would not be conclusive, but a circumstance to be considered. In this case the goods were not charged to appellant, as is apparent from the exhibit to the complaint. In fact, they were not charged to either the appellant or Larkin, which fact will be considered later in this opinion. It thus appears from the conduct of appellee in making its charge that it regarded appellant's promise as collateral.

We are clearly of the opinion that the writing given appellant in this case must be adjudged to be a collateral undertaking, in the light of the authorities cited. Having reached this conclusion, the complaint is fatally defective for the want of an allegation of acceptance and notice of default on the part of Larkin. Read in the light of the authorities, appellant's undertaking was to pay for the goods, supplies, etc., which appellee might sell to Larkin, in the event that Larkin himself failed to make payment. But there is another fatality to the complaint which required consideration. The letter of credit or of guaranty (and the latter is probably the more proper term to use) directed appellee to let Corvin Larkin have whatever he wanted, and appellant would see that the same was paid for. That instrument of writing is made an exhibit to the complaint, and by proper averments it is shown that appellee sold to Larkin goods, supplies, etc., on the faith of such writing, according to the bill of particulars filed with the complaint as an exhibit. That bill of particulars is attached to the complaint as Exhibit B. The heading of that exhibit is as follows: "Knight and Jillson Company . . . sold to Larkin and Company." Then follows an itemized statement of the account. The complaint avers that appellee relied solely upon the writing, and furnished to "Corvin Larkin" certain goods, merchandise, and supplies, "all of which is shown by a bill of particulars marked 'Exhibit B,' which is hereto attached and made a part of this complaint." So it appears from appellee's complaint, which must be most strongly construed against it, that it did not sell any goods, etc., to Corvin Larkin. Corvin Larkin and "Larkin & Co." are not one and the same person, so far as disclosed by the complaint. The two names, Corvin Larkin and Larkin & Co., are not idem sonans. There is no averment that the goods were sold to Corvin Larkin in the name of Larkin & Co. Appellant did not promise to pay for any goods sold by appellee to Larkin & Co. There is a fatal variance between the complaint and Exhibit B, and, this being true, the exhibit must control. Goodbob v. Scheller, 3 Ind. App. 318, 29 N. E. 610; Globe, etc., Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; Dunlap v. Eden, 15 Ind. App. 575, 44 N. E. 560; Harrison, etc., Co. v. Lackey, 149 Ind. 10, 48 N. E. 254.

The complaint not stating facts sufficient to constitute a cause of action, the judgment is reversed.

ROBY, P. J. (concurring). It appears from the record that a demurrer to the complaint was overruled, and an exception reserved by appellant. This action of the court is assigned as error. It is also assigned as error that the complaint does not state facts sufficient to constitute a cause of action, but, in view of the presumptions indulged

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in as against the direct assignment, which do not prevail as against the demurrer, I do not think that the assignments ought to be confused.

It appears by bill of exceptions that the complaint was interlined pending the trial by the addition of the words "under the name and style of Knight & Jillson Company." Appellee did not offer to refile the pleading, and the court did not direct it to be refiled after such interlineation. Appellee made the interlineation for its own advantage, and the complaint upon which the case was tried, as it appears from the record, contains the allegation. It would hardly be fair for it now to be permitted to say that the case was not tried upon such pleading, for the purpose of depriving appellant of the benefit of the ruling upon his demurrer and his exception thereto. Where an amended pleading is filed, it renders rulings on the original harmless, but no amended pleading has been filed in this case, and I am therefore of the opinion that the sufficiency of the complaint as it arose upon the demurrer thereto is properly presented by the assignment of error. The instrument upon which the action is based is a direct, immediate undertaking on the part of appellee. It is not collateral, and is continuing. It was not an offer to guaranty, and did not require any notice of acceptance. Lane v. Mayer et al., 15 Ind. App. 382, 44 N. E. 73; Newcomb Bros. Wall Paper Co. v. Emerson, 17 Ind. App. 482, 46 N. E. 1018; Bryant v. Stout, 16 Ind. App. 380, 44 N. E. 68, 45 N. E. 343; Wheeler v. Rohrer, 21 Ind. App. 477, 52 N. E. 780; Smith, etc., v. Dann, 6 Hill, 543; Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Wright v. Griffith et al., 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Hotchkiss v. Barnes, 34 Conn. 27, 91 Am. Dec. 713.

I do not think the complaint was sufficient, in so much as it sought to hold appellant liable for goods delivered to Larkin & Co.; his engagement being only to pay for those delivered to Corvin Larkin. I therefore concur in the conclusion announced.

Decision No. 788.

ROBERTS v. FARMERS' BANK.

80 S. W. 441.

(Court of Appeals of Kentucky. April 29, 1904.)

PLEDGES — COLLATERAL SECURITY — LIABILITY OF PLEDGOR.

1. A pledgee of a note assigned as collateral security is liable when, by the exercise of ordinary diligence, he could have collected the same at maturity, and not only failed to do so, but refused to turn it over to the pledgor, so that he might enforce payment, and in consequence thereof, the makers subsequently becoming insolvent, and removing from the State, the note became worthless.

Appeal from Circuit Court, Crittenden county.

"To be officially reported."

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Action by the Farmers' Bank against D. C. Roberts. From a judgment for plaintiff, defendant appeals. Reversed.

A. C. Moore, for appellant.
Champion & Champion, for appellee.

BARKER, J. This action was instituted by the Farmers' Bank for the purpose of recovering judgment against D. C. Roberts on a note for the sum of $220, executed and delivered to it by him, and by which he agreed and proimsed to pay to it the principal, with interest, sixty days after its date. As a defense appellant alleged substantially the following facts as a counterclaim against appellee: That at the time he executed and delivered the note sued on he assigned to appellee, as collateral security, a note of S. C. Knight and D. C. Griffith for the sum of $1,000, with interest at six per cent. from the 30th day of April, 1902, until paid; that when the collateral fell due its makers were solvent, and paying their debts, and appellee, by the exercise of ordinary diligence, could have collected the amount due thereon from the payors; that he demanded of appellee that it turn over to him the collateral, so that he might sue upon it and enforce its payment, but appellee refused to surrender the note, or permit him to sue thereon; that more than a year had elapsed since the maturity of the note, and that in the meantime its makers had become insolvent, and moved out of the State; that by reason of appellee's negligence in the premises the note had become wholly worthless and uncollectible. A general demurrer to this answer was sustained by the court, and, appellant declining to amend, judgment was rendered against him in accordance with the prayer of the petition of which he is now complaining.

The question for adjudication is the liability of the pledgee of a note assigned as collateral security for failure to enforce its collection at maturity where the maker has become insolvent, entailing a loss upon the pledgor. Colebrooke, in his work on Collateral Securities (section 114), thus states the rule: "If, upon a pledge of negotiable collateral securities so as to convey the title thereto, the pledgee, because of his gross negligence, or by his tortious transfer of them or dealings therewith, fails to collect the same of the parties bound thereon when it might have been done, and the pledgor is injured, and the amount of the collateral paper lost, the pledgee is chargeable with the face of such collateral securities as in payment and discharge of the principal debt. Where the opportunity of collecting collateral bills or notes is lost by the insolvency of the parties thereto by reason of the supine negligence of the pledgee, when with ordinary care the same might have been enforced, the latter is liable to account for the full loss and damage of the pledgor. Such responsibility of the pledgee is limited to the actual loss." Section 115: "The pledgee of negotiable collateral securities, however, is not held to strict responsibility in proceeding at once, upon default, in the enforcement thereof. Mere delay in so doing is not sufficient to create any liability upon his part to the pledgor. Where there is no suspicion that the maker is embarrassed, and no request on the part of the pledgor that collection should be promptly made, the pledgee is not answerable for a subsequent actual loss." In the Am. & Eng. Ency. of Law (2d ed.), vol. 22, p. 899, it is said: "It is well settled that when a chose in action, such as a bond, or accepted order on a third person, is transferred and delivered to the creditor as collateral

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security, it is the duty of the pledgee to use reasonable care and diligence to make such collateral available; that he is bound to use proper exertion to render its collection effectual for the purpose for which it was pledged; that, if necessary, he must bring an action against the maker of the collateral; and that, if through his negligence or wrongful act or omission the collateral is lost, he is accountable and liable to the pledgor in the same manner as the pledgee of goods and merchandise is liable to the pledgor if they are lost or destroyed through the pledgee's failure to give them the necessary protection and care." On page 903, Id., it is said: "Whether or not the pledgee of collaterals has used due diligence to collect them is a mixed question of law and fact. It is not for the court to determine that due diligence has been used. It is the province of the court to instruct the jury what is due diligence, and for the jury to find whether due diligence has been used." In the case of Noland v. Clark, 10 B. Mon. 239, the rule is thus stated: "It is said that a person who receives bonds and notes as collateral security for a debt is bound to use due diligence, and, if they are afterwards lost, through his negligence, by the insolvency of the makers, he is charged with the amount. In the case of Bonta v. Curry, 3 Bush, 678, a note had been assigned as collateral security. Afterwards the assignor, becoming insolvent, made a general assignment for the benefit of his creditors. After the maturity of the collateral, the assignee in bankruptcy demanded of the holder of the collateral that it be turned over to him for collection, and warned him that, if he would neither surrender the note, nor forthwith sue on it, he must take the risk, and would be held responsible for any loss which might result from his persistent inaction. The court said: "Now, although Vanarsdall's note did not pass to Harris by the deed of trust, and the appellant therefore was not bound to surrender it on the demand made, yet, as a trustee of ordinary faith and prudence, it was his duty, after that notice and warning by the appellee, to proceed without delay to collect the note by legal process; and it seems probable that, had he thus acted, he would have made the whole amount." Thereupon the judgment holding the assignee liable for laches in regard to the collateral was affirmed. In the case of Sanford v. Lowenthal, 1 Ky. Law Rep. 357, the rule was stated that the assignee of a note held as collateral was required to use due diligence in its collection. In the case of Shindler v. Hayden's Adm'r, 8 Ky. Law Rep. 859, in a well considered opinion of Judge Ward, wherein a great number of authorities are reviewed and commented upon, it is said: "Reason and the analogies of the law therefore concur in the rule as stated in Slevin v. Morrow, 4 Ind. 425, that the holder of collateral paper guilty of laches, whereby the assignor is damaged, makes the paper his own, and must account to his debtor on the principal debt for the sum which he could have made by pursuing the maker of the collateral paper with ordinary diligence." We think the allegations of the answer, while not as direct and explicit as they might have been made, were sufficient to have aroused appellee, and put it upon inquiry as to the financial condition of the payors of the collateral it held, and, if true, show that the holder was guilty of at least ordinary negligence in refusing to institute proceedings to enforce the collection of the note, and under the rule established by the authorities herein cited the demurrer should have been overruled.

Wherefore the judgment is reversed for proceedings consistent herewith.

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Decision No. 789.

O'GRADY v. STOTTS CITY BANK.

(St. Louis Court of Appeals. Missouri. April 26, 1904.)

BANKS — DEPOSITOR'S GUARANTY OF CHECK — APPLICATION OF DEPOSIT — PROPRIETY.

1. A bank has no right, without a depositor's consent, to apply his deposit to the payment of the check of a third person, drawn in favor of a fourth, and guarantied by the depositor.

Appeal from Circuit Court, Lawrence county; Henry C. Pepper, Judge.

Action by J. M. O'Grady against the Stotts City Bank. Judgment for defendant, and plaintiff appeals. Reversed.

W. B. Skinner and Henry Brumback, for appellant.
E. J. White, for respondent.

BLAND, P. J. The suit is to recover damages for the refusal of the defendant bank to pay plaintiff's check, dated May 26, 1902, drawn on it in favor of C. E. Fuller, for the sum of ten dollars. It is admitted that the defendant refused to honor or pay the check. Its excuse for refusing to pay the check is that the plaintiff had no funds in the bank with which to pay it when it was presented, May 31, 1902. The evidence shows: That, on the day the check was dated, plaintiff had on deposit to his credit with the defendant bank $248.94. That on the 13th day of May, 1902, the M. B. Mining Company drew its check for $372.94 on the defendant bank in favor of Ed Hill. That on May 19, 1902, the following indorsement was written on the back of this check: "May 19, 1902. For value rec'd, we hereby guarantee payment of the within check May 26, 1902. J. M. O'Grady, C. E. Fuller." That on May 27th Hill presented this guaranteed check to the cashier of the defendant bank for payment, and the cashier took the check, and charged plaintiff's account with the amount of the check, and credited Hill's account with the bank for a like amount. After plaintiff was apprised of this transaction, and after the ten dollar check had been dishonored, he, on June 3, 1902, deposited $372.94 with the bank, and directed that the deposit be applied to the payment of the check which he had guaranteed. His request was complied with, and the check marked "Paid" and turned over to him. The evidence of plaintiff is that the M. B. Mining Company had no deposit account with the bank and was insolvent. Under instructions given by the court the verdict was for the defendant. Plaintiff appealed.

The legal question at issue is whether or not the bank had the right to apply the deposit fund of plaintiff toward the payment of the guaranteed check, and set off the check against his deposit account, without his request or permission to do so. The relation of a bank and its depositor is that of debtor and creditor, and it is the duty of the bank to pay the checks of its depositor on presentation, when he has funds sufficient to his credit. A bank may apply the funds of its depositor in payment of his matured note due to the bank, and set off the debt against his deposit account. Mt. Sterling Nat. Bank v. Green, (Ky.)

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35 S. W. 911, 32 L. R. A. 568. But it has no right to apply money of its depositor to the payment of a note on which he is security or guarantor. In Harrison v. Harrison, (Ind.) 20 N. E. 747, 4 L. R. A., loc. cit. 112, the court said: "The general rule in keeping the account of a depositor is that, as money is paid in and drawn out, a balance may be considered as struck at the date of each payment or entry on either side of the account; and it is the right of the bank, in case the depositor becomes indebted to it by note or otherwise, and the deposit is not specially applicable to a particular purpose, or there is no express agreement to the contrary, to apply a sufficient amount thereof to the payment of any debt due and payable from the depositor to the bank. Second Nat. Bank v. Hill, 76 Ind. 223 (40 Am. Rep. 239); Nat. Mahaiwe Bank v. Peck, 127 Mass. 298 (34 Am. Rep. 368); Commercial Nat. Bank v. Henninger, 105 Pa. 496. This results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exist mutual demands. It is familiar law, however, that mutuality is essential to the validity of a set-off, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal, and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. Watts v. Christie, 11 Beav. 546; Dawson v. Real Estate Bank, 5 Ark. 283; Sefton v. Hargett, 113 Ind. 592 (15 N. E. 513); Morse, Banks, § 326. It follows that, in the absence of a contract giving it the right to do so, the bank could not have applied money due the petitioner, as a depositor, to the payment of the note upon which he was surety, any more than it could have successfully pleaded the note as a set-off in case the petitioner had brought suit to recover the balance due him on deposit."

The check was not O'Grady's check, it did not represent his debt, nor was the debt for which it was given due to the bank but to Hill. There was neither direction nor consent of O'Grady to the bank to apply money to his credit in the bank to the payment of the check; hence its application to that purpose was without authority; and, as the evidence shows plaintiff had money deposited in the bank sufficient to pay the ten-dollar check on the day it was presented, it was the duty of the bank to have paid it. On its refusal to do so a right of action on the case for damages at once accrued to plaintiff. Viets v. National Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Citizens' Nat. Bank v. Importers', etc., Nat. Bank, 44 Hun, 386; Whitaker v. Bank of England, 6 Carr. & P. 700. In such cases the damages, according to the authorities, are not limited to a mere nominal sum, but the plaintiff is entitled to recover general compensatory damages. Rolin v. Stewart, 14 C. R. 595; Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; Patterson v. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Bank of Commerce v. Goos, (Neb.) 58 N. W. 84, 23 L. R. A. 190; 1 Sutherland on Damages (2d ed.), § 77.

The judgment was for the wrong party, and is reversed, and the cause remanded for new trial.

REYBURN and GOODE, JJ., concur.

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Decision No. 790.

HARRIGAN et at. v. ADVANCE THRESHER CO.

81 S. W. 261.

(Court of Appeals of Kentucky. June 7, 1904.)

SALES — WARRANTY — BREACH — REMEDY OF PURCHASER — NOTES — ACTION BY ASSIGNEE — DEFENSES — ESTOPPEL.

1. Where, on the sale of a chattel, the seller makes a positive statement as to its condition, or utters what is equivalent to a promise, rather than a mere belief, such statement amounts to a warranty, irrespective of whether he intends to be bound by the statement.

2. On an executed sale of a chattel the purchaser has the right to rely on the warranty without examination or inspection of the article.

3. Where, on an executed sale of a chattel, there is a breach of warranty, the purchaser may return the article, or sue for the breach of warranty, or use it as a defense by way of recoupment.

4. Where, on an executed sale of a chattel, there is a breach of warranty, which the purchaser relies on by way of recoupment, the measure of his recoupment is the difference between the agreed price and the actual value of the chattel at the time of its receipt.

5. Under Ky. St. 1903, § 474, providing that all notes for money or property shall be assignable so as to vest the right of action in the assignee, but, except in case of bills of exchange, subject to the right to any defense or set-off that defendant might have used against the original obligee before notiec of the assignment, held, that where the assignee of a note given for the price of a chattel sued thereon, it was subject to the same defenses as if it were the property of the original payee.

6. In an action on a note given for the price of a threshing machine, defendants were not estopped, by an acknowledgment of liability, from setting up a breach of warranty by way of recoupment, where plaintiff failed to plead or show any act of defendants placing plaintiff in a more unfavorable position, or causing him to suffer any loss.

Appeal from Circuit Court, Simpson county.

"Not to be officially reported."

Action by the Advance Thresher Company against H. W. Harrigan and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

See 80 S. W. 205.

G. W. Whiteside, for appellants.
Jno. J. Nuniken, for appellee.

NUNN, J. This action was instituted by appellee against the appellants on a note for $300, executed for the purchase price of one "Star" engine, purchased by appellants from West Bros., the note having been executed direct to appellee at the request of West Bros. The appellants answered the petition of the plaintiff, and alleged that at the time and before they made the trade with West Bros. for the engine West Bros. warranted the engine to be in good condition, and all right, and that it

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would do the work of any twelve hourse power engine; that in buying this engine they relied upon these statements and warranty in making the trade; that they had no opportunity to test the engine as to its condition or power prior to the trade, and that, but for these statements and warranty, they would not have bought the engine; that they executed the note sued on to the appellee before they had received possession of the engine, with the positive representation and statement of West Bros. that the engine was in the condition and of the character as represented by them, which was made in the presence of one Boyd, the general agent of the appellee, who approved their statements, and agreed that appellee would make good the representations and warranty of West Bros.; that in a few days after the execution of the note they received this engine, and undertook to operate it, and they found that it was not "all right," that it was not in "good condition," that it "would not do the work of any good twelve horse power engine," and that in fact it was of no value; that they bought it for the purpose of running a thresher and corn shredder, which was at the time known to West Bros. and appellee, and that it was not in the condition, nor did it have the power, to run either the thresher or shredder, and it was not fit for any purpose; and that they had been damaged in the way of repairs and other expenses in attenmpting to run it in the sum of $160. They asked that their note be canceled, and tendered the appellee the engine, and asked judgment for $100. The parties pleaded to an issue, the case was tried in equity, and the court adjudged that appellants pay the note, with interest, from which judgment they have appealed.

It appears from the proof that the engine was in very bad condition at the time appellants purchased it; that it would not do the work and did not have the power of any good twelve horse power engine, nor half that power, and was worthless for the purpose for which they purchased it. It also appears that Tom West, of the firm of West Bros., and the person who sold the engine to appellants, represented at the time and before the trade to appellants that the engine was all right, and that it was in good condition, had the power and could do the work of any good twelve horse power engine. This proof was without any contradiction, except West stated that he did not warrant or guaranty the engine, but did not deny that he made the representations stated. It was not shown what, in the opinion of Tom West, it took to constitute a warranty. He, in all probability, did not believe that the representations attributed to him amounted to a warranty. This court, in several cases, has passed upon this question. In the case of McClintock v. Emick, Stomer & Co., 87 Ky. 161, 7 S. W. 903, the court held that, while a trade for mules was in progress, the following amounted to a warranty for the soundness of the mules, "Are they all right?" The answer was, "They are." In that case the court said: "If a person makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it." To the same effect is Lamme v. Gregg, 1 Metc. 444, 71 Am. Dec. 489. In the case of Cook v. Gray, 2 Bush, 121, the court said: "There is a material distinction between a warranty of a chattel

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on an executed sale and a warranty that articles to be manufactured and delivered in the future shall be of a particular quality. In the former case the purchaser has the right to rely upon the warranty without examination or inspection of the article, and therefore may return the article or sue for the breach of warranty, or use it as a defense by way of recoupment." Upon this authority and the other cases cited in the opinion, supra, this being an executed sale, the appellants had the right to retain the engine and make defense by way of recoupment. And, if the warranty be proven, the appellants should have a credit on the note for the difference between the price they agreed to pay and the actual value of the engine at the time they received it.

Appellee contends that appellants are estopped from making defense to this note, because, after the execution of it, they acknowledged their liability thereon, and also because the appellee was an innocent purchaser and holder thereof. The proof shows in this case that appellee's agent originated this trade, and aided and induced, throughout the negotiations, the trade to be made, and there is proof, although contradicted, that he agreed that the company should be bound with West Bros. on this warranty in consideration of appellants executing the note direct to appellee. At all events, the appellee became the owner of this claim by assignment from West Bros., and under section 474 of the Kentucky Statutes of 1903, it is subject to the same defenses as if it had remained the property of West Bros. Appellee's plea in estoppel cannot avail it for the reason it does not plead nor show by proof that by any act or omission of appellants it has been placed in any more unfavorable position, or suffered any loss.

Wherefore the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Decision No. 791.

CRITCHER v. PORTER-McNEAL CO. et al.

47 S. E. 604.

(Supreme Court of North Carolina. May 27, 1904.)

SALE OF MACHINERY — BREACH OF WARRANTY — DAMAGES — SPECIAL DAMAGES.

1. In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value.

2. Plaintiff contracted with defendant for the purchase of an engine of a certain make, size, and capacity. He accepted another kind of an engine, with a guaranty on defendant's part that it would develop the capacity of the one contracted for, or that defendant would make it do so. Held, that plaintiff, after giving defendant a reasonable opportunity to make good the guaranty, had the right to reject the engine on its failure to come up to the guaranty, and his measure of damages would then be the amount paid, and such special damages sustained as was within the contemplation of the parties, subject to be reduced by a fair rent of the engine while in use, or he might accept it, and recover the difference between the contract price and its real value, with special damage, subject to the same deduction.

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3. Where one contracted to sell an engine of a certain make, size, and capacity, with knowledge that it was to be used to run a sawmill, and furnished an engine of another size under a guaranty that the latter would develop the capacity of the engine contracted for, the guaranty must be construed as a warranty that the engine furnished would develop for the particular use the same power as the engine contracted for.

4. In an action for damages for breach of warranty on the sale of an engine to run a sawmill, plaintiff cannot recover as damages the loss of profits resulting from his inability to perform contracts for the sale of the output of the mill, in the absence of knowledge on the part of defendant that plaintiff had made such contracts.

5. Where, in an action for damages for breach of warranty on the sale of an engine to run a sawmill, plaintiff did not offer to show that he had logs on hand sufficient to run the mill any given number of days, or for what time contracts for the sale of the output extended, the exclusion of evidence showing that at the time of the purchase of the engine he had contracted for the sale of the output of the mill was not erroneous.

6. In an action for breach of warranty on the sale of an engine for use in a sawmill, under a guaranty that it will develop a certain horse power, or that defendant will make it do so, plaintiff is entitled to recover expenses incurred in running the mill, at defendant's request, to enable him to make the engine develop the designated horse power.

7. In an action for breach of warranty on the sale of an engine for use in a sawmill, plaintiff is entitled to interest on the amount invested in the mill for the time it was idle.

Appeal from Superior Court, Martin county; Ferguson, Judge.

Action by Roger Critcher against the Porter-McNeal Company and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

The plaintiff alleged: That he contracted with the defendants for the purchase of an Erie City, twenty-five horse power, 10 x 12, horizontal center crank engine, together with other machinery for the equipment and operation of a sawmill, at the agreed price of $1,150, to be paid partly in cash and the balance in several instalments, for which he was to execute his promissory notes, secured by a deed in trust. The deed sent to the plaintiff for execution described the engine as "one 25 H. P. 9 x 12, horizontal center crank engine." Plaintiff wrote defendants calling attention to the fact that the engine was described in the deed as 9 x 12, while he had contracted for one 10 x 12, and for that reason declined to execute the notes and deed. That defendants, in reply, wrote that they would guaranty that the engine described, and which they would send, "would develop 25 H. Power and be plenty large to operate" plaintiff's mill. That plaintiff, relying on said guaranty, before the engine arrived, signed the deed in trust and notes and sent them to defendants with the cash payment of $400. That after the engine was put up it was found that it would not cut the logs, wanting power to do so. The plaintiff complained to defendants, and they urged him to continue to use the engine and the trouble would disappear. That defendants urged that the oil used by plaintiff was not of good quality. That, after giving defendants full opportunity to make good their guaranty, they having failed to do so for nine months, plaintiff put the engine aside and notified defendants that it was held subject to

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their order. Defendants thereupon advertised the property conveyed in the trust deed for sale. This action is brought for the purpose of enjoining the sale of the property and to recover damages by way of recoupment, etc. The sale was enjoined. The defendants denied the material averments in the complaint.

The court, without objection, submitted the following issues:

"(1) Did the defendants guaranty that the engine sold to plaintiff would develop 25 horse power?" To which the jury answered, "Yes." "(2) Would the engine sold to plaintiff develop 25 horse power?" To which the jury answered, "No." The plaintiff's damages were fixed at $98. The balance found due the defendants on the note was fixed at $411, with interest, and subject to the $98 damage.

The plaintiff testified in regard to the contract and guaranty. He further testified that he signed the trust deed upon the faith of the guaranty. The engine was received about the 8th day of May and was put up by experienced machinemen. From the beginning plaintiff saw that it would not cut; found trouble to be that it lacked power. It got worse all the time and he continued to complain to the defendants. They sent a man out to examine it. He did not remedy it. Plaintiff, at the instance of defendants, sent engine to them at Norfolk. Was gone a week or ten days. Shortly after its return Mr. Hardy came again to overlook it. He did nothing to it. Plaintiff asked him how he could tell whether it would develop twenty-five horse power. He said if it didn't cut a blind line with eighty pounds of pressure on fast speed it would not develop twenty-five horse power. Plaintiff urged him to test it but he declined. He said that plaintiff was not using proper oil. Gave him order for twenty-five gallons such as he recommended. The engine did no better with new oil. Plaintiff wrote to defendants frequently that they must do something to remedy the trouble. They continued to assure the plaintiff that it would improve and they would remedy it. Plaintiff finally wrote defendants that, unless something was done at once to remedy the trouble, he would be obliged to put it aside and purchase another, which plaintiff finally did. Was trying to use it nine or ten months, relying upon the assurance of defendants that it would get all right, or they would remedy it. It was idle two-thirds of the time. It would never develop twenty-five horse power. Plaintiff testified: "I had been operating a mill previous to the time I made the contract with the defendants. Had between $1,200 and $1,500 invested in mill and other fixtures, and $1,500 to $2,000 additional in logs and team. Had five men engaged by the year in the service of the mill (giving amount of wages paid, etc.). They were idle part of the time. In addition I had drivers, loggers, and some men cutting logs in connection with the mill. The teams were idle when the mill was not running. I had commenced to cut logs for the mill before I contracted with the defendants. Had a quantity of logs on hand. I lost on account of the idleness of the mill." The plaintiff proposed to prove that at the time of his contract with defendants plaintiff had contracted with reliable parties for the sale of the output of his mill at a stipulated price, and that plaintiff was unable to comply with said contract on account of the failure of the defendants to furnish the engine contracted for. This evidence was offered upon the question of damages, and upon objection was excluded. Plaintiff excepted. The plaintiff further testified: That the engine which he got was afterwards priced by defendant Porter at $168.

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That a fair output of a twenty-five horse power engine was 6,000 to 8,000 feet a day. The engine furnished did not average over 1,500 feet a day. That the usual profits during the time the engine was in use was $1.50 per thousand feet, clear of expenses. He had a quantity of logs. On account of idleness of mill between 12,000 and 20,000 feet were not hauled from the woods.

His honor instructed the jury in regard to the measure of damages as follows: "If you should find that the engine in question would not develop twenty-five horse power then the measure of the damages which the plaintiff is entitled to recover is the difference between the price paid or agreed to be paid for the engine and the real or true value of the engine in fact sold and delivered to the plaintiff. There is no fixed price stipulated for the engine in the written contract between the parties. So you will inquire and ascertain from the evidence what was the price charged for the engine furnished the plaintiff and subtract the real value of the engine furnished at the time it was received from the price charged; and the remainder is the measure of the plainti's damage in this case, if you should find the second issue in his favor." Plaintiff asked certain instructions which were refused, and to such refusal plaintiff excepted, and, from a judgment on the verdict, appealed.

Gilliam & Martin, for appellant.

Harry W. Stubbs and H. S. Ward, for appellees.

CONNOR, J. (after stating the facts). The only question presented by the plaintiff's exceptions relates to the kind and measure of damages to which he is entitled upon the evidence and finding of the jury. It is well settled by all of the text-books and adjudged cases that, in the absence of any special conditions or special damage, the true measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value. Kester v. Miller, 119 N. C. 475, 26 S. E. 115; Mfg. Co. v. Gray, 126 N. C. 108, 35 S. E. 236. There are cases, however, to be found in our court and the courts of other States in which, by reason of special and peculiar circumstances, other elements of loss enter, and may be recovered as damages. If the plaintiff had, immediately upon the receipt of the engine, ascertained that it did not develop twenty-five horse power, as warranted to do, rejected it, or, as he expresses it, "put it aside," notifying the defendant thereof, it is clear that he would have been entitled to recover the amount paid, and to a cancellation of his notes and the trust deed, together with such damage as he sustained, and which were within the contemplation of the parties, in his effort to use it. If he had retained and used it his measure of damages would have been the difference between the contract price and the actual value of the engine, with such special damages as were within the contemplation of the parties. Joyce on Damages, § 1716. The question before us is, however, complicated by the fact that a contract collateral to the principal one was made by the parties. The plaintiff knew that the engine which he accepted, and for which he paid in cash and notes, was not the same which he contracted for. He accepted it with a contract of guaranty that it would develop twenty-five horse power, or that the defendant would make it do so. This contract was not performed on the part of the defendant, and for which breach of contract he claims damages. It was not contemplated that the engine should be returned until the de-

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fendants were given a reasonable time within which to make it develop twenty-five horse power. Therefore the rule usually applicable to breaches of warranty in the sale of machinery does not apply. We are of opinion that, after a reasonable opportunity given the defendants to make good the guaranty, the plaintiff had the right to reject the engine. If he had paid for it he could have sued for damages; and it would seem that the measure of his recovery would be the amount paid, and such incidental or special damage as was within the contemplation of the parties, and as he had sustained, subject to be reduced by a fair rent of the engine while using it. If, instead of rejecting it, he retained the engine, he would recover the difference between the contract price and its real value, with special damage, subject to the same deduction. The courts find difficulty in defining and fixing the limits to what are termed "special damages." All authors and judges concur that the rule or principle to be followed is that laid down in the leading case of Headley v. Baxendale, Exch. 341: "When two parties make a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great multitude of cases, not affected by any special circumstances for such a breach of contract, for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would have been very unjust to have deprived them."

The judges concur in the principle, but find great difficulty in applying the rule to the ever varying cases which are presented for adjudication. Simple contracts of purchase, with warranty as to soundness or quality, are of easy solution; but when, by varying the original contract, either attaching new agreements or conditions, or making contracts collateral to the original, thus introducing difficult and complicated elements, the courts find it extremely difficult to apply general principles working out satisfactory results. Beasley, C. J., in Crater v. Binninger, 33 N. J. Law, 513, 97 Am. Dec. 737, referring to the rule laid down in Headley v. Baxendale, supra, says: "This is the usual statement of the rule, but the difficulty has been to apply this general proposition to this particular case, for, in any attempt to examine causes in connection with their effects, it will be soon apparent that some criterion is necessary by which to decide what result is proximate and what remote, in a legal sense, to the given act. The standard set up by the decisions above cited supplies, to a reasonable degree, this deficiency. The test is that

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those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequences of his fraud or breach of contract." Mace v. Ramsey, 74 N. C. 11.

The testimony discloses a contract for the sale of an engine of a certain make, size, and capacity. It would seem a reasonable inference that the sellers knew that it was to be used to run a sawmill for cutting logs into boards. Their guaranty must, in the light of these facts, be construed as an assurance that although the engine was 9 x 12, instead of 10 x 12, as contracted for, it would develop for this particular use the same power as the engine contracted for, or that they would make it do so. This, of course, involved the idea that the plaintiff was to put it in position for use, and use it, giving the defendants a reasonable time and opportunity to fulfill their contract. What damage would usually result from a breach of this contract? What would a man selling such machinery, knowing the use to which it was to be put, the place to which it was sent, etc., have reasonably contemplated as the usual result of a failure to make this develop twenty-five horse power? The plaintiff offered to show that at the time of making the contract he had contracted with reliable parties for the sale of the output of his mill at a stipulated price. The refusal to permit him to show this is the basis of his first exception. It is well settled that, while for breach of contract the law seeks to give full compensation for actual loss sustained, it will not undertake to estimate uncertain profits. We think that, in the absence of any knowledge on the part of the defendants that the plaintiff had made such a contract, damages resulting from it could not be said to be within their contemplation. There is the further objection that the plaintiff did not offer to show that he had logs on hand sufficient to run the mill any given number of days, or for what time the contract extended. If the question as stated in the record had been answered the jury could not possibly have made it the basis for assessing damages. There were too many elements of uncertainty involved to form the basis of any verdict. It may be that the plaintiff intended to show how these matters were, but we must pass upon the exception as presented to us in the record. In Lewis v. Rountree, 79 N. C. 123, 28 Am. Rep. 309, the plaintiff was permitted to recover upon the basis of the price of the rosin in New York, to which point it was shipped, for the reason that it was purchased for that purpose, and the defendant had notice of it. In Mace v. Ramsey, supra, the boat was hired for a particular occasion and the plaintiff had engaged a certain number of passengers at an agreed price. The court held that such loss as ensued was within the contemplation of the parties. In Mfg. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602, it was held that damages could not be recovered for failing to ship machinery for a cotton mill based upon anticipated profits from the output of the mill; Lumpkin, J., saying: "The gains were too remote and uncertain, depending upon a variety of contingencies, the failure of any one of which would subvert the whole computation." The slightest reflection will show the number of contingencies attending a slae of the output of a sawmill — the weather, a breakdown of the mill, failure to get logs, etc. Sycamore Co. v. Strurme, 13 Neb. 210, 13 N. W. 202. His honor properly excluded the testimony.

The plaintiff excepts to the refusal of the court to give certain special instructions: First, that the plaintiff is entitled to recover reasonable rent and insurance for the buildings which were idle by reason of the

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delay of the defendants to furnish an engine according to contract. We find no evidence upon which to base this instruction. The plaintiff says nothing of any buildings being idle or of any insurance paid. The same is true in regard to the second prayer. There is no evidence that the logs were damaged, or, if so, to what amount. The third prayer is based upon the principle announced in Kester v. Miller, supra. The plaintiff was entitled to this instruction. For the reasons given in that case the plaintiff is entitled to such damages as he sustained while operating the mill, at the defendants' request, to enable them to make the engine develop twenty-five horse power. The defendants knew that the mill was being operated at their request and for their benefit. They knew that it required hands, teams, etc., to operate the mill, and any loss sustained in doing so must have been within the contemplation of the parties. It is true the evidence on this question is very meager; and, if there was no more than we find in the record, the jury would have found difficulty in assessing the plaintiff's damages. There was, however, some evidence of the number of hands engaged about the mill, the price paid them, and the difference per day in the output of the mill as it was and should have been according to the contract and the value thereof. This exception must be sustained. Mfg. Co. v. Rogers, supra. This ruling does not include hands and teams employed in logging. It includes only those employed in running the mill. The fourth prayer is disposed of by the ruling upon the rejection of the proposed evidence. The same ruling applies to the fifth prayer. The sixth is included in the disposition of the third prayer. The seventh prayer is disposed of by what is said in regard to the fourth. There is no evidence that the defendant knew of the employment of teams, etc., for logging the mill. The eighth prayer, in so far as it applies to the amount invested in the milling outfit, should have been given. For any time that the milling machinery was idle, the plaintiff is entitled to interest on the amount invested. Boyle v. Reeder, 23 N. C. 607; Rocky Mt. Mills v. Railroad, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. There is no evidence to sustain the ninth prayer, and the same is true as to the ninth.

We have carefully examined the entire record. For the reasons pointed out there must be a new trial on the third issue as to damages. The plaintiff will recover the costs in this court. New trial.

Decision No. 792.

ALASKA FISH & LUMBER CO. v. CHASE.

128 Fed. 886.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 983.

MASTER AND SERVANT — CONTRACT OF EMPLOYMENT — BREACH — DAMAGES — WRONGFUL DISCHARGE — OTHER EMPLOYMENT.

1. Where plaintiff brought suit for breach of a contract of employment, but made no claim that there was anything due for services actually rendered, the measure of damages was the actual loss sustained, and not the amount of wages stipulated from the time of the discharge to the time of the trial.

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2. Where a servant was wrongfully discharged before the termination of his contract of employment, it was his duty to use prompt and reasonable diligence to procure other employment of a similar character, and if he failed to do so the damages should be mitigated to the extent of the compensation which he might have received by proper effort to seek employment.

In error to the District Court of the United States for the First Division of the District of Alaska.

W. E. Crews (Lorenzo S. B. Sawyer, of counsel), for plaintiff in error.

Malony & Cobb, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The parties to this action entered into a written contract on the 14th day of February, 1902, by which the defendant in error (plaintiff below) agreed to work for the plaintiff in error (defendant below) "as a superintendent or foreman, or in such other capacity as both parties hereto consent to, for the term of one year, beginning March 1, 1902, in the territory of Alaska, or elsewhere in the United States, as said party of the first part (the plaintiff in error) shall desire, and to well and faithfully devote his entire time, efforts and attention during said year to the services of the said party of the first part," in consideration of which the company agreed that, so long as the defendant in error should faithfully perform his duties under the contract, it would pay "his traveling expenses from Seattle, State of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year, as hereinafter stated, and also pay or furnish, free to the party of the second part, board and lodging, and will further pay the party of the second part the sum of $200 per month, payable monthly, and within 30 days after the end of each month." The case shows that the defendant in error entered the service of the company in Alaska, in pursuance of the contract, and so remained until June 24, 1902, at which time he was discharged, and paid in accordance with the terms of the contract up to that time. On the 3d day of October, 1902, he brought the present action against the company, alleging, after setting out the contract and his entry upon his duties under it; that on the 24th day of June, 1902, the defendant to the action, without cause and in violation of the contract, discharged the plaintiff from its employment, and refused to permit him to render any further services thereunder, his readiness and willingness to perform which he also alleged. The complaint further alleged that the fishing and canning business, which was the subject of the contract —

"Is of such a nature that it is customary and necessary to secure employment therein by the year, or for the whole season of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1, 1903, to secure any employment, and will during the whole period from June 24, 1902, to March 1, 1903, be left without employment and compelled to support himself at his own expense; that defendant has only paid plaintiff the sum of $766.66 on his wages due

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and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging from and after said 24th day of June, 1902; that by reason of the breach of contract by defendant as aforesaid plaintiff has been damaged in the following sums, to wit:

For loss of wages	$1,633 33
Expenses for board and lodging	410 00
Expenses return trip to Seattle	25 00
Making an aggregate of	$2,068 33

"Wherefore plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and 33/100 dollars ($2,068.33), together with costs herein incurred."

The answer of the defendant contained, among other things, the following:

"For further, separate, and affirmative defense, defendant alleges that plaintiff failed and neglected to in any wise perform the conditions of the contract of employment on his part, and that the plaintiff is unskilled, negligent, and incompetent, and in all respects failed to perform the duties for which he was employed, and the defendant was compelled to and did employ other persons to perform the duties for which the said plaintiff was employed; that plaintiff in no respect complied with the terms of his contract, and his representations as to his knowledge, skill, and ability were false; that by reason of the unskillfulness, want of knowledge, and lack of experience on the part of said plaintiff, defendant was compelled to dispense with his services by mutual agreement between the plaintiff and the defendant on or about the 24th day of June, 1902, at which time plaintiff and defendant had a mutual, full, complete, and absolute settlement of all differences between them. Defendant then and there paid to the plaintiff all sums of money due the plaintiff for his services theretofore rendered, which settlement was in all respects satisfactory to the plaintiff in all particulars; and plaintiff then and there made, executed, and delivered his receipt in writing in full of all demands, which receipt defendant now holds, and which settlement was a complete and absolute one, and satisfactory to all parties at the time. Defendant denies that it at this time is indebted to the plaintiff in the sum of $2,088.33, or any other sum whatsoever."

On the trial the plaintiff introduced the contract in evidence, and testified on his own behalf to the effect that he was competent for the work undertaken by him, and that he performed his duties thereunder to the best of his ability until his discharge by the defendant on the 23d day of June, 1902, and that up to the time of his discharge no complaint had been made in regard to his services. The plaintiff also testified that after his discharge by the defendant he sought to obtain other employment of the same or similar character, but without success, and in answer to the question by his counsel, "Now, what was the reasonable value, Mr. Chase, of the board and lodging that was to be furnished you under this contract?" said, "Well, of course, at a place like that it would be over twenty-five or thirty dollars a month — at Shakan." And in answer to the question, "Now, Mr. Chase, state what it would cost to procure such board and lodging here in Alaska as the company furnished you down there — the reasonable cost?" the plaintiff said, "I would say it would cost somewheres about fifty dollars a month." The bill of exceptions then recites:

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"After some evidence had been introduced on behalf of the defendant, and the plaintiff having offered some in rebuttal, and the cause having been submitted to the jury, the court then gave the following instructions to the jury: 'Perhaps I should state to you, further, that the rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end.' To the giving of which instructions the defendant then and there excepted, and his exception was by the court duly allowed."

The instruction thus given and excepted to is the concluding clause of the instructions of the court in respect to the measure of damages, the whole of which is as follows:

"Now, as to the measure of damages: That is what the defendant agreed to pay this man, if he has a right to recover at all, viz., two hundred dollars per month and his board. If there were proof upon the question he would be entitled to the expense of a return trip to Seattle, because that, as I understand it, is a part of the contract. Now, for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire he might recover for the whole term mentioned in the contract, if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can tell. If a man were sick, or should he die, that would terminate his contract of hire, and he could recover nothing beyond that period. We are all liable to die at most any time. So uncertain is the future that to say a man will live for any time and may recover damages up to any time in the future is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of the plaintiff, without objection, that he had made an effort to obtain employment from the time of his discharge, I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted, and coming before the court and jury without objection, I say to you the measure of damages in this case, if the plaintiff recovers, and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial, and such damages for board during the meantime as he is entitled to under the evidence before you. As to the character of the evidence upon the question of board, you will recall what that is. The defendant did not state what the expense of board was at Shakan, but what the expense had been to him, viz., fifty dollars a month. He stated, perhaps, in the first place, that the board down there might cost the company perhaps twenty-five to thirty dollars per month; but it is for you to determine under the evidence just what he is entitled to, and you are to recall just what the evidence was on this point. And if there is any evidence before you — I frankly state I do not recall any — as to the expense of a passage back from Shakan to Seattle, the plaintiff under his contract of hire is entitled to recover that, and you should so find. Perhaps I should state to you, further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end."

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The instruction, as well as the theory upon which the complaint proceeds, is erroneous. The plaintiff's cause of action was not for wages, but for damages for breach of the contract. The complaint nowhere alleges that there is anything due the plaintiff from the defendant for services actually rendered; and, while it alleges that the plaintiff has been damaged by the defendant, the specific allegations of damage hereinbefore quoted clearly show that what he asked as damages, and all that he asked, is pay for his constructive services at the rate specified in the contract. In Saxonia Mining & Reduction Co. v. Cook, (Colo.) 4 Pac. 1111, it is said:

"When a servant is discharged, without a sufficient legal excuse, before the expiration of his term, he has his choice of two remedies: He may treat the contract as rescinded, and at once bring an action for the value of the services rendered, or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term. Wood, Master & Servant, § 125, and authorities cited; Smith, Master & Servant, 91; Suth. Dam. 471. Under the remedy in the latter class of cases the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages prima facie, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor is to be deducted from the amount of the damages occasioned by the breach of the contract sued upon. Wood, Master & Servant, § 125, and cases cited; 1 Suth. Dam. 473."

See also numerous cases cited in 1 Am. & Eng. Encyc. of Law (2d Ed.) 1104.

The plaintiff's duty (if he was improperly discharged) was to use prompt and reasonable diligence to procure other employment of a similar character, and thus reduce the damages; and if he did not conform to that duty the damages should be mitigated to the extent of the compensation which he might have received by proper effort in seeking employment. Park Bros. & Co. v. Bushnell, 60 Fed. 583, 9 C. C. A. 138; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Costigan v. R. R. Co., 2 Denio, 609, 43 Am. Dec. 758. This phase of the case was eliminated from consideration by the jury under the instructions of the court below, which were to the effect that the plaintiff was entitled to recover (if at all) the amount that would be due under the contract in question from the 1st day of March, 1902, to the time of the rendition of the verdict, less the amount actually paid. The jury might have been satisfied, from the plaintiff's own testimony, from his manner of testifying, for instance, that he did not make any reasonable or bona fide effort to obtain other employment, and yet by the instructions of the court they were precluded from giving effect to such a conclusion.

The judgment is reversed, and the cause remanded to the court below for further proceedings.

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Decision No. 793.

RAGAN v. HILL et al.

(Supreme Court of Arkansas. March 19, 1904.)

GIFTS CAUSA MORTIS — ESSENTIALS — DELIVERY.

1. A loan by an old man, who did not expect to live long, of a sum of money to a firm, which executed a receipt containing an agreement to turn the money over to a certain person in case of the lender's death, was not a gift causa mortis, because not delivered to the beneficiary, or any one for him, and not to go to him until the death of the lender; and the lender's direction, not being made and proved as a will, was ineffectual to pass title to the beneficiary.

Appeal from Johnson Chancery Court; William L. Morse, Chancellor.

Suit by J. O. Ragan, administrator of W. M. Rees, deceased, against John C. Hill, Sr., and another, B. C. Rees interpleader. From decree for interpleader, plaintiff appeals. Reversed.

J. H. Basham and Gilleylen & Leftwitch, for appellant. J E. Cravens, for appellees.

BATTLE, J. J. O. Ragan, as administrator of W. M. Rees, deceased, sued John C. Hill, Sr., and John C. Hill, Jr., partners doing business under the firm name and style of John C. Hill & Son, for $1,000, money loaned to them by the deceased in his lifetime, and for interest thereon. Defendants admitted this indebtedness, and alleged that it was also claimed by B. C. Rees; offered to bring the money into court; asked that B. C. Rees be made a party, and that he and the administrator of W. M. Rees, deceased, be required to interplead for the same, which was done, the administrator claiming that the money was owing to his intestate and belonged to his estate, and B. C. Rees, on the other hand, claiming that it was given to him by W. M. Rees, the deceased, in his lifetime. The court rendered a decree for the same, less $191.85 advanced by John C. Hill & Son to pay expenses of the burial of the deceased, in favor of B. C. Rees, and the administrator appealed.

The facts in the case are substantially as follows: On the 14th day of July, 1899, W. M. Rees was an old man, being seventy-eight years of age; was feeble; afflicted with some disease; did not expect to live long; had $1,000; offered to and did loan it to John C. Hill & Son; and they executed to him therefor the following instrument of writing: "Clarksville, Ark., July 14th, 1899. Received from W. M. Rees one thousand dollars with interest at 4 per cent. It is agreed that in case of the death of W. M. Rees that B. C. Rees is to take charge of this money. [Signed] John C. Hill & Son." At the time he loaned the money he stated that it was "to go to B. C. Rees at his death." He was a good friend of B. C. Rees. He died on the 18th of August, 1899. John C. Hill & Son advanced $191.85 to pay his funeral expenses.

Was the $1,000 a gift to B. C. Rees?

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In Newton v. Snyder, 44 Ark. 42, 45, 51 Am. Rep. 587, it is said: "To establish a gift mortis causa, the evidence must be sufficient to show not only that the person in extremis designated with proper distinctness the thing to be given and the person who is to receive it, but it must establish also that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. In this respect there is no difference between gifts inter vivos and causa mortis. Basket v. Hassell, 107 U. S. 602 [2 Sup. Ct. 415, 27 L. Ed. 500]; Coleman v. Parker, 114 Mass. 30."

In Ammon v. Martin, 59 Ark. 194, 26 S. W. 826, it is said: "Delivery before death is just as essential to a gift causa mortis as it is to a gift inter vivos, and the same rules as to delivery are applicable to both."

In the case of Nolen v. Harden, 43 Ark. 307, 51 Am. Rep. 563, the question was as to a gift inter vivos, and the court held that "if the gift is intended to operate in præsenti, and is accompanied by delivery, it operates at once; but if there is only an intention to give, and no delivery is made, it will be inchoate and incomplete, however strong the expression of intention may be."

In Thornton on Gifts and Advancements it is said: "In all gifts a delivery of the thing given is essential to their validity; for, although every other step be taken that is essential to the validity of a gift, if there is no delivery the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences. . . . The reason for the rule . . . is obvious. It is based upon 'grounds of public policy and convenience, and to prevent mistake and imposition.' Such gifts open the door for fraud and perjury, and, as these gifts are usually claimed upon parol evidence, it is difficult to meet and overthrow such claims when the alleged donor is dead, unless a delivery to the donee is made an absolute and requisite test in determining whether or not a gift was actually consummated — not intended, but consummated." Thornton on Gifts and Advancements, pp. 105–108, and cases cited.

In every case a delivery is necessary to constitute a gift. In this case W. M. Rees loaned the money to John C. Hill & Son. He never parted with dominion over it in his lifetime. It was not delivered to B. C. Rees, or to any one for him. In the language of witness John C. Hill, "it was to go" to B. C. Rees at the death of W. M. Rees. The directions of the latter (W. M. Rees) in this respect were testamentary in character, and were not effective, because not made and proved as a will.

Reversed and remanded, with directions to the court to enter a decree in accordance with this opinion.

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Decision No. 794.

NICHOLLS & SHEPARD CO. v. CALDWELL.

80 S. W. 1099.

(Court of Appeals of Kentucky. May 18, 1904.)

SALES — WARRANTY OF QUALITY — BREACH — PURCHASER'S FAILURE TO COMPLY WITH CONDITIONS — EFFECT — AGENTS — AUTHORITY — RESCISSION — ADJUSTMENT OF RIGHTS OF PARTIES.

1. Where a written warranty by the seller, on the sale of a machine, was on condition that, if within five days from its use the machinery should fail to fulfill the warranty, the purchaser should give written notice to the seller at its home office by registered letter, a verbal notice given by the purchaser to the local agent was not sufficient.

2. The purchaser of a machine cannot recover on a warranty of quality unless he has complied with the terms and conditions of the warranty.

3. On a breach of the warranty of quality on the sale of a machine, the purchaser must offer to return the property within a reasonable time after discovering the breach, and if he fails to do so the sale becomes absolute.

4. In an action for the purchase price of a machine, evidence considered and held sufficient to sustain a finding that the purchase-money notes were executed on the faith of an agreement made by the seller's general agent that he would make everything about the machine satisfactory, and that he failed to do so.

5. Where a written contract for the sale of a machine contained a warranty of quality, but it was on condition that. in case the machine proved defective, notice of the defect should be given in writing to the seller at its home office, but before the purchaser signed the purchase-money notes he complained to the general agent of the seller of a defect in the machinery, and he promised to remedy any defect, and on the faith of such promise the purchaser signed the notes, but the machine was not made satisfactory, the purchaser was entitled to rescind, though he had not given the notice required by the written contract, and though he continued to use the machine with knowledge of its defectiveness.

6. Though a contract for the sale of a machine provided that, in case of failure of warranty, the seller should not be liable for an old machine taken by him in part payment, such provision was not binding in determining the right of the parties on a rescission by the purchaser.

7. In an action for the price of a threshing machine it appeared that defendant had given as part payment an old machine, but that, under the facts, he was entitled to rescind the contract. It was shown that while he had been in possession of the new machine he had made therewith a profit of $250 over and above his own services, but that the damage to the new machine while in his possession amounted to $200. The old machine had been valued in the contract at $750, and it did not appear what was the state of repair of the old machine. The contract provided that the seller should not, in case of failure of warranty, be liable for any machinery or other property taken as part payment, but only for the return of cash and notes payable. Held, that the purchaser should be charged with the $250, and the $200 for damages to the machinery, which should be set off against $650 allowed against the seller for the value of the old machine.

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

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Action by the Nichols & Shepard Company against J. S. Caldwell. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. H. Shelton, A. C. Hergman, and White & Ray, for appellant. Robbins & Thomas, for appellee.

HOBSON, J. In May, 1901, the Nichols & Shepard Company sold to J. S. Caldwell a 16-horse traction engine and a 52-inch grain separator, with steel bagger and wind stacker. In payment he delivered to it an old engine, which it took at $750, and he executed to it his notes for $1,160.75. He failed to pay the notes, and this suit was filed by the Nichols & Shepard Company to recover on the notes and enforce a lien given to secure them. Caldwell answered that, at the time he bought the machine and executed the notes therefor, the plaintiff warranted all the machinery to be well made, of good materials, and, with proper management, capable of doing well the work for which the machines were respectively made; that the machinery did not come up to the warranty, and was worthless; that as soon as he found this out he offered to return the machinery to the plaintiff, but it refused to take it back, or to give back to him the notes or the property which it had received from him, or its value; that the machinery was of no value for the purpose for which it was made, and that but for the warranty he would not have bought it; that the $750 obtained from him on the machinery in the old engine was obtained without consideration; that within less than five days after first starting the machinery he gave to plaintiff at Battle Creek, Mich., through its local agent, and to its general managing agent at Nashville, Tenn., notice that the machinery failed to fill the warranty, but that the defect was of such a nature that he could not tell what it was or where it was, and that plaintiff had not remedied the defect, and was unable to make the machinery work. He made his answer a counterclaim against the plaintiff, and prayed judgment against it for the value of the old engine. The written contract under which the machinery was sold was filed as a part of the answer, and referred to as containing the warranty relied on. The warranty contained in the writing is in these words: "This machinery is purchased and sold subject to the following express warranty and agreement, and none other, to wit: That said machinery is well made, of good material and with proper management capable of doing well the work for which the machines respectively are made, and sold conditioned that if within five days from its first use it shall fail to fill this warranty, written notice shall be immediately given by the purchaser to Nichols & Shepard Company at Battle Creek, Mich., by registered letter (and written notice also to the local dealer through whom the same was received) stating particularly what parts and wherein it fails to fill the warranty. Reasonable time shall be allowed the company to get to the machine with its workmen and remedy the defect, if any there be (unless it be of such a nature that a remedy may be suggested by a letter), the purchaser to render friendly assistance and co-operation in making the machinery a practical success. If a workman visits the machine for the company and does not leave it working satisfactorily, the purchaser shall give immediate notice to the company at Battle Creek, Mich., by registered letter as before (and also to the local dealer), and state in writing specifically any

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failure or neglect complained of and allow time for another workman to be sent to examine the machine and its workings; if, after giving the notices as above provided, any part of the machinery cannot be made to fill the warranty, that part which fails shall be returned immediately by the undersigned to the place where it was received, with the option of the company, either to furnish another machine, or part, in place of the machine or part so returned, which shall perform the work, or return the money and notes which have been received by the company for the same, and thereby rescind the contract to that extent or the whole, as the case may be, and be released from any further liability herein. The failure of any separate machine, or any part thereof, shall not affect the contract or liability of the purchaser for any other separate machine, or for any part of such machines as are not defective. It is expressly agreed that said company shall be liable only for the return of cash and notes payable to its order actually received by it, and not for any machinery or other property taken hereon as part payment."

The plaintiff filed a demurrer to the answer, which was overruled to so much of the answer as set up a defense to the notes, but sustained so much of it as plead a counterclaim. The defendant then amended his counterclaim, pleading that the engine which he delivered to the plaintiff was of value $750, and was obtained from him without consideration. In another amended answer he pleaded that within five days of its first use he gave notice by telephone and in person to the plaintiff's local agent and its traveling agent, Long, and that they were present when he was trying to operate the machine, and saw that it failed to fill the warranty; that he bought the machinery to be used in threshing wheat, and plaintiff's agents who sold it to him represented to him that the engine, separator, and attachments were all that were necessary to thresh and separate wheat; that, at the time he bought the machinery and executed his notes therefor, plaintiff's agents, from whom he bought it, knowingly, falsely, fraudulently, and with the fraudulent intent to deceive and cheat him, and to induce him to buy the machinery, represented to him that it was well made, of good material, and with proper management capable of doing the work for which it was sold, and that the engine was a good 16 horse power; that all these statements were false and fraudulent, and were made with intent to deceive him, and induce him to buy the machine; that, relying thereon, he executed the contract and notes sued on, and but for them he would not have bought the machinery or executed the notes; that the machinery was of bad material and workmanship, but this was of a hidden nature, and could not be detected without opening it and going inside of it, but that it was so rudely and badly constructed that the defects could not be remedied without its being rebuilt. The plaintiff by its reply controverted the allegations of the amended answer, denying that its agents induced the defendant to buy the machinery by any false or fraudulent representations, or made to him any false representations at the time he executed his notes, or that they made any other statements about the machinery than those contained in the written contract, alleging that if they did they acted beyond the scope of their authority, and the defendant never knew this. The case being submitted on the evidence, the court entered a judgment in favor of the defend-

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ant on the counterclaim for $600.30, and dismissed the plaintiff's petition, with costs.

The evidence for the defendant showed these facts: He had been running engines and separators for eleven years. He had an old engine of the plaintiff's make, and in the spring of 1901 G. W. Long, the traveling salesman of the plaintiff, and A. D. Peyton, its general manager at Nashville, came to his house after there had been some understanding with Moss & Reese of Clinton, Ky., who were the plaintiff's local agents. A contract was made for the purchase of the new rig for $1,892, the old engine being taken in at $750. The new machinery was shipped to Stubbs, Ky., and was there received by the defendant and taken to his house. In going from the station to his house after Long had turned over the machinery to him, he had some trouble in going uphill, from the fact that the water came out of the boiler into the cylinder. At this time he had not executed his notes for it. After he had reached his house the engine was fired up on several occasions to exhibit the machinery to other persons proposing to purchase, and, while the persons to whom the machinery was exhibited were satisfied, Caldwell noticed the same trouble he had had in bringing the machinery home from the station. He made complaint to Peyton, the general manager, and Peyton said he would make it all right. This was before he signed the notes. He refused to sign the notes when presented by Long until he talked with Peyton, and he said to go on and sign the notes and he would make everything all right. Caldwell then signed the notes. This was while the machinery was at his house, and before he began to use it. He first used it on Monday, June 24th, and they had to stop four or five times in going a half a mile. When they started it to running the engine failed to develop power, blew the water through the cylinder, and they could not keep up a head of steam. That evening he notified Moss & Reese and Long at Clinton, Ky., also notified them the next day, and two or three days later notified Peyton at Nashville. All of this was by telephone. Several times afterward notices were given by telephone, and in the next few days. Peyton answered that he would send a man at once to fix the engine, but the man did not come for some time, or until about July 9th, and then did nothing. Caldwell worked with the machine about twenty days, and then quit. He paid his hands for fifteen days' work. The machinery was never satisfactory. The separator gave trouble from breaking, and the engine did not develop power. When Peyton was notified of the trouble he said he would make everything all right, but this he failed to do, and Caldwell offered to deliver the machinery back to them at the place where he received it. After he quit threshing, or about that time, he notified the plaintiff at Battle Creek, Mich., by registered letter, of the defects in the machinery, and would have done so sooner if Peyton had not said that everything would be all right. He threshed about 15,000 bushels of wheat with the machine in the twenty days. Its estimated capacity was about 2,000 bushels a day. The offer to return the machinery was after he stopped threshing, and was made to Peyton and Long. After this he threshed six bushels of peas with the machinery, as an experiment to see how it would do.

The proof for the plaintiff contradicts the defendant on every point,

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but, in view of some letters in the record and the testimony of disinterested witnesses sustaining the defendant, we are not disposed to disturb the chancellor's conclusion on the facts. The defendant was a man of experience in the business, he had several other experienced men to assist him in the operation of the engine and separator at different times, and we are inclined to the conclusion that the trouble was due to an inherent defect in the engine by reason of which it failed to develop proper power. We also conclude that he promptly notified Peyton by telephone of the trouble, also Long and Moss & Reese; and Peyton promised to send a man at once to remedy the trouble. The man came about the 9th of July, and he went away without doing anything. On these facts, what is the law of the case?

It will be observed that the written warranty is upon the condition that if, within five days from its first use, the machinery shall fail to fill the warranty, written notice shall be immediately given by the purchaser to Nichols & Shepard Company at Battle Creek, Mich., by registered letter, and also to the local dealer; reasonable time shall then be allowed the company to get to the machinery and remedy the defect; if a workman visits the machine for the company, and does not leave it working satisfactorily, the purchaser shall give immediate notice to the company at Battle Creek, Mich., by registered letter as before, and allow time for another workman to be sent; and if, after all this, any part of the machinery cannot be made to fill the warranty, that part shall be immediately returned by the purchaser to the place where it was received, with the option of the company either to furnish another in place of it which shall perform the work, or return the money and notes which had been received by the company, and thereby rescind the contract and be released from any further liability thereon. It is expressly agreed that the company shall be liable only for the return of cash and notes actually received by it, and not for any machinery or other property taken as part payment. Caldwell did not give written notice by registered letter to Nichols & Shepard Company at Battle Creek, Mich., that the machine failed to fill the warranty, nor did he notify them by registered letter immediately when the workman who visited the machine for the company did not leave it working satisfactorily. The only notices he gave were verbal notices to Peyton, Long, and the local agents, and, while these were promptly given, they were not a sufficient compliance with the contract. It is said that the agreement to give a notice in writing was only an agreement to furnish certain evidence of notice, and when the notice was given verbally, and was acted on or agreed to be acted on, this was a waiver of a written notice. But a waiver of this sort cannot be implied simply from the fact that Peyton said he would send a man to fix the machine. There was not enough in this to show a waiver of a stipulation in the contract. Besides, the notice was to be given to the company at Battle Creek, Mich. Peyton was at Nashville, Tenn., and it cannot be presumed, on the facts shown, that either party had in mind the notice to him, as he had made the sale, but the notice which was required to be given to the company at Battle Creek, Mich. It is settled that, to recover on a warranty like this, the purchaser must comply with its terms (Frick Co. v. Morgan & Co., 69 S. W. 1072, 24 Ky. Law Rep. 836; Osborne v. Traylor, 8 Ky. Law Rep. 359); and, where there is a breach of the

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warranty, the purchaser must offer to return the property within a reasonable time after discovering the defectiveness of the machinery, and if he fails to do so the sale becomes absolute (McCormick Harvesting Machine Company v. Arnold, 76 S. W. 323, 25 Ky. Law Rep. 663). But in this case, before Caldwell completed the contract by executing the notes, he became apprehensive that the machinery was not all right, and refused to sign the notes. He was induced to sign them by the assurance of Peyton that he would make everything all right. While Peyton denies this, his letters to Caldwell tend to confirm Caldwell's statement, which is also confirmed by the subsequent conduct of both Caldwell and Peyton. We therefore conclude that the chancellor was warranted in finding, from the evidence, that the notes were executed upon the faith of the agreement of Peyton that he would make everything all right, and that this he failed to do.

What, then, are the rights of the parties? The parties might, by a subsequent parol agreement, modify the written contract which they had made. Peyton was the general manager of the company, and had authority, as such, to make such a contract with Caldwell. It was within the scope of his apparent authority, and when he induced Caldwell to give the notes by assuring him that he would make the machinery all right, the company is bound by his agreement, and cannot, when it failed to comply with it, enforce the notes. The contract between the parties must therefore be rescinded, and the engine and separator, with attachments, should be adjudged to appellant.

As to how the rights of the parties should be settled upon a rescission we have had great difficulty in determining. Caldwell threshed with the outfit 15,000 bushels of wheat at eight cents a bushel, amounting to $1,200. His expenses were $61.35 for fifteen days, amounting to $919.25, which would leave a net balance in his hands of $280.75. He delivered to the appellant the old engine, which it took at $750 in the trade, but we do not find in the transcript any evidence by appellant as to its real value, except it comes out indidentally that the commissions to the agent for making the sale, which would depend upon the value of this engine, were to be taken up later when this was ascertained. The record does not show how old it was, or how long it had been used, or what was its state of repair. It is stipulated in the contract that the company shall not be liable for any machinery or other property taken as part payment thereon. There is no charge of mistake or fraud in the execution of the contract in this particular. But a court of equity will not enforce a contract which is harsh and oppressive. When the contract is rescinded it must be rescinded upon equitable terms, and, as far as practicable, the court must place the parties in statu quo. The parties cannot by previous contract tie the chancellor's conscience, and require him to do what is inequitable when he rescinds the contract. The Circuit Court seems to have valued the old engine at $650, and from such knowledge as we have of such transactions this seems to be a fair conclusion. We cannot tell from the record how much the new machinery was damaged by the use Caldwell made of it, but that it was damaged is, we think, clear from the evidence. Upon the whole case, making the best approximation we can, we have reached the conclusion that Caldwell should be charged with $250 for balance

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received by him for the threshing, over and above his own services, and that he should also be charged with $200 for damages to the new machinery, and that this should be offset against the $650 allowed against the company for the value of the old engine. Caldwell tendered the machinery back as soon as he became satisfied that Peyton was not going to make it do all right. His delay in tendering it back was due to Peyton's assurance that he would send a man to fix it. And, while he was not in the wrong in continuing to use the machinery as he did, he ought to compensate the company for the injury to the property while he was running it.

On the return of the case to the Circuit Court a judgment will be entered rescinding the contract and adjudging to appellant the property in controversy, and a judgment will be entered in favor of Caldwell for $200, with interest from July 30, 1901. Appellant will recover costs in this court, and Caldwell will recover costs in the Circuit Court.

Judgment reversed, and cause remanded for a judgment as above indicated.

Decision No. 795.

HERRICK v. EDWARDS.

81 S. W. 466.

(Kansas City Court of Appeals. Missouri. May 30, 1904.)

BILLS AND NOTES — NEGOTIABILITY — MEMORANDA — EFFECT — ANOMALOUS INDORSEMENT — LIABILITY OF INDORSER — ACTIONS — EVIDENCE.

1. Where a note payable to the payee's order contained on its face the words "Non-negotiable or transferable," and on the back the memorandum, "This note is not transferable nor to be used as collateral without the written consent of principal and indorsers, and if so used shall be absolutely void," such memoranda destroyed the negotiability of the note.

2. A memorandum on a note, providing that it was not transferable nor to be used as collateral without the written consent of the principal and indorsers, was ineffective to render the note nonassignable and nontransferable as other nonnegotiable paper.

3. In an action on a note indorsed by one not the payee, evidence is admissible to show that he signed as an indorser and not as a joint maker, unless the note is in the hands of a purchaser without notice.

4. Where a third person signed a note on the face thereof, and placed the word "indorser" after his name, he was not an indorser known to the law merchant, and was therefore not entitled to demand and protest or notice of nonpayment.

5. Where a third person signed a note on the face thereof and placed the word "indorser" after his name, his liability was either that of a maker or guarantor.

6. Where a third person signed a note on the face thereof and placed after his name the word "indorser," whether his liability was that of maker or guarantor, he might be sued directly on the maturity of the note, without an action having been instituted by the holder against the real obligor.

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Appeal from Circuit Court, Cole county; James E. Hazell, Judge.

Action by Emery Herrick against W. J. Edwards, as executor of the estate of J. R. Edwards, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Silver & Brown, for appellant.
W. J. Edwards, for respondent.

ELLISON, J. The plaintiff brought his action on a promissory note. The trial was before the court without a jury. The finding and judgment were for defendant.

The following is a copy of the note:

"$900.00. Jefferson City, Mo., January 10th, '98.

"One year after date we promise to pay to the order of E. Herrick nine hundred 00/100 dollars at my place of business——— Value received with interest from date at 7 per cent.

"No.—— Due

M. F. MARKS, Principal.
"Morris Marks,
"J. R. EDWARDS, Indorser.

"Non-negotiable or transferable."

On the back thereof are the following indorsements:

"This note is not transferable nor to be used as collateral without the written consent of principal and indorsers. M. F. MARKS.

"And if so used shall be absolutely void. J. R. EDWARDS, Indorser."

The note, considered disconnected from the memoranda appearing on its face and back, would be an ordinary negotiable instrument. But in our opinion such memoranda destroy its negotiability from the fact that it amounts to notice that the parties do not intend that it shall be used as commercial paper. Negotiable commercial notes represent money, and they are intended to pass from hand to hand as money. 1 Parsons, Notes and Bills, 30, 37; Story, Prom. Notes, 41; People's Sav. Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754. We regard the memoranda aforesaid as negativing and restraining such function, and therefore rendering the note non-negotiable.

But we believe it was nevertheless assignable and transferable as any other non-negotiable paper. Weber v. Rosenheim, 37 Ill. App. 72. It is not within the power of a person executing a promissory note to another to take from it one of the principal rights of property, viz., the right of disposal. We therefore regard defendant's undertaking to prohibit its transfer, either absolutely or as collateral, as noneffective. Merely as illustrative of this view of the law we quote the following from 2 Coke, 21, viz.: "If a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void, because when a man so infeoffed of lands, or tenements, he hath power to alien them to any person by the law. For if such a condition should be good then the condition should oust him of all power which the law gives him, which should be against reason, and therefore such a condition is void. And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void. And so it is of a grant, release, confirmation, or any other conveyance whereby a fee

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simple doth pass. For it is absurb and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain the feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man; and it is within the reason of our author that it should ouster him of all power given to him."

The question then remains: What obligation did defendant assume? It will be noticed that he signed his name on the face of the note at the place usually occupied by makers, but he added to his signature the word "Indorser." Now, the law is that, while, regularly, the name of an indorser should appear on the back of a note, yet it is not necessary that it should. It may appear even on the face. 1 Daniel's Neg. Insts., § 688; Gibson v. Powell, 6 How. (Miss.) 60.

When one not the payee of a note indorses it before delivery it will be presumed that he is a maker. But evidence is admissible to show in what character he really signed unless the note is in the hands of a purchaser without notice. Powell v. Thomas, 7 Mo. 440, 38 Am. Dec. 465; Lewis v. Harvey, 18 Mo. 74, 59 Am. Dec. 286; Schneider v. Schiffman, 20 Mo. 571. But in this case there is no room for presumption or evidence aliunde, since defendant designated the character in which he signed to be that of indorser. What, therefore, are the rights and liabilities of an indorser of a non-negotiable promissory note? In the first place he is not entitled to have demand and protest made, or notice of nonpayment. Pococke v. Blount, 6 Mo. 338; Stix v. Matthews, 75 Mo. 96. Though he termed himself "indorser," yet he is not the indorser known to the law of negotiable commercial paper. Richards v. Warring, *40 N. Y. 578, 582; Dean v. Hall, 17 Wend. 214, 215; Seabury v. Hungerford, 2 Hill, 80; Hall v. Newcomb, 3 Hill, 233; Griswold v. Slocum, 10 Barb. 402.

In Samstag v. Conley, 64 Mo. 476, it was decided that when the payee sold and indorsed a nonnegotiable note he was not an indorser, but was an ordinary assignor, impliedly liable only if diligence were used to collect of the maker. But in this case defendant was not the payee, and he did not indorse for the purpose of transferring title, as in the Samstag Case. He is a stranger to the note except as to the obligation he assumed when he signed as "indorser," and we have already seen that by such signing he did not assume the liability of an indorser known to the law merchant. The question of what was his liability has been solved by the cases from New York, cited above, wherein it is held that he became liable as a maker or guarantor, and that his contract was the equivalent of making a new note. To those authorities may be added Cromwell v. Hewitt, 40 N. Y. 491, 100 Am. Dec. 527; Seymour v. Van Slyck, 8 Wend. 421. The same view was taken of his obligation in Massachusetts: Austin v. Boyd, 24 Pick. 64. In New Hampshire: Martin v. Boyd, 11 N. H. 385, 35 Am. Dec. 501. And that construction of his obligation was adopted by the Supreme Court of this State in Lewis v. Harvey, 18 Mo. 74, 59 Am. Dec. 286.

While our conclusion is, as shown by the foregoing, that defendant

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cannot assume the obligation of an ordinary indorser of negotiable paper for the purpose of claiming the rights of such character of indorser, and will not be allowed to show that it was understood he was to be such indorser, yet he may show that he signed in any of several characters (if there be several) which the nature of his obligation will permit. We have shown that his obligation was either that of a maker or guarantor. Whether it was one or the other might be shown by him by evidence aliunde. Lewis v. Harvey, supra. But whether maker or guarantor he could be sued directly, on maturity of the note, without it being necessary to have instituted an action against the real obligor as between themselves. Hill v. Combs, 92 Mo. App. 242, 252.

The case was not tried in conformity to the views herein expressed, and the judgment will be reversed and the cause remanded. All concur.

Decision No. 796.

REEVES & CO. v. BRUENING.

100 N. W. 241.

(Supreme Court of North Dakota. May 31, 1904.)

SALE — CONTRACT — ORDER FOR MACHINERY — ACCEPTANCE — PAROL EVIDENCE — MODIFICATION — DELIVERY — GENERAL AGENT.

1. A written order for machinery to be shipped to the purchaser, which fully describes the machinery and the terms under which it is to be purchased, becomes a contract by the unconditional acceptance of such order.

2. Until acceptance such order is not a contract, and may be revoked, but not after acceptance.

3. The acceptance becomes effective when a letter containing an acceptance of the order is duly deposited in the post office for transmission to the person who gives the order.

4. Parol evidence is not admissible to show that the contract is different from that contained in the accepted order.

5. Parties to a contract can, by consent, orally modify or waive the terms of a written contract, if such modified contract is executed.

6. Where a written executory contract of sale specifies the terms under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made and the title was to pass.

7. The intention of the parties at the time that delivery is claimed determines whether delivery was made or not.

8. The evidence in the case considered, and held not to show a delivery of the property as a matter of law.

9. A general agent of a machine company, whose authority is not in writing, is a competent witness as to what authority he has.

(Syllabus by the Court.)

Appeal from District Court, Foster County; S. L. Glaspell, Judge.

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Action by Reeves & Co. against John Bruening. Judgment for plaintiff, and defendant appeals. Reversed.

Morrill & Engerud and White & Craven, for appellant.
H. R. Turner and McCue & Leslie, for respondent.

MORGAN, J. This action is brought to recover the purchase price of a steam threshing outfit consisting of an engine and separator and all other necessary parts to make the outfit complete. The complaint contains the following allegations, after a particular description of the property, viz.: "That afterwards, on the 17th day of August, 1903, the defendant purchaser of the plaintiff, by his unconditional order in writing, the above described personal property for the sum of $3,100; that by virtue of the terms of said written order and sale the defendant agreed to pay to the plaintiff the aforesaid $3,100 by delivering a proper and sufficient mortgage . . . and execute five promissory notes. [Here follows description of notes.] That by virtue of the further terms and conditions of said written order defendant agreed to pay the freight on said property from Columbus, Indiana, to Carrington, North Dakota, which freight was and is the sum of $262. That on or about the 17th day of August, 1903, said property and machinery was complete and ready for delivery at Carrington, North Dakota, and on said day the plaintiff, through its agents, Chaffee Bros. & Co., of Carrington, North Dakota, sold and delivered to the defendant all of the above foregoing described property. That the plaintiff has demanded the foregoing notes and mortgage for the purchase price of said property and machinery, together with the $262 freight thereon, all of which the defendant refuses to execute and deliver, and refuses and neglects to pay the freight on said property, or any part thereof, as above stated. That by virtue of the terms and conditions of said written order and sale of said property, and on account of the failure of said defendant to execute and deliver said notes and to pay the freight hereinbefore set forth, the plaintiff had the right to declare the entire purchase price of said property due and payable, and the plaintiff has so elected and declared the said purchase price of said machinery now due." The answer alleges, in effect, that there was no perfected sale of the property in question; that defendant proposed in writing to buy the threshing outfit, but before the same was accepted by the plaintiff defendant withdrew his proposition of purchase. And defendant further denies generally all the allegations of the complaint. The trial court directed a verdict for the plaintiff for the price of the property specified in the contract and for the freight agreed to be paid, being in all for the sum of $3,416.75. The defendant appeals from the judgment, and specifies errors of law in the admission of testimony and error in directing a verdict.

The errors relied on may be considered under three divisions: (1) Admissibility of certain evidence of conversations between the parties before the written contract was entered into; (2) admissibility of certain evidence as to the authority of the general agent of the plaintiff who was acting under a written contract; (3) insufficiency of the evidence to justify a direction to the jury that, as a matter of law, the sale was an executed sale, or in directing the jury as a matter of law that there was a delivery of property to the defendant.

The evidence is practically uncontradicted and is substantially as follows: On August 17, 1903, the defendant, Bruening, stated to the

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firm of Chaffee Bros. & Co., the plaintiff's local agents at Carrington, N. D., at their office in said city, that he was now ready to buy the threshing rig if terms could be agreed on. There had been conversations between the agents and the defendant in regard to such purchase before. They talked over the price and terms of payment on this day, and during such talk Mr. Chaffee talked with Mr. Weego, the company's general agent at Fargo, over the telephone, and stated to him the price and terms proposed by the defendant. Weego stated that the defendant ought to pay certain sums that fall. The defendant said he could not, and Chaffee so repeated his answer to Weego, who then accepted the offer of the defendant and told Chaffee to let him have the rig. Chaffee told the defendant what Weego said, and further told him: "Mr. Weego accepted the offer, and the rig was his, and Mr. Houlihan will draw up the contract in accordance with our talk. . . . You can take the rig at any time." Immediately after this conversation over the telephone an order was drawn up and signed by the defendant, and sent by mail to Fargo, to the general agent, Mr. Weego. This order for the rig provided that it was taken subject to the approval of Reeves & Co., and contained a description of the property, price and terms of payment, and contained a provision that the title to the approval, price and terms of payment, and contained a provision that the title to the property should remain in Reeves & Co. until paid for in full, and that the freight was to be paid and settlement made by paying cash or giving notes at the time defendant received the property under the contract. This order was immediately sent by mail to the company's offices at Fargo, and on August 18th was accepted by letter to the defendant from Mr. Weego, and the letter mailed before six o'clock A. M. of August 19th. In this letter the general agent stated that the order was acceptable, and that settlement papers had been prepared and sent to Chaffee Bros. & Co. On August 17th, in the afternoon, the defendant attempted to countermand and revoke the order that he had previously signed that day, and wrote Chaffee Bros. & Co., at Carrington, and Reeves & Co., at Fargo, that he canceled the order. He has ever since refused to accept the machine and to settle therefor by giving the notes and security provided for by the contract. Before these letters were written, and right after signing the order, it is claimed by respondent that the machine was delivered to the defendant. It is also claimed by respondent that the terms of the written order were modified, and that it was understood between the parties that the order was given and received in reference solely to the rig then on hand at Carrington. It is also claimed that the terms of the order as to transfer of title, delivery, and settlement were all waived, and that unconditional delivery was made without complying with any of the terms of the order as to these matters. The evidence upon the question as to the delivery of the machine is as follows: That Chaffee stated to the defendant at the close of the conversation over the telephone with Weego, "The rig is yours; you can take it at any time," and other similar statements; that afterwards the defendant and the witness Houlihan, an agent of plaintiffs, had the following conversation at or near the machine: "After we had written up the written contract he wanted to know if the machine was ready to take out, and everything with it. I told him, as far as I knew, everything that came with the machine was there, and we went and walked up to it, and stepped up on the wheel of the water tank and looked over

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the tools, and I unlocked the tool box, and he looked them over, and he said he wanted to take it home on Saturday, and I told him there was water in the engine, and everything was ready to start up." Under the facts as set forth it is claimed by respondent that (1) the contract entered into was an executed one, and passed the title to the property by virtue of the acceptance by Weego of the terms and conditions of the sale over the telephone; (2) there was an actual delivery of the rig to defendant, even if the contract be executory.

The cause of action as set forth in the complaint is upon the written order and the delivery under it. The written order is pleaded and its terms relied on for judgment for the price of the rig, for the reason that defendant refused to pay the freight and to execute notes and a mortgage as agreed to in the order. The written order and its acceptance form the contract entered into by the parties. Prior or contemporaneous negotiations in reference to the terms of the contract cannot be considered in determining what the contract is, as all such negotiations are deemed to have been incorporated therein, and are superseded by such written contract. Section 3888, Rev. Codes 1899. This provision of the Code applies in its full extent in this case, as the facts do not bring it within the rule established by cases that oral declarations may be considered when the written contract is ambiguous, or is silent upon the subject of an additional agreement. Mott v. Richtmyer, 57 N. Y. 49; Brown v. Russell, 105 Ind. 46, 4 N. E. 428; Brewster v. Potruff, 55 Mich. 129, 20 N. W. 823. In this case the written order deals with a rig to be shipped from Columbus, Ind. It provides that the order is taken subject to approval by Reeves & Co. The written contract provided that delivery was not to be made before settlement for the machine. It provided that the title to the property remained in Reeves & Co. until paid for. Plaintiff endeavors to show by Chaffee's evidence that the contract was modified in these particulars by waivers prior to the execution of the order, and by statements and declarations of the parties showing that an immediate delivery was made and contemplated by the parties. The terms of the contract, as made by the written order, followed by the acceptance, cannot be changed by such conversation or declarations. The contract cannot be modified or varied by parol evidence of what happened during the negotiations. The contract thus entered into was executory in every particular. The notes were to be executed secured by mortgages; freight charges were to be paid in cash; the title remained in the seller; possession was not given to the purchaser until the property was paid for in cash or settlement made by notes; and in no sense or particular was the contract as entered into an executed contract or sale. The defendant could not compel delivery to him unless he had paid the freight and tendered the notes. The acceptance of the order did not constitute the transaction a sale as a matter of law. Parsons on Cont., vol. 1 (9th ed.), p. 529. From the contract it therefore plainly appears that neither the title was to pass nor delivery be made until these conditions as to settlement were complied with. Whether the order be deemed to have been accepted by mail or by authority of Weego to Chaffee over the telephone it was not revoked before acceptance. There can be no revocation after acceptance, as the contract is entered into by such acceptance. Section 3862, Rev. Codes 1899; Hawkinson v. Harmon, 69 Wis. 551, 35 N. W. 28. The plaintiff cannot plead the order and unconditionally rely upon it for a recovery,

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and at the same time claim a parol modification of it made before its acceptance. After acceptance of the order the contract could be modified by consent if the modified contract was executed. The parties could agree that the defendant would take the machine then on hand in place of the one to be shipped under the terms of the order, and delivery could be agreed upon without executing papers or paying freight, and oral proof given in respect to such modified contract, if followed by delivery. Section 3936, Rev. Codes 1899.

It is contended that Weego had no authority to accept the order, and that it was error to admit his testimony to the effect that express authority had been conferred on him to accept orders for machines. He was general agent for the plaintiff company in this State. His powers or duties as agent were not reduced to writing. He was a competent witness to testify what his authority was. Section 102, Mechem on Agency, and cases cited; Piercy v. Hedrick, 98 Am. Dec. 774; vol. 2, Greenl. Evi. (16th ed.), § 63.

So far as the attempted revocation is concerned, it is immaterial whether the acceptance was by letter or by parol. In either case the acceptance was before a revocation was communicated to the company or to any of its agents. Section 3862, Rev. Codes 1899. In either case such acceptance mutually bound the parties to the contract. Contracts entered into by acceptance of an offer cannot be modified by showing by parol a different contract, any more than any other explicit contract can be so modified. Hooker v. Hyde, 61 Wis. 204, 21 N. W. 52; McCormick Harvester Co. v. Markert, 107 Iowa, 340, 78 N. W. 33.

It now remains to be determined whether, as a matter of law, there was a transfer of the title and a delivery to the defendant on the day the order was signed. On plaintiff's part it is claimed that the oral acceptance of the order by Weego, with a direction to Chaffee to let defendant have the machine, followed by telling defendant that he could have the machine at any time, and the machine being in condition for delivery, and defendant stating that he would want it on Saturday, with defendant's inspection of it as stated heretofore, constituted a delivery. On a valid sale of such property this would probably be a sufficient delivery between the parties. But whether this is so under a written contract for a sale, stipulated under what conditions delivery shall be made, and under what conditions the title shall pass, is a different and more difficult question. To say that there was a change of title and a delivery of possession presupposes that the original order was, by consent, modified, so that the defendant was to accept a rig then on hand in place of one to be shipped from Indiana, and presupposes the further fact that the plaintiff waived all of the conditions of the written contract as to payment of freight and settlement by notes and morgages. We cannot agree with the trial court that such facts were shown as a matter of law. This involves the question whether it appears from the facts that it was then the intention of the parties that the machine was then and there conditionally delivered tthe purchaser, and whether it was the intention of the seller then and there to waive all conditions precedent to delivery, as stated in the contract. Does the evidence conclusively show that the seller manifested by his words or conduct an intention to waive all security and rely upon the personal responsibility of the purchaser for the payment of the price? We do not think that the evidence in the case warrants such a conclusion. During the negotiations noth-

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ing had been said that freight charges were not to be paid, nor was anything said that title should not remain in the company; nor was anything said at the machine, or before, that plaintiff delivered the machine to defendant, or words to that effect. What was there done and said is not inconsistent with the fact that it was simply an examination to ascertain if the machine was in shape for delivery when delivery was to be made. We think the evidence insufficient, as a matter of law, to show that such was then the intention of the parties. This question as to the intention that delivery was then made, and whether plaintiff waived, and then intended to waive, the terms of the order as to settlement notes, payment of freight, and other provisions, is to be determined by what was said and done at the time it is claimed delivery was made, together with other circumstances subsequent or prior thereto that will throw light on the question as to what was then the intention and understanding of the parties as to delivery and waiver. The intention of the parties at the time that delivery is claimed determines whether delivery was made or not. Mechem on Sales, vol. 1, § 552, and cases cited; Leavitt v. Rosenthal, (Sup.) 84 N. Y. Supp. 530; Gibson v. Chicago Packing Co., 108 Ill. App. 100; Paul v. Reed, 52 N. H. 136; Witte v. Reilly, 11 N. D. 203, 91 N. W. 42.

The court directed a verdict for the contract price. Plaintiff has not conclusively brought itself within section 4987, Rev. Codes 1899, providing that the detriment caused by a breach of the buyer's contract to accept and pay for personal property, the title to which has vested in the buyer, shall be deemed to be the contract price. Unless there was an unconditional change or transfer of the title, the contract was not fully executed, and the measure of damages laid down in section 4987, supra, does not prevail. In this case there was a refusal to receive the property, and plaintiff would have a remedy under section 4988, Rev. Codes 1899. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Minn. Thresher Mfg. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993. The complaint sets up a cause of action for the price of property sold and delivered. The facts do not conclusively show a sale or a delivery. The facts show only a contract for a sale. It is claimed by respondent that the transaction became an actual sale at the moment the general agent accepted the order and authorized the local agents to let the defendant have the machine; in other words, that it became an oral sale followed by delivery. The delivery necessary to satisfy the statute of frauds must be of a different character than in cases of sales not within the statute. To satisfy the statute of frauds there must be delivery and acceptance of the property. Delivery alone will not suffice. Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612, and cases cited.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

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Decision No. 797.

SWEET et al. v. MONTPELIER SAV. BANK & TRUST CO.

77 Pac. 538.

(Supreme Court of Kansas. July 7, 1904.)

ELECTION OF REMEDIES — CONVERSION OF FUNDS — INCONSISTENT REMEDIES — COLLECTION BY CORPORATION — LIABILITY OF OFFICERS.

1. Where the remedies afforded are inconsistent, the election of a remedy by a party with a full knowledge of the important facts affecting his rights operates as a bar against the adoption of another of such remedies.

2. Where money has been wrongfully converted to the use of a corporation, and the assets of the corporation by its insolvency have come into the hands of a receiver, the following of the funds in the hands of the receiver as a trust fund does not preclude the maintaining of an action to recover against the parties by whose wrongful act the funds were converted, the two remedies not being inconsistent.

3. Where there is sent to a corporation a note and mortgage for collection, with instruction to collect and remit, and the money is collected, but not remitted, a recovery may be had by the owner of the note and mortgage against the executive officers and managing agents having the active management, charge, and control of the affairs of the corporation for the conversion of the money by them for the use of the corporation, and also a recovery of them for such conversion of the money by subordinates, with the knowledge and acquiescence of such officers and managing agents.

(Syllabus by the Court.)

Error from District Court, Shawnee county; Z. T. Hazen, Judge.

Action by the Montpelier Savings Bank & Trust Company against T. B. Sweet and others. Judgment for plaintiff, and defendants bring error. Reversed.

Rossington, Smith & West, for plaintiffs in error.

J. W. Gleed, J. L. Hunt (Gleed, Ware & Gleed, and D. E. Palmer, of counsel), for defendant in error.

ATKINSON, J. Defendants Sweet, Noble, and Sheldon, were president, vice-president, and treasurer, respectively, of the Trust Company of America, a corporation having its place of business in the city of Topeka. They were also large stockholders in the corporation, and had the active management, charge, and control of its affairs. The business of the corporation, among other things, was that of receiving money in trust, executing trusts, and performing such duties as might be committed to it by any person or corporation. In June, 1898, at the request of the trust company, through Sheldon, its treasurer, plaintiff, a corporation with its place of business at Montpelier, Vt., inclosed to the trust company the note and mortgage of J. E. Weaver for $1,545, owned by plaintiff, with instructions to collect and remit. Accompanying the mortgage, as requested, was a release of the same, to be, with the mortgage, surrendered upon payment. During the month the trust

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company collected the amount of the note and mortgage. The amount collected was never remitted to plaintiff, nor was it known by plaintiff until in November following that the amount had been collected. In the meantime, about September 1st, a receiver was appointed by the federal court who took charge of the property and effects of the trust company. In December, 1898, plaintiff filed in the federal court its petition of intervention asking that its claim be allowed as a trust fund, and decreed a first lien on the assets in the hands of the receiver. The petition was submitted to a special master, but no report made thereon. Subsequently this action was brought by plaintiff against defendants Sweet, Noble, and Sheldon to recover of them the said sum of $1,545, charging that they had wrongfully converted the proceeds of the collection to the use of the trust company. Defendants denied liability, and pleaded that the proceeding of plaintiff by petition of intervention in the federal court constituted an election of remedies and a bar to this action. Verdict and judgment for plaintiff.

The right of plaintiff to follow the funds in the hands of the receiver as a trust fund is a recognized remedy. Bank v. Bank, 62 Kan. 788, 64 Pac. 634; Hubbard v. Irrigating Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625. But it was not the only remedy open to plaintiff. It is conceded plaintiff had the right to select its remedy from among the remedies afforded; but it is claimed that, having elected to follow the funds in the hands of the receiver, plaintiff is held to its selection of that remedy; that such election constitutes a bar to plaintiff maintaining this action against defendants. The doctrine of the election of remedies has been frequently applied by this court. The cases hold that, where the remedies afforded are inconsistent, the election of a remedy by a party, with a full knowledge of the important facts affecting his right, operates as a bar against the adoption of another of such remedies. Remington Paper Co. v. Hudson, 64 Kan. 43, 67 Pac. 636; Railway Co. v. Henrie, 63 Kan. 330, 65 Pac. 665; Bank v. Haskell Co., 61 Kan. 785, 60 Pac. 1062; City of Larned v. Jordan, 55 Kan. 124, 39 Pac. 1030; Plow Co. v. Rodgers, 53 Kan. 743, 37 Pac. 111. Election goes not to the form but to the essence of the remedy. It applies only where the law supplies to a party two or more modes of procedure predicated upon inconsistent and conflicting theories. If the remedies afforded are predicated upon consistent theories, the suitor may use one or all of the remedies. There can be but one satisfaction. Where the remedies afforded are inconsistent the election of a remedy operates as a bar. Where the remedies afforded are consistent the satisfaction of the claim operates as a bar. Is there inconsistency in following the trust property so far as it can be traced, and in recovering of the trustee damage which the beneficiary has sustained by reason of the misappropriation? In Heidelbach v. National Park Bank, 87 Hun, 117, 33 N. Y. Supp. 794, a large quantity of tin was shipped on the condition that the title to the same would be held in trust for the owner until he had received the proceeds of its sale. Sale was made by the trustee who failed in business before remitting to the owner. The owner of the property presented his claim to the commissioners of the estate of the trustee, which was allowed, and a dividend paid thereon. Soon after the claim had been presented to the commissioners for allowance, the owner of the property commenced an action to recover from the bank to which the remittance for the proceeds of the sale of the property had been made, and recovered in the action to the extent of the amount of funds in the bank to the credit of the trustee

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at the time of his financial failure. The action against the bank was defended on the ground that the two proceedings to recover were inconsistent; that, plaintiff having elected to file his claim against the estate with the commissioners, he would not be permitted to maintain his action against the bank. The court, in passing upon the question, said: "An election once made is determined forever, and it may be determined by any decisive act made with full knowledge of all the facts, and the bringing of an action to enforce one of the remedies sufficiently evidences such election; but if a person has two or more consistent, instead of two or more inconsistent, remedies, for the recovery of the same debt, he may resort to all, although he can have but one satisfaction." The same view is expressed as to a trust fund in the opinion of Stoller v. Coates, 88 Mo. 514. See, also, Gambling v. Haight, 59 N. Y. 354, and Commercial Nat. Bank v. Kirkwood, (Ill.) 50 N. E. 219. In Bowen, Executor, v. Mandeville, 95 N. Y. 237, the court said: "A party may prosecute as many remedies as he legally has provided they are consistent and concurrent." See, also, 7 Encyc. of Plead. & Prac. 362. In Fowler, Executor, v. Bowery Savings Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479, John White deposited money with the bank to the credit of his wife, Elizabeth White, but not as a special deposit. Both the husband and wife soon thereafter died. The executor of the estate of John White and the executor of the estate of Elizabeth White each made demand of the bank for the funds. The money was paid by the bank to the executor of John White. The executor of Elizabeth White brought an action and recovered judgment against the executor of John White. Being unable to satisfy this judgment he subsequently brought an action to recover the amount of the deposit from the bank. It was held that the relation of debtor and creditor existed between the bank and Elizabeth White at the time of her death; that, after the bank had paid out the money to the executor of John White, the executor of Elizabeth White had two remedies. He could have sued the bank as a debtor for the amount of the deposit, or he could have brought an action for money had and received against the executor of John White, and have recovered a judgment against either; but that he was not entitled to both remedies at the same time or in succession. In the opinion it was said: "If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it, without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds wherever he can trace them, so far as the law will permit him to do so, without relieving the trustee." In Hervey v. Rawson, 164 Mass. 501, 41 N. E. 682, it was said: "The plaintiff cannot, of course, have more than one satisfaction, but the general rule in cases of trust is that, when the trust property has been misappropriated or misapplied by investing it in an unauthorized manner, the beneficiary may pursue and recover the trust property so far as it can be traced, unless the purchaser or holder of it has obtained a good title against the beneficiary, and can also recover of the trustee any damages which the

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beneficiary has sustained by reason of the misappropriation or misapplication." As appears from the averments of plaintiff's petition of intervention and from the petition filed in this case, plaintiff has at all times disaffirmed the wrongful act of defendants in the conversion of its funds. In neither proceeding is there a recognition of title to the funds in the trust company, nor a ratification of the wrongful act of defendants. The amount, if any, that may be recovered from the receiver will go to reduce the damage of defendants. There is nothing inconsistent in the two positions. There is nothing in the nature or the justice of the case which should preclude plaintiff from pursuing this course, which is for the interest of the defendants. To hold that the proceeding in the federal court ratified the act of the trust company or condoned the offense of defendants, and would relieve them of liability, would be carrying the doctrine of implied ratification to an unreasonable and unjust extent. As to what are consistent and what inconsistent remedies is a matter to be determined by the facts in each case. No arbitrary rule can be enunciated the application of which will constitute a test for all cases. In the case at bar plaintiff, after filing its petition of intervention in the federal court, could have maintained an action against the trust company, the trustee in this case, to recover its damage for the misappropriation of the funds of plaintiff; the limitation being that there could be but one satisfaction of plaintiff's claim. The view we take of the case, if the conversion of the money was through the wrongful act of defendants, the same rule would apply to them. We find no inconsistency in plaintiff adopting the two remedies. Nor does it conflict with the former decisions of this court. There is in the two remedies no controversy as to the ownership of the trust property. There is no waiver of plaintiff's claim of ownership. There is no ratification of the act of defendants. There is no affirmance of an act or contract in the one proceeding and a disaffirmance of it in the other. The two proceedings are between different parties. There can be but one satisfaction of plaintiff's claim.

Error is assigned in the court giving to the jury the following instruction: "If you believe from the evidence in this case that in June, 1898, the plaintiff was the owner of the Weaver note and mortgage; that the Trust Company of America, then doing business in the city of Topeka, requested plaintiff to forward said note and mortgage to it for collection, and the same was forwarded, with instructions that, when collected, the money should be remitted to the plaintiff; that in pursuance to that request the plaintiff forwarded to the Trust Company of America the Weaver note and mortgage in June, 1898, for collection; that the Trust Company of America collected said note and mortgage, but failed and neglected to notify the plaintiff that the collection had been made, and withheld from plaintiff information of said collection; that plaintiff did not learn of the facts of said collection until about November 22, 1898; that the Trust Company of America appropriated the money so collected to the use of said company without the knowledge or consent of the plaintiff; that defendants had knowledge that the money so collected was a trust fund, and of its misappropriation; that the defendants, or either of them, participated in the misappropriation of the money, or knowingly permitted subordinates in the office to misappropriate the money to the Trust Company of America, and acquiesced in such misappropriation — then I instruct you that the defendants, or

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such of them as participated in the misappropriation, or knowingly acquiesced in the misappropriation of the money by subordinate employees, would be liable in this action." The above instruction fairly states the law applicable to this case, where it is shown, as alleged, that defendants were the active executive officers of the corporation, and had personal charge and supervision of the business affairs of the corporation, directing and managing its affairs, receiving and disbursing moneys that came into the possession of the corporation. The personal liability of defendants to plaintiff, as alleged, is not statutory, but rests wholly on the common law. Upon the subject of the personal liability of the officers of a corporation for their wrongful acts to persons having dealings with the corporation, see the following authorities: Anderson v. Daley, (Sup.) 56 N. Y. Supp. 511; Hempfling v. Burr, (Mich.) 26 N. W. 496; Winchester v. Howard, (Cal.) 69 Pac. 77, 89 Am. St. Rep. 153; Gores v. Day, 99 Wis. 276, 74 N. W. 787; Wolfe v. Simmons, 75 Miss. 539, 23 South. 586; Fusz v. Spaunhorst, 67 Mo. 256; 3 Thompson on Corp., §§ 4138, 4140.

Complaint is made of the court giving to the jury the following instruction: "If the defendants were respectively president, vice-president, and treasurer of the Trust Company of America, a corporation, and the principal place of business of said company was in the city of Topeka, and the defendants had personal charge and supervision of the office and the business affairs of said company, directing and managing its affairs, receiving and disbursing moneys that came into its possession, then the defendants would be held to have knowledge of all the business affairs of the corporation which came under their personal observation and knowledge of all the business affairs of the corporation which they might have known by the exercise of ordinary diligence in the conduct of the business affairs of the company." The corporation is primarily liable for the conversion or misappropriation of moneys by its employees. The employees of the corporation are its agents within the line of their respective duty. The instruction complained of, as to liability, would probably be applicable where an action is brought direct against a corporation for a conversion or misappropriation of money by its employees. The usual remedy in such cases is an action against the corporation for the recovery of the money misappropriated. A proceeding against the managing officers of a corporation, as in the case at bar, is a somewhat unusual and extraordinary remedy. But where there is sent to a corporation a note and mortgage for collection with instructions to collect and remit, and the money is collected, but not remitted, a recovery may be had by the owner of the note and mortgage against the executive officers and managing agents having the active management, charge, and control of the affairs of the corporation for the conversion of the money by them for the use of the corporation; and a recovery may be had against them for such conversion of the money by subordinates with the knowledge and acquiescence of such officers and managing agents. That part of the instruction complained of holding defendants personally liable for the conversion of funds by the subordinates, of which they had no actual knowledge, but by the exericse of ordinary diligence in the conduct of the business affairs of the corporation they might have known, does not meet with our approval. The rule announced by the able trial judge in his charge to the jury holding such officers liable for ordinary negligence finds support in the following

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cases: United Society of Shakers v. Underwood, 9 Bush, 609, 15 Am. Rep. 731; Marshall v. Farmers' & Mechanics' Saving Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Soloman v. Bates, (N. C.) 24 S. E. 478, 54 Am. St. Rep. 725; Delano v. Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81. The cases following hold that such officers of a corporation are not personally liable to persons dealing with the corporation for mere acts of negligence. Union Nat. Bank v. Hill, (Mo.) 49 S. W. 1012, 71 Am. St. Rep. 615; Frost Mfg. Co. v. Foster, (Iowa) 41 N. W. 212; Chick et al. v. Fuller, 114 Fed. 22, 51 C. C. A. 648; Deaderick v. Bank, 100 Tenn. 457, 45 S. W. 786; 3 Thompson on Corp., § 4137. These latter cases more nearly meet our approval. It is a well-known fact that much of the business of this day and age is transacted by corporations, many of them employing numerous persons in the various departments of the work in which the corporation is engaged. Large amounts of money and property are daily handled by the employees of such corporations. The instruction complained of casts upon the executive officers and managing agents of such corporations an unreasonable degree of liability. It would be a great hardship to hold them liable for acts of misappropriation of money or property by subordinates of which they had no actual knowledge. The rule of personal liability of such officers for the misappropriation by subordinates adopted by the trial court is too far-reaching in its scope. Aside from the giving of the instruction complained of the record discloses no material error.

For error in giving the instruction complained of, the judgment will be reversed, and a new trial ordered. All the justices concurring.

Decision No. 798.

In re GEORGE M. HILL CO.

130 Fed. 315.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,024.

BANKRUPTCY — PREFERENTIAL TRANSFER OF PROPERTY — DEPOSIT IN BANK — PAYMENT OF NOTES TO INDORSEE — PAYMENTS AND NEW CREDITS — NET RESULT OF TRANSACTIONS.

1. The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], although the bank may be at the time a creditor, and under section 68a the bank has the right to set off so much of its claims as equals the balance in such account.

2. The payment to a bank by an insolvent, within four months prior to bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank, under Bankr. Act July 1, 1898, ch. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which it must surrender under section 57g before proving a claim against the estate.

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3. A corporation previous to its bankruptcy had borrowed large sums from a bank, giving its notes therefor, and had also obtained a discount of customers' notes, which it indorsed. The bank had also discounted notes given by the corporation to third persons. Such transactions continued during the four months prior to bankruptcy, the corporation being in fact insolvent, but the bank having no knowledge or notice of such fact. The net result of the transactions during such time was to decrease the corporation's direct indebtedness on its own notes, both those given direct to the bank and those given to third persons, by the excess of payments over new notes given, but to increase its contingent indebtedness on indorsements of customers' notes. Held, that the latter should not be considered in determining the amount of preferences received by the bank which must be surrendered under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], as a condition to its proving a claim against the estate, since the discounting of the customers' notes which were the bankrupt's property did not increase its estate, but that the excess of payments over new credits on both the other items of direct indebtedness, taken together, constituted a preference, which must be surrendered.

Appeal from the District Court of the United States for the Northern District of Illinois.

See 123 Fed. 866, 59 C. C. A. 354.

Orville Peckham, for appellant.

Horace Kent Tenney, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The First National Bank of Chicago, the appellant here, filed in the bankruptcy court its amended claim against the estate of the bankrupt.

The indebtedness to the appellant is not in dispute. The contest below, as here, had reference to certain payments made by the bankrupt within four months prior to the filing of the petition in bankruptcy. On June 4, 1903, the referee made an order which upon petition for review he certified to the court below, wherein he found, first, that there was due to the bank from the bankrupt upon notes executed by it payable to the bank, and upon its indorsements of notes of third persons, held by the bankrupt, the sum of $55,644.45; second, that the bankrupt for four months prior to the filing of the petition in bankruptcy was wholly insolvent and not possessed of property sufficient to pay its debts; third, that within the period of four months the bank received from the bankrupt the sum of $3,700.93, which was paid and received with knowledge by the bank of the fact of insolvency, and that such payment was a preference which the trustee was entitled to recover from the bank; fourth, that within the stated period the bankrupt paid to the bank the further sum of $77,005.53, which was received without knowledge of the bankrupt's insolvency, which payment constituted a preference which the bank was bound to pay to the trustee as a condition of proving its claim against the estate. It was thereupon ordered that the claim of the bank be disallowed, unless the bank should within ten days pay to the trustee the amount of $80,706.46, and if such sum should be paid the claim of the bank should be allowed at the sum of $136,350.91. On the 22d of July, 1903, upon the hearing, the court below approved

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and confirmed the findings and judgment of the referee, which decree the bank brings here for review.

The bankrupt, a corporation engaged in the book business in the city of Chicago, and against whom a petition in bankruptcy was filed on March 6, 1902, had been for a long time a customer of the First National Bank, maintaining a deposit account with it, and was a constant and large borrower of money from it. The bank was ignorant of the insolvency of the bankrupt until March 4, 1902, two days before the filing of the petition in bankruptcy. In its dealings with the bankrupt the bank kept a "loan account" and a "deposit account." The loan account included direct loans, being discount to the bankrupt of its notes (herein designated as direct indebtedness), and notes of customers of the bankrupt received from, indorsed by, and discounted for it (herein called contingent indebtedness). During the same period the bank discounted for others of its customers notes of the George M. Hill Company to a large amount, indorsed by such other customers. Such discounts, however, did not appear in the loan account of the bankrupt kept by the bank, but in the loan account of the customers for whom the discounts were made. On November 6th, the commencement of the period of four months immediately preceding the filing of the petition in bankruptcy, the loan account stood as follows:

Direct indebtedness	$30,000 00
Contingent indebtedness	39,700 00
	$69,700 00

On March 6, 1902, the date of the filing of the petition in bankruptcy, the loan account exhibited as follows:

Direct indebtedness	$23,500 00
Contingent indebtedness	51,829 86
	$75,329 86

There was in fact $20,000 in addition paid during the stated period, but with the money of the bank loaned for that purpose. The loans were for like amounts, and were contemporaneous with the payments, and are treated by the referee as renewals and not considered as payments. The amount actually paid by the bankrupt upon its direct indebtedness during the stated period of four months was $17,500. The last payment, $2,500, was made January 7, 1902, and reduced the direct indebtedness at that date to $15,000, at which sum it remained until February 11th, when $5,000 was added, and on March 1st $3,500 more was loaned, making the total direct indebtedness, at the date of filing the petition in bankruptcy, $23,500.

On the second day before the filing of the petition in bankruptcy, and after knowledge of the insolvency of the George M. Hill Company, the bank appropriated the balance in the deposit account standing to the credit of the company, to wit, $3,700.93, and applied it upon the direct indebtedness in the loan account.

During the stated period of four months the bankrupt paid to the bank on its promissory notes discounted by the bank for third parties,

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and owned by the bank, the sum of $59,505.53. These payments do not appear upon the loan account of the bank with the George M. Hill Company, but in the loan account kept by the bank with the customers for whom the discount of the notes was made. The sums thus received by the bank within the stated period of four months were these:

On loan account	$17,500 00
In payment of bankrupt's notes discounted by the bank for third parties	59,505 53
Appropriated balance	3,700 93
	$80,706 46

These accounts the referee held to be preferences, the appropriated balance to be repaid to the trustee, because received with knowledge of insolvency, and the others to be repaid as a condition of the allowance of the bank's claim.

The contention here is with respect to the ruling upon each of these sums.

First. With respect to the appropriated balance of $3,700.93, it was ruled below that because the appropriation of that amount was with knowledge of the insolvency of the George M. Hill Company it was a transfer of property amounting to a preference, under section 60a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. It is sufficient to say that the precise question has recently been ruled to the contrary by the Supreme Court, in New York County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. ——. In this respect, therefore, the referee and the court were in error.

Second. It is insisted by the appellant that payment by the bankrupt of notes given by it to third parties and discounted by the bank were, under the law, preferential payments to those for whom the bank discounted the notes, and were not preferential payments to the bank. We are not able to concur in this contention. The fact that the bank did not enter these notes in its loan account with the bankrupt, but in the account with the parties for whom they were discounted, is of no moment. The real question is, what was the true nature of the transaction? Was payment under the law preferential to the bank receiving payment? The title of the bank to these notes was absolute. The debt thereby evidenced was a debt owing by the bankrupt to the bank. True, the original payees of the notes were liable to the bank upon their indorsements of the notes, contingent upon their dishonor by the maker and upon due notice of such dishonor. True that, in the absence of a bankruptcy law, payment of the notes by the maker would inure to the benefit of the indorsers, relieving them from such contingent liability. True, also, that the debt of the bankrupt expressed by the notes would become a debt to the indorsers if and when, in discharge of their liability as indorsers, they should repossess themselves of the notes. But it was the bank, not the indorsers, who received the preferential payment. The release of the indorsers from contingent liability, if such release was effected by such payment, was an incident not affecting the penalty imposed by the bankruptcy act for the receipt, however innocent. of a preferential payment. Within the definitions of the

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bankruptcy act the indorser has been held to be a creditor of the bankrupt, while his liability as an indorser is contingent, so as to charge him with preferential payment made to the holder of the note. Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399. But none the less is the owner of the note likewise subjected to the penalties of the act for receipt of such preferential payment. Swarts v. Fourth National Bank of St. Louis, 117 Fed. 1, 54 C. C. A. 387. In these cases both the bank and the indorsers were held chargeable for receipt of preferential payment by reason of the amount paid to the bank, which payment must be refunded before either party could prove an independent claim against the bankrupt with which the other party was in no wise connected. This would not result, as counsel supposed, that in such case the insolvent estate would recover twice what it lost. Only the amount by which the assets of the estate had been depleted must be returned.

It is further said that the bank, refusing to receive payment of the notes, would thereby discharge the indorser. The contention is not free from difficulty, and if that result would follow the enforcement of the act would be productive of injustice. But we think the matter has been ruled by the Supreme Court in Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866, a case arising under the former bankruptcy act (Act March 2, 1867, c. 176, 14 Stat. L. 534, 536). The question was presented in that case, and Mr. Justice Miller, delivering the opinion of the court, said:

"It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion of it in another. It was made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such a payment. Under these circumstances, whatever might have been the right of the indorser, in the absence of the bankrupt law, to set up a tender by the debtor and a refusal of the note holder to receive payment, as a defense to a suit against him as indorser, no court of law or equity could sustain such a defense, while that law furnishes the paramount rule of conduct for all parties to the transaction; and when in obeying the mandates of that law the indorser is placed in no worse position than he was before, while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover, either of the indorser or of the bankrupt's estate."

Within the rule in Pirie v. Chicago Title & Trust Company, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, and In re Fort Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, we have no doubt that the amount of these notes thus paid should be refunded as a condition that the bank prove its other claim. The payment of the several notes was the payment of a debt within the stated period, which inured to the detriment of the bankrupt's estate, disturbing the equality of the statute and forbidden by the statute.

Third. In Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, it was ruled that payments on a running account, in the usual course of business, by a person whose property has actually become insufficient to pay debts, where new sales succeeded pay-

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ments, and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency, and no reason to believe an intention to prefer, are not preferences which must be surrendered as a condition to the allowance of a proof of claim under the bankruptcy act. It is insisted by the appellant that under this rule it was improper to require the repayment of the sum of $17,500 paid during the stated period upon the direct indebtedness. It is to be observed that this account with the bankrupt kept by the bank does not include the notes of the bankrupt discounted by the bank for the respective payees of those notes, and which, as we have said in the preceding paragraph, was the debt of the bankrupt to the bank, and upon which was paid the sum of $59,505.53 during the stated period. We think that in stating the accounts between the parties, within the rule declared in Jaquith v. Alden, all the transactions between the parties must be included, and that we are not limited to an account as it is stated or was kept by the bank, because we are to inquire whether the net result of the transaction was to increase or decrease the estate of the bankrupt. If the account was stated including that amount, there remains no question that the net result of the dealings was to decrease the bankrupt's estate, and that the bank is therefore chargeable with the amount of that net decrease as a condition of proving its claim. Treating the account, however, as it is stated by the bank, there appears, during the stated period, to have been a decrease of direct indebtedness of $6,500, and an increase of contingent indebtedness of $12,129.18, showing an apparent net increase of indebtedness of $5,629.18. The inquiry presents itself whether the contingent indebtedness is properly included in that account. That contingent indebtedness was the contingent liability of the bankrupt upon notes of its customers discounted by the bank upon its indorsement of those notes and the proceeds paid to the bankrupt. This created no increase of the bankrupt's estate, for these notes were assets of the bankrupt, which by the transaction it had simply converted into money. Its liability upon these notes to the bank was contingent upon dishonor of the notes and due notice of such dishonor, and the bank's claim thereon might be proven as a contingent claim. The amount of liability could only be determined at the maturity of the notes. At the time of the bankruptcy the amount of these notes was $51,829.86, upon which there was paid by makers of them, at or before the hearing by the referee, the sum of $4,433.19. Whether and to what extent the bankrupt's estate should be charged could only be determined when the contingent liability had become an absolute liability. But, since the test is not whether the bank was damaged by it, or the indebtedness to it increased, but whether the bankrupt's estate was increased, and as the discount of these notes did not increase the bankrupt's estate, but operated merely to convert existing assets into cash, we do not think that this contingent liability should be permitted, in stating the account, to work an increase of benefit to the estate.

The referee and the court below allowed, as a preferential payment, the sum of $17,500 upon the direct indebtedness during the stated period, upon the postulate that there was a decrease of that direct indebtedness during the stated period of $6,500. These payments were made on or prior to January 7, 1902, reducing the direct

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indebtedness at that date to $15,000; but by discounts obtained February 11th of $5,000, and March 1st of $3,500, the direct indebtedness was increased from $15,000 on January 7th to $23,500 at the date of filing the petition in bankruptcy. The actual decrease of indebtedness between the 6th day of November, 1901, and the 6th day of March, 1902, was $6,500, and yet the court below has charged as a preferential payment the total payments made upon this direct indebtedness of $17,500, ignoring the subsequent discount by the bank during the stated period, and by which the estate was increased. The court below, nevertheless, ignored the payment of $20,000 because the payments were made by renewal notes, and the estate, with respect to increase or decrease of assets, was unaffected thereby. By the bankruptcy statute, section 57g (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences; and under the rule in Jaquith v. Alden we must ascertain the net result of gain or loss to the estate during the stated period, and, treating this account of direct indebtedness by itself, there was a direct loss to the estate of only $6,500, and the amount of preference could only be that sum. Restoration, not punishment, is the object of this law. It was therefore not correct to hold the entire payment of $17,500 to be a preference. It results, therefore, that, in ascertaining the amount which should be required to be paid to the trustee as a condition of proving the claim of the bank, the amount of payments upon the notes of the bankrupt discounted to third parties, to wit, $59,505.53, should be included, to which should be added the amount of preference on direct indebtedness of $6,500, making a total of $66,005.53.

The decree is reversed, and the cause is remanded, with directions to the court below to enter a decree in conformity with the views herein expressed.

Decision No. 799.

BAINES v. COOS BAY, R. & E. R. & NAV. CO. et al.

71 Pac. 400.

(Supreme Court of Oregon. July 5, 1904.)

RAILROADS — NOTES — POWER OF GENERAL MANAGER — KNOWLEDGE OF PAYEE — PRESUMPTION — JURY QUESTION — PLEADINGS — AMENDMENT — DISCRETION OF TRIAL COURT.

1. Where a director of a railroad company, who is also an officer thereof, procures from its general manager as such the execution and delivery of promissory notes of the company to the director himself as payee, which the general manager has no express authority to execute, the payee is presumed to know the measure of power delegated to the general manager, so that no apparent holding out of the general manager can be invoked in behalf of the payee.

2. In an action on notes of a railroad company executed by the general manager to secure the discharge of a lien on the company's property which was a pressing

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demand, whether the general manager had implied power to execute the notes, held, under the evidence, to be a question for the jury.

3. The privilege of amending pleadings is a matter within the sound discretion of the trial court.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by W. E. Baines against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and another. From a judgment for defendants, plaintiff appeals. Reversed.

For former opinion, see 68 Pac. 397.

J. W. Bennett and T. S. Minot, for appellant. J. Couch Flanders, for respondents.

MOORE, C. J. This is a second appeal by the plaintiff from a judgment rendered against him for costs and disbursements upon a verdict returned in pursuance of instructions. The question involved is whether the testimony taken at the trial was sufficient to be submitted to the jury as tending to show that the general manager of a railroad company possessed implied power to execute on its behalf promissory notes evidencing debts claimed to have been incurred by it in the legitimate exercise of its business; and the chief error relied upon is the action of the court in charging the jury to find for the defendant.

The bill of exceptions contains all the evidence from which it appears that the defendant is a corporation existing under the laws of this State, and organized to construct, maintain, and operate a railroad from Marshfield to Roseburg; that one R. A. Graham was its promoter and the subscriber for all its capital stock, though each director was the nominal holder of enough thereof to qualify him for office. At the first meeting of the board of directors, held August 19, 1890, the following, among other resolutions, was adopted: "That there shall also be elected a general manager, whose authority shall be to have the general management of the business of the company." And in pursuance thereof Graham was chosen to that position. The plaintiff, W. E. Baines, was a director, and also secretary and treasurer, of the corporation; but his duties as such were only nominal. Graham having entered into a contract with the corporation to build its road, plaintiff was employed to secure rights of way, and also performed other duties from the time of the organization of the company until March 5, 1894, when he was discharged by Graham. He thereupon filed in the office of the county clerk of Coos county his notice of lien on the railroad, structure, etc., to secure the sum of $12,750, and on April 18, 1894, the corporation being without funds, its general manager, in settlement of plaintiff's claim, executed to him on its behalf two promissory notes, each for the sum of $4,000, payable in twelve and eighteen months, respectively, with interest at the rate of seven per cent. per annum. The notes not having been fully paid, this action was instituted April 25, 1900, and at the former trial it was held that the testimony, though controverted, was sufficient to be submitted to the jury as tending to show that the corporation was indebted to plaintiff (Baines v. Coos Bay, etc., R. Co., 41 Ore. 135, 68 Pac. 397); and the conclusion then reached has not been changed

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by the evidence given at the subsequent trial, from which the jury might reasonably have inferred that a consideration existed for the execution of the notes.

Graham had no express authority to execute negotiable instruments on behalf of the corporation, and, the plaintiff having been a director and an officer thereof, and presumed to know the measure of power delegated, no apparent holding out of the general manager can be invoked in his behalf; and it remains to be seen whether the testimony indicates that Graham possessed implied authority to evidence the indebtedness of his principal by executing the notes in question. The rule is general that no managing agent of a corporation, except the cashier of a bank, possesses implied power to bind it by issuing, accepting, or indorsing on its behalf negotiable instruments. 10 Cyc. 929; 3 Clark & Marshall, Private Corp., § 700; 2 Cook, Corp. (5th Ed.) § 719; McCullough v. Moss, 5 Denio, 567; Culver v. Leovy, 19 La. Ann. 202; New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Helena Nat. Bank v. Rocky Mt. Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628; Sanford Cattle Co. v. Williams, (Colo. App.) 71 Pac. 889. This is so because such paper, in the hands of an innocent holder, is subject practically to no defense, and to protect corporations from the fraud of their agents, for through them alone can they act, the law requires that such an agent must possess express authority before he can bind his principal by putting in circulation negotiable instruments. Elwell v. Puget Sound, etc., Co., 7 Wash. 487, 35 Pac. 376. Where, however, the exigency of a creditor's demand against a corporation, incurred in the legitimate exercise of its business, necessitates a speedy settlement, it has been held that its general manager, for lack of funds, possesses implied power to evidence the debt by executing on its behalf a promissory note therefor.

Thus, in Bates v. Kieth Iron Co., 7 Metc. 224, the defendant's agent was authorized by one of its by-laws "to manage the affairs of the corporation committed to his care, according to the best of his ability, and at all times exercise the powers committed to him according to his discretion, and promptly to collect all assessments or other sums that shall become due to the corporation, and disburse them according to the order of the board of directors, saving that the board of directors shall be a board of control over him, and whenever they shall give him special instructions he shall be bound strictly to adhere to them." The defendant being indebted to an employee and not having the money with which to pay him, its managing agent gave him its promissory note, and in an action to recover the sum due thereon it was held that, if the board of directors did not interfere to control the agent's proceedings, he had authority to employ workmen and carry on the business of the corporation, and to pay them its funds therefor, and for want thereof to give its notes in payment. In Castle v. Belfast Foundry Co., 72 Me. 167, the directors of the defendant corporation, at a meeting of the board, voted "that the president have full power and control of all the business of the company;" and in pursuance thereof such agent borrowed money with which to purchase materials to be used in conducting the business of the corporation, and, having given its promissory notes therefor, it was held that he had sufficient authority to evidence the debt in that manner. In Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11

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Sup. Ct. 36, 34 L. Ed. 608, it was held that when an officer of a construction company had full control of the building of a railroad, and was charged with the general management of the business of the corporation, promissory notes given by him, in the absence of contrary instructions by the directors, for moneys used to pay off indebtedness of the company arising in the construction of a railroad, could not be considered as in excess of his powers. As illustrating the implied power possessed by a subordinate agent, in the absence of his superior, to bind his principal by contracts entered into on its behalf in cases of urgent necessity, see Holt v. Cumming, 48 Am. Rep. 199; Terre Haute, etc., R. Co. v. McMurry, 49 Am. Rep. 752; Pacific R. Co. v. Thomas, 19 Kan. 256; Union Pac. R. Co. v. Winterbotham, 52 Kan. 433, 34 Pac. 1052. So, too, where the general manager of a corporation owns practically all its capital stock, and "is virtually the corporation itself" (Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458), the validity of promissory notes executed by him on its behalf to evidence bona fide corporate debts has been upheld (Castle v. Belfast Foundry Co., 72 Me. 167; First Nat. Bank of Hailey v. G. V. B. Mining Co., [C. C.] 89 Fed. 439). Thus, in Africa v. Duluth, etc., Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424, it was held that the president and general manager of a corporation, who possessed and exercised with its assent general and unrestricted charge and control of the management of its affairs, and who was the sole stockholder thereof, had implied authority to borrow money to pay and discharge maturing debts and obligations of the corporation, and to make and deliver for that purpose its promissory notes.

It will be remembered that, the defendant herein being without funds, Graham, as its general manager, executed to plaintiff its promissory notes to secure a discharge of the lien, which was evidently a pressing demand. As a speedy settlement of the claim became necessary to maintain the credit of the defendant, that it might continue the building of the railroad, we think the court could not say, as a matter of law, in view of the necessity adverted to, that Graham was without implied power to make the notes in question. The general manager of a corporation should not, except in cases of extreme necessity, be permitted to issue negotiable instruments without express authority, even to evidence bona fide debts contracted by it in the legitimate exercise of its business; for, if he were invested with implied power in all cases, he might, by issuing promissory notes, impose upon the corporation excessive burdens and prevent an inquiry by the stockholders into the reasonableness of the creditor's claim thus approved by him. Where, however, the general manager of a corporation is practically the owner of all its capital stock, self-interest must necessarily prompt him to protect the rights of his principal in approving claims against it, in which case no valid reason can well be assigned why power to issue negotiable instruments to evidence debts incurred in the legitimate prosecution of the business of the corporation should not be implied. In the case at bar Graham was the subscriber for all the capital stock of the defendant corporation, and, though he had hypothecated a part of his stock, he was legally the owner thereof, and as such might have possessed implied power to make the notes sued upon, and, in our opinion, the testimony was sufficient to be submitted to the jury on that question.

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The plaintiff's counsel contend that the court erred in permitting the defendant, over their objection and exception, to file a third amended answer, alleging a want of authority on the part of the general manager to execute the notes. The privilege of amending pleadings is a matter within the sound discretion of the trial court, and, as no abuse thereof is manifest herein, its action will not be disturbed.

For the error committed in charging the jury to find for the defendant, the judgment is reversed, and a new trial ordered.

Decision No. 800.

TAYLOR v. SKILES et al.

81 S. W. 1258.

(Supreme Court of Tennessee. June 25, 1904.)

SURETYSHIP — COMPOSITION BETWEEN PRINCIPAL AND CREDITORS — EFFECT ON SURETIES — REVIVAL OF DEBT — INDEMNITY GIVEN TO SURETIES — EQUITY OF COSURETY — TRUST DEED — CONSTRUCTION.

1. An instrument conveying property to a trustee, to sell the same and apply the proceeds to the payment to designated persons of the amount that they were bound for on certain notes executed by the makers of the instrument, operated only to give protection to the parties named, and did not secure the debt evidenced by the notes.

2. An order of the bankrupt court confirming a composition made by the bankrupt with his creditors operates in itself as a discharge of the bankrupt.

3. While a subsequent promise will revive a debt discharged under insolvent or bankrupt laws, such promise made after a composition and settlement between the bankrupt and his creditors is without consideration, and affords no cause of action.

4. Where, after having made a composition and settlement with his creditors, a debtor gave indemnity to certain sureties on a debt to one of his creditors, such creditor could not avail himself of the indemnity.

5. Nor had a cosurety who was not included in the indemnity any equity therein.

Appeal from Chancery Court, Gibson County; Jno. S. Cooper, Chancellor.

Bill by R. Z. Taylor against J. M. & W. A. Skiles and others. From a decree for complainant, certain defendants appeal. Reversed.

Spl. Hill, A. W. Biggs, and W. C. Caldwell, for complainant. Walker & Clark, for defendants.

BEARD, C. J. This bill was filed for subrogation. The facts were as follows: The complainant, Taylor, and defendants Wade, Walker, and Bell, were the sureties of J. M. & W. A. Skiles upon a note for $1,500 executed to the Exchange Bank of Trenton, in this State. After the delivery of this note, and before payment, the principal

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debtors were, upon petition of their creditors, forced into bankruptcy, and their assets passed into the custody of the trustee duly elected under the bankrupt laws of the United States passed in 1898. Pending the proceedings so instituted, the bankrupts, in due form, submitted terms of composition to their creditors, which by them were accepted. To enable the Skileses to carry out the composition, defendants Wade, Walker, and Bell (J. C. McDearmon also joining) agreed with the bankrupts to raise for them the sum of $4,000, which they did, on their own note. These sureties, by withdrawing certain claims they had proven against the estate of the bankrupts, upon which they would have been entitled to distribution, and paying into the registry of the court the $4,000, enabled the Skileses to pay to the creditors the pro rata of their claims offered in their petition for the composition. This being done, the judge of the United States District Court for the Eastern Division of the Western District of Tennessee duly entered an order of confirmation of this composition, and thereupon the assets theretofore in the hands of the trustee in bankruptcy were turned over by him to the Skileses. Among the creditors receiving a pro rata from this composition fund was the Exchange Bank of Trenton. On its note it received the sum of $500.

In recognition of the assistance thus received by them, immediately upon recovering possession of their property the Skileses made a conveyance of the same to McDearmon, as trustee, which provides as follows:

"We, J. M. and W. A. Skiles of Trenton, Tennessee, . . . hereby turn over . . . to J. C. McDearmon, as trustee, the stock of goods, wares and merchandise . . . in the storehouse . . . near the southwest corner of the public square of Trenton, Tennessee, . . . also all the accounts and notes due the firm . . . on various persons. The said McDearmon, as trustee, is . . . to sell the said goods at retail and to replenish the said stock of goods as is necessary to sell the same to the best advantage, and he is to pay out of the said money received by him from such sales, first two notes of five hundred each made by J. M. Skiles and J. A. Bell security . . . and out of the next money received by him, he would pay to J. C. McDearmon, W. W. Wade, J. R. Walker and J. A. Bell the amounts that they were bound for on certain notes executed by J. M. and W. A. Skiles payable to the Exchange Bank of Trenton, Tennessee. . . . "

Wade, Walker, and Bell each paid one-fourth of the balance on the note held by the Exchange Bank, which was due after the receipt by the bank of its pro rata under the composition, and were reimbursed these payments by the trustee out of moneys derived by him from the assets conveyed to him in trust. The complainant subsequently paid the remaining one-fourth of this note, and filed this bill to enforce indemnity out of the trust estate acquired by McDearmon as trustee, and also a ratable contribution from his cosureties, Wade, Walker, and Bell, from the proceeds of the trust property so received by them. The chancellor dismissed the bill, so far as McDearmon was concerned, and entered a decree against each of the cosureties named for a fixed amount, the total of which would indemnify the complainant for three-fourths of the sum which he had paid in the discharge of the note.

There are two theories upon which complainant rests his right to relief. The first is that the instrument hereinbefore set out, by its

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terms, secures, among others, the $1,500 note, and that as surety on this note, he was entitled to have the trust estate applied to its extinguishment. If wrong in this, then the insistence is that complainant is entitled to a ratable contribution from Wade, Walker, and Bell, under the well-established equitable rule that the surety is entitled to share with the cosurety in any fund furnished to him by the principal debtor for the indemnity of the cosurety against loss on a debt upon which both are bound as sureties. It evidently was upon the assumption that this rule applied in the present case that the chancellor gave the complainant relief.

We do not think the first contention is sound. It is clear from the reading of the instrument that the intention of its makers was to furnish personal indemnity to Wade, Walker, and Bell, and not to secure the debt of which they were sureties. The provision is that the trustee shall pay these parties "the amounts they are respectively bound for on certain notes executed," etc., "payable to the Exchange Bank." The name of the bank at which the paper is payable is used simply for the purpose of identification, and not with the view of protecting that bank, if it were the holder. The effect of the terms used is to give protection to the parties named. The makers intended no more, and it would do violence to their intention, as not only clearly indicated in the paper itself, but as gathered from the surroundings, to hold that the bank was named as beneficiary in this trust.

The soundness of the other contention depends upon the legal status of the Skileses at the time of creating this trust, and their relation to the note in question, and the several parties who were bound for its payment.

As has been stated, they had effected in the bankrupt court, under the proceedings instituted against them by their creditors, a composition, which had been accepted by these creditors, and approved by the court having jurisdiction of the subject-matter and the parties. This order of confirmation of the composition served as a discharge of the bankrupts, and no further discharge was required. Brandenburg on Bankruptcy, § 319.

But as to the Exchange Bank, accepting, as it did, the benefit of the composition, it was more than a mere discharge of the bankrupts. It was an agreed extinguishment of the debt, so far as it was concerned. It is very generally held that, in the case of a discharge of a debt under insolvent or bankrupt laws, a subsequent promise to pay by the insolvent or bankrupt will revive the original debt and make it enforceable at law. But it is otherwise where the creditor comes to terms with his debtor under a valid composition, and agrees to, and does, accept a part of his debt for the whole. When this is done the debt is extinguished. The parties having met on common ground, and agreed on terms of settlement which have been carried out, there is no longer even a moral obligation resting upon the debtor as to the balance of the original liability. So that a new promise after composition is without consideration, and will not afford a cause of action. Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Stafford v. Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; Evans v. Bell, 15 Lea, 569.

So it is that when the Skileses made the transfer of their property to McDearmon, trustee, the debt due to the Exchange Bank, so far as they were concerned, was as if it had never existed. They were as

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much strangers to it as any one who had never connection with it. Being such strangers, and furnishing, at their pleasure, this indemnity for three of the parties bound on this debt, has the fourth party, Taylor, any right to complain that he has been omitted, and can he invoke, as against these protected parties, the equitable doctrine of subrogation?

We are satisfied that the Exchange Bank could not avail itself of this indemnity. On this subject, Mr. Brandt, in section 327 of his work on Suretyship & Guaranty, says: "While, as a general rule, a security given by a principal to his surety operates eo instante as a security to the creditor for the payment of the debt, yet it is held that where such security is given by a stranger to the surety, and not for the payment of the debt, a trust does not attach in favor of the creditor, and he cannot be subrogated to the surety's rights." Thus, where the security was given by the surety's wife (Taylor v. Farmers' Bank of Kentucky, 87 Ky. 398, 9 S. W. 240; Leggett v. McClellan, 39 Ohio St. 624), or by the principal's daughter (Macklin v. Northern Bank of Ky., 83 Ky. 314), it was held that these several grantors were strangers, within the meaning of the rule.

The principle which would exclude the Exchange Bank from the benefit of this security would equally exclude the complainant. The right of the creditor and of a cosurety to subject collaterals or other securities pledged or conveyed to one surety by the principal debtor is a natural and necessary equity, which flows from the relations of the parties, and, though not the result of contract, is nevertheless the execution of their intentions. "For when the debtor has given personal guaranties for the performance of his obligation, and has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish; and a court of equity, accordingly, will give to it this effect. All this, . . . as the rule . . . requires, presupposes that the fund specifically pledged . . . is the property of the debtor, and it is because it is so that equity impresses upon it the trust which requires it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is that a pledge made expressly to one is in trust for another, because the relations between parties is such that the obligation of the transaction best effectuates the express purpose for which it was made."

This paragraph is taken from the opinion of the court in Hampton v. Phipps, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719, and with great clearness states the reason and fixes the limit of the rule. The party who is primarily bound for the debt is under legal obligation to pay it, and to this end to devote his entire estate, if necessary, to save his sureties from harm, so that when he turns over a part of the whole of his estate to his creditor, or to one of his sureties, as security for his debt, in the first instance the sureties, and in the latter the creditor or cosurety, is equitably entitled to insist that it be so appropriated. The necessary presumption from such a transaction is that this result was contemplated by the debtor, and only by such appropriation can this intention be carried out and equity be subserved. This implica-

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tion, however, cannot arise where the pledge is made by one who at the time is under no obligation to pay the debt — a stranger to the transaction. When such a party, for reasons satisfactory to himself, but under no legal obligation so to do, pledges his property to indemnify a surety against loss, what possible equity has the creditor or the cosurety in this property? What is to prevent the party so indemnified from releasing his security, and, if he does, who can call him to account? As is said in the opinion from which we have already quoted: "A stranger might well choose to bestow upon a surety a benefit and the preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship to another. In such a case neither cosurety nor creditor could, upon any ground or privity in any interest, claim to share in the benefit of such a benevolence."

We think it clear, in view of this principle, that complainant is without equity, on the facts disclosed in this record, and that the chancellor committed an error in holding otherwise, and his decree is reversed and the bill is dismissed.

Decision No. 801.

FLEMING v. GEORGIA R. R. BANK.

48 S. E. 420.

(Supreme Court of Georgia. August 12, 1904.)

ABSOLUTE DEED — MORTGAGE — DEBT SECURED — SALE OF REALTY — RIGHT TO REDEEM.

1. Where one borrows money from a bank to pay for land, causes a conveyance of the land to be made to the bank, and gives his note to the bank, containing a recital that it is secured by the deed, such conveyance, though absolute on its face, is a deed to secure the payment of the loan.

2. No subsequent indebtedness of the borrower to the bank is secured by the deed unless there is a written agreement that such indebtedness shall thereby be secured.

3. The stipulation in the note given for the subsequent indebtedness had no reference to the security deed, and was not an agreement that such indebtedness should be secured by the deed.

4. The petition set forth a good cause of action, and the court erred in sustaining the demurrer thereto.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by Frank E. Fleming against the Georgia Railroad Bank. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Flemming, for plaintiff in error.
Jos. B. & Bryan Cumming, for defendant in error.

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EVANS, J. Frank E. Fleming filed his petition against the Georgia Railroad Bank, alleging, substantially: On August 26, 1901, Antoine P. Carr purchased from John W. Dickey, for the sum of $3,030, a certain lot of land in the city of Augusta, described by metes and bounds. The deed to this lot was, at the direction of Carr, made to the defendant bank, in order to secure a promised loan by it to Carr of $1,000. Dickey had no negotiations at all with the bank concerning such sale or conveyance. On August 31, 1901, the Georgia Railroad Bank fulfilled its promise and made the loan to Carr, accepting delivery of the deed as security therefor; but the deed was not recorded until February 18, 1903. On November 25, 1901, Carr paid off the balance of the loan he had procured from the defendant bank, and made and delivered to it another note for $2,200. On the same day the bank took from Carr a sealed instrument, duly executed, reciting the different steps of the transaction up to that date, and reciting that: "The agreement between the bank and myself is that the said deed described above shall be held as security until this note of ($2,200) two thousand two hundred dollars, and all renewals thereof and interest on the same, is fully paid." This instrument has never been recorded. On January 20, 1902, Carr conveyed to the Commercial Bank of Augusta, for the sum of $1,950, the lot of land above referred to; reciting in his conveyance that it was made subject to a deed to the Georgia Railroad Bank to secure a loan of $2,000. This deed was recorded May 22, 1902. The Commercial Bank of Augusta acquired its transfer of the property from Carr in good faith, and without notice of any lien or claim thereon, except the indebtedness of $2,000 just mentioned. On March 31, 1903, the Commercial Bank sold and conveyed to Frank E. Fleming, the plaintiff, all its right, title, and interest in and to said lot. On May 1, 1903, Fleming tendered to the Georgia Railroad Bank all the balance of principal, interest, and other rightful charges against said lot accruing under the note of November 25, 1901, for $2,200, and under the sealed instrument given to that bank on that day, at the same time demanding a conveyance to himself of the interest in the property held by the Georgia Railroad Bank; but this tender was rejected, and his demand refused. That bank demands, as a condition precedent to a conveyance of its interest in the land, the payment not only of the amount tendered but also payment of a balance due to the bank by Carr on another note, for $2,250, dated January 14, 1902. On January 20, 1902, the date of the conveyance from Carr to the Commercial Bank, neither that bank nor the plaintiff had any knowledge or notice of any kind of Carr's note to the Georgia Railroad Bank for $2,250, dated January 14, 1902. Taxes of the city of Augusta for the year 1902 were assessed on real property in the names of those who owned it, or were supposed to own it, on January 1, 1902; and the Georgia Railroad Bank did not have the land assessed in its name, but the same was assessed in the name of Antoine E. Carr.

The plaintiff stated in his petition that he made a continuing tender of the amounts due on the note and under the sealed instrument of November 25, 1901, and prayed that the defendant bank be required to accept such tender and make to him a conveyance of all its interest in the land. Attached as exhibits to the petition were copies of the sealed instrument given to the Georgia Railroad Bank by Carr on November 25, 1901; the last note which he gave to it, dated January 14, 1902; and

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the deed from Carr to the Commercial Bank. By way of an amendment to his petition the plaintiff further alleged that the "lot was unimproved, and was never in the possession of the Georgia Railroad Bank, except as said bank held possession under said deed, and was never in the actual possession of said Carr."

The defendant demurred to the petition on the ground that it was without equity and set forth no cause of action; that plaintiff acquired a mere equity in the land which was subject to any counterclaim which defendant might have against plaintiff's assignor, A. P. Carr; and that defendant had no notice of any transfer by A. P. Carr to plaintiff of his equity in the premises, and was justified in dealing with Carr as the owner of the equity. The demurrer was sustained, and the plaintiff excepts to the judgment sustaining the demurrer.

The right of the plaintiff, Fleming, to require the Georgia Railroad Bank to execute to him a conveyance of all its right, title, and interest in the lot of land upon payment of the amount due on the $2,200 note, depends upon whether Carr could have maintained the same action which Fleming is prosecuting. Carr's deed to the Commercial Bank conveyed only his equity of redemption, and Fleming, under his deed from the Commercial Bank, acquired only such title as that bank had. It is therefore pertinent to inquire into Carr's right to compel a conveyance from the Georgia Railroad Bank under the facts alleged in the petition.

When Carr bought the land from Dickey he procured the Georgia Railroad Bank to advance him $1,000, and agreed that the bank should take the title to the land to secure this loan. That the deed was taken as security for this loan appears conclusively from recitals in the instrument under seal given to the bank by Carr on November 25, 1901, and from the fact that the bank never went into possession of the land, nor returned the same for taxes. The writing just mentioned further recited that Carr had on that date borrowed from the bank $2,200, which amount was to become due thirty days after date, and that the agreement between him and the bank was that this deed should be held as security until a note for $2,200 given the bank by Carr, and all renewals thereof and interest on same, should be fully paid. Carr alone signed this instrument, but the bank, by accepting it, assented to its terms. Upon the conclusion of this transaction Carr's indebtedness was $2,200, and the bank's security was the land, the title to which was made to it by Dickey. If no subsequent transaction had occurred between Carr and the bank, clearly, on the payment of the $2,200 debt, he would have been entitled to a conveyance of the land from the bank. Carr did, it appears, pay $200 on this indebtedness. While his interest in the land was only the equity of redemption, upon payment of the debt secured by the deed Carr or his assignee could maintain a proceeding to compel a conveyance from the bank. Upon payment of the debt a resulting trust would have arisen; and the bank, holding the naked legal title, with no beneficial interest in the land, would be deemed the trustee of Carr.

But there was a subsequent transaction between Carr and the bank. He procured an additional loan of $2,250, and gave the bank his note for this amount. This last note recited that the borrower had deposited with the bank "Bill Lading Five Cars Corn" as collateral security for the payment of this and any other indebtedness. The note also con-

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tained this clause: "The undersigned hereby agree to deposit with the said bank such additional collateral security as the said bank may from time to time demand; and also hereby give to the said bank a lien for the amount of all liabilities aforesaid, upon all the property or securities at any time given into or left in the possession of the said bank by the undersigned, and also upon any balance of the deposit account of the undersigned with the said bank." This stipulation, the defendant contends, created an obligation on the part of Carr to pay all his indebtedness — both the original indebtedness connected with the purchase of the land from Dickey and the indebtedness evidenced by the note containing the stipulation — before he could have a conveyance of the land from the bank. The soundness of this contention rests upon the meaning of the clause of the note which we have quoted. The language clearly refers to personalty or choses in action capable of physical delivery. The note was filled out on a printed form, and what follows indicates that the clause relied on could not have been intended to refer to any class of securities except those capable of hypothecation by manual delivery. Provision is made in the note for the sale of the "securities" at any broker's board, at public or private sale, without notice — such a provision as is usually made for the sale of personalty or securities received in pledge. A pledge is a bailment of personal property to secure an indebtedness. A pledge cannot be created by delivery of title deeds. Civ. Code 1895, § 2956; Davis v. Davis, 88 Ga. 191, 14 S. E. 194. A third person paying the purchase money at the instance of the vendee, and taking the title to the land direct from the vendor, holds neither the land nor the title as pledgee. Such a transaction is the equivalent of the vendor's conveyance to the vendee, and a conveyance of the land by the vendee to the person paying the purchase money, as security for the debt. The legal status of the deed from Dickey to the Georgia Railroad Bank is that of a security deed, and the debt thereby secured is the money advanced by the bank to Carr at the time he executed the agreement of Novmber 25, 1901. Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863. No other debt is secured thereby, and nothing in the last note indicates that any additional indebtedness was to be included. The clause in the note that Carr thereby gives "to the said bank a lien for the amount of all the liabilities aforesaid upon all the property or securities at any time given into or left in possession of the bank" by him, cannot create a mortgage on the land, because of lack of description of the land. We are therefore of the opinion that no contract was created by the last note, whereby the additional loan evidenced thereby was to be included in the indebtedness secured by the deed from Dickey to the bank. And Carr or his assignee, upon payment or tender of the amount due on the note for $2,200, will be entitled to a conveyance from the bank of its right and title in and to the land. Accordingly we hold that the petition set out a good cause of action, and that the court erred in sustaining the demurrer and dismissing the petition.

Judgment reversed. All the justices concurring, except LAMAR, J., disqualified.

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Decision No. 802.

RADEY v. McCURDY et al.

(Supreme Court of Pennsylvania. May 23, 1904.)

LANDLORD AND TENANT — TRADE FIXTURES — REMOVAL BY TENANT — EXTENSION OF LEASE.

1. Trade fixtures attached to leased property by the tenant may be removed by him at the expiration of his lease, and no intention to abandon them to his lessor can be imputed to him, unless, after his term expires, he leaves the fixtures on the premises.

2. Where a tenant secured a new lease in the nature of an extension of the old lease, and the new lease contained no reservation of the right to remove trade fixtures attached to the land by the tenant, he may keep the fixtures on the premises without giving the landlord the right to restrain their removal at or before the expiration of the second lease.

Appeal from Court of Common Pleas, Philadelphia county.

Bill by John H. Radey against James McCurdy and another for an injunction. From a decree for plaintiff, defendants appeal. Reversed.

Argued before MITCHELL, C. J., and DEAN, BROWN, THOMPSON, and MESTREZAT, JJ.

M. Hampton Todd and Daniel C. Donoghue, for appellant.
William McLean, Jr., for appellees.

BROWN, J. This was a bill by a landlord to restrain his tenants from removing trade fixures from the demised premises. A preliminary injunction was awarded but subsequently dissolved. Before final hearing all the articles were removed by the tenants, and the court's decree was that they pay their landlord $5,400, the value of the articles removed, together with the costs of suit.

On September 17, 1892, the appellee leased the premises described in the bill to John C. McCurdy and James McCurdy, trading as McCurdy Bros., for the term of ten years from October 1, 1892. The court found that the articles enumerated in the bill were trade fixtures and belonged to the lessees under the lease of September 17, 1892. The legal conclusion of the learned judge that the tenants had the right to remove them during the term of their lease was, therefore, manifestly correct, and under the facts found the landlord could have raised no question if they had been removed at any time prior to October 1, 1902. Before the expiration of the lease the tenants, as required by it, gave three months' notice to the landlord of their intention to terminate it. In 1899 John C. McCurdy, as found by the court below, "sold his interest in the stock of goods, wares, and merchandise, together with the machinery and fixtures, contained in the building at the northwest corner of Front street and Susquehanna avenue, to James McCurdy." On July 11, 1902, a new lease was executed by the appellee to the said James McCurdy and Samuel McCurdy, another brother, trading under the same firm name of McCurdy Bros., and James and Samuel became the lessees under the agreement of that date, which defines the lease to be an "extended and

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renewed" lease of September 17, 1892, at a reduced rental. The appellants removed all the fixtures before October 1, 1903, the date of the expiration of the extended and renewed lease.

Under the foregoing facts the court below made the decree mentioned for the reason that even if the lease of July 11, 1902, is to be treated as a renewal of the lease of 1892 between the same parties, the appellants had no right to remove the fixtures after the expiration of the first lease, in the absence of a clause in the second one reserving the right to do so at its expiration. Though the lessees under the first lease had an unquestioned right to remove the fixtures at any time before October 1, 1902, and, if they had done so, could immediately after that date have reinstalled them in the premises with the same unquestioned right to remove them at any time before October 1, 1903, the view of the learned court below is that they became the property of the landlord, because they were not removed and reinstalled; and there is no clause in the "extended and renewed" lease reserving the right of the tenants to remove them before it expired. Though this has been declared to be the law by some courts, and the learned judge had authority outside of this State to sustain him, we cannot subscribe to such a doctrine as being either in harmony with reason or consistent with fair dealing between man and man. When a tenant attaches to the land fixtures necessary for him in the conduct of his business, the presumption is that at the expiration of his lease he will remove them; and it is his right to do so. They are not put in for the benefit of the landlord; and until the tenant, after his term expires, leaves them on the premises in which he no longer has any interest, no intention can be imputed to him to abandon them to his lessor. Hill v. Sewald, 59 Pa. 271, 91 Am. Dec. 209; Watts v. Lehman, 107 Pa. 106. There is a distinct finding that McCurdy Bros., the lessees under the lease of 1892, never intended to abandon their trade fixtures. One of the brothers, owning and having them in his possession, on July 11, 1902, entered with another brother into the "extended and renewed" lease. The possession of the premises and the fixtures remained unbroken from 1892 to 1903 in at least one of the present appellants; and yet, because he did not, on the last day of September, 1902, remove them, and put them back on the following day, when the "extended and renewed" lease began, and the lessees under it failed to formally reserve the right to remove them at the expiration of the "extended and renewed" term, an intention is to be imputed of an abandonment of them to the landlord. Abandonment to him being a question of intention it cannot be that under the undisputed facts in this case the appellants ever intended to or did abandon their trade fixtures. To have removed them one day and put them back the next would have been a vain and useless thing, which the law requires of no one; and it offends reason to say that the landlord had a right to regard his tenants' property as abandoned to him because one of them who was to continue as such for another year, needing the same fixtures in his unchanged business into which he had taken another person, had not, when the lease was extended and renewed, inserted a clause giving the tenants the right to remove the fixtures at the end of the extended term.

It will profit nothing to review the very many cases brought to our attention by the learned counsel for the appellee to support the decree of the court below. It is sufficient to say that none of our own do so.

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They are rather to accord with the view which we entertain that the plaintiff's bill should have been dismissed. "That a tenant who erects fixtures for the benefit of his trade or business may remove them from the demised premises is an established doctrine of the law, but with this qualification: That the removal be made during the term. After the term they become inseparable from the freehold, and can neither be removed by the tenant nor recovered by him as personal chattels by an action of trover, or for goods sold and delivered. White v. Arndt, 1 Whart. 91, and the cases cited in the argument. If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." Davis v. Moss, 38 Pa. 346. "It is a well-settled rule of law that a tenant for years who erects fixtures for the benefit of his trade or business may, at any time during the term, remove them from the demised premises; but cannot after the expiration thereof, unless he remain in possession and hold over, so as to create an implied renewal of the lease." Darrah v. Baird, 101 Pa. 265. In the late case of Donnelly v. Frick, 207 Pa. 597, 57 Atl. 60, we said: "The presumption of the law, being in favor of trade, is that a tenant does not intend to make his trade fixtures part of the realty for the permanent benefit of his landlord, but will remove them before the end of his term; and it is only when he leaves without removing them during the term that an intention of making a gift of them to the landlord is to be imputed to him. Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209; Watts v. Lehman, 107 Pa. 106. If, during the term, no intention can be imputed to the tenant to make a gift to his landlord of fixtures, which he had attached to the land for the use of his business, and he has a right to remove them during the tenancy, the same rule ought to and does apply when by permission of the landlord, even without a formal renewal or extension of the lease, he continues to remain on the premises for a definite or indefinite term. During such period in the absence of any agreement to the contrary his intention as to his fixtures remains unchanged, and his right to remove them is unaffected by his holding over." Of great weight is the following from the learned Judge Cooley in Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the protection of the landlord,. and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term. Indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. Penton v. Robart, 2 East, 88; Weeton v. Wood-

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cock, 7 M. & W. 14. But why the right should be lost when the tenant instead of surrendering possession takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should, in effect, say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord.'"

The decree of the court below is reversed and plaintiff's bill dismissed, at his costs, which include those on this appeal.

Decision No. 803.

HANNA et al. v. LYON et al.

71 S. W. 778.

(Court of Appeals of New York. August 5, 1904.)

BANKS — ACTION AGAINST DIRECTORS — WHO MAY BRING — INTERVENTION.

1. Though directors are liable to a bank which has suffered loss through their negligence, and any stockholder may prosecute an action for himself and others in a similar situation, where the bank does not bring the action after demand, or without demand when the officers who committed the wrong are still directors, such plaintiff must be a stockholder both at the time of the commission of the acts complained of and at the time of the commencement of the action.

2. Where a person sues directors of a bank for injuries caused by their negligence, he must be a stockholder of the bank at the time of the bringing of the action; and where he is not qualified, but a qualifying stockholder has been permitted by the court to intervene, the complaint should not be dismissed as to such intervening stockholder.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by David J. Hanna, suing for himself and all of the stockholders of the People's National Bank of Salem and others, against Susan A. Lyon and others, executors of Charles Lyon. From a judgment of the Appellate Division (78 N. Y. Supp. 516) reversing a judgment in favor of plaintiffs, plaintiffs appeal. Modified.

John B. Holmes, for appellants.

J. Sanford Potter, S. W. Russell, and Abner Robertson, for respondents.

PARKER, C. J. The findings of the trial court establish conclusively that the defendants' testators, Charles P. Lyon and Joshua J. Rogers, were, as officers and directors of the People's National Bank of Salem,

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N. Y., guilty of negligence resulting in a loss of many thousands of dollars to the bank — a loss so great that an assessment equal to the capital stock was charged upon the stockholders. Upon these findings the trial court gave judgment for the plaintiffs, which was reversed in the Appellate Division, and the complaint dismissed. The form of the order of reversal was such as to make it the duty of this court, under section 1338 of the Code of Civil Procedure, to assume that it was not reversed upon the facts.

The question presented for our determination is whether either of the plaintiffs is entitled to maintain an action against the defendants upon the facts found. The law is settled in this State that directors of monetary corporations are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs. Cassidy v. Uhlmann, 170 N. Y. 517, 63 N. E. 554; Bloom v. National Savings & Loan Co., 81 Hun, 120, 30 N. Y. Supp. 700, affirmed in 152 N. Y. 114, 46 N. E. 166; Hun v. Cary, 82 N. Y. 72, 37 Am. Rep. 546. Applying this rule to the facts found in this case there can be no doubt that Lyon and Rogers were liable to the bank.

The bank could have successfully prosecuted an action against the defendants, but it did not do so; and in such a case it is well settled that a stockholder may bring such an action in behalf of himself and all others in like situation, either after demand made that the bank should bring the action, and its refusal, or without demand where the persons who committed the wrongful acts continue to be directors of the corporation. Brinckerhoff v. Bostwick, 88 N. Y. 52; Same v. Same, 99 N. Y. 185, 1 N. E. 663; Same v. Same, 105 N. Y. 567, 12 N. E. 58; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894. In such a case the purpose of the action is for the restoration, for the benefit of all concerned, of the corporate funds wasted or lost through the fault of the directors of the corporation.

The plaintiff Hanna by his complaint brought himself within the rule established by these authorities by alleging, in effect, that all of the present directors of the bank, with one exception, were directors of the bank at the time of the acts and misconduct which led to the suspension of the bank, and that all of the old directors were guilty of negligence and misconduct in connection with their supervision and management of the bank, and the bank was made a party defendant. But while the plaintiff Hanna was a stockholder at the time of the commission of the acts of which he complained, he had ceased to be a stockholder at the time of the commencement of the action, and hence was without authority to maintain it. His rights as a stockholder had passed to the subsequent purchaser of the stock, and the Appellate Division was therefore right in reversing the judgment as to him, and dismissing the complaint.

The plaintiff Piser is a stockholder, and, as such, has the right, under the authorities we have cited, to maintain an action for the purpose of securing to the bank this asset of the bank, which accrued to it by reason of the misconduct of the defendants. It is true that she was not a party to the action at the time of its commencement, but the action was brought in behalf of the plaintiff and all other stockholders in like situation who should in due time come in and seek relief by, and contribute to the expenses of, the action. The plaintiff Piser moved the court at Special Term that she be made a party plaintiff to the action. This motion was opposed by the defendants but the court granted the

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order making her a party plaintiff; so amending the complaint as to make it contain the necessary allegations to entitle her to prove her claim upon the trial, and so amending the answer that it met and amended allegations in the complaint.

In the notice of appeal from the judgment entered in favor of the plaintiffs the defendants gave notice of their intention to bring up for review the order making Clarissa Piser a party plaintiff. The Appellate Division, however, did not reverse that order, and hence the order making her a party plaintiff stands, and it was accordingly error for the Appellate Division to dismiss the complaint as to her. In other respects the judgment was right and must stand.

As we think that the interests of justice will be best subserved by a new trial as to the plaintiff Piser the judgment appealed from must be affirmed, except in so far as it dismissed the complaint as to the plaintiff Piser, and as to her the judgment must be reversed and a new trial granted, with costs to the appellants Piser to abide the final award of costs.

BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment accordingly.

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DECISIONS.

Decision No. 804.

BANK OF INDIAN TERRITORY v. FIRST NAT. BANK OF BUCHANAN CO.

83 S. W. 537.

(Kansas City Court of Appeals. Missouri. Nov. 28, 1904.)

DRAFTS — PAYMENT BY DRAWEE — EFFECT OF MISTAKE — NEGLIGENCE OF HOLDER — INDORSEMENT — EFFECT.

1. **A payment of a draft by the drawee concludes him, and he cannot avoid the transaction by showing that he was mistaken in supposing that he had ney in his hands to pay it.**

2. **The fact that a bank to which a draft was made payable had a suspicion that the drawer was not honest is not evidence of negligence on its part which precludes a recovery from the bank of collection, which received payment from the drawee under a mistaken belief that he had funds in his hands.**

3. **An indorsement on a draft by a bank to whom it is made payable as follows, "Pay to any bank or banker or order," is an indorsement for collection, and not a transfer of the title of the draft.**

Appeal from Circuit Court, Buchanan County; H. M. Ramey, Judge.

Action by the Bank of Indian Territory against the First National Bank of Buchanan County, of St. Joseph, Mo. From a judgment for defendant, plaintiff appeals. Reversed.

Brown & Dolman, for appellant. Culver, Phillip & Spencer for respondent.

BROADDUS, J. The facts of the case are as follows: On the 24th day of February, 1903, one H. H. Hagan, of Guthrie, Okl., drew a sight draft on Kemper, Bowman & Hillix, payable to the order of plaintiff, for the sum of $700. On the same day, plaintiff received the draft at Guthrie, where it did business, and credited Hagan with the full amount of $700, and indorsed and forwarded it through its correspondents to defendant bank, in St. Joseph, Mo., for presentation and payment. On March 3d, defendant presented the draft to the drawees, who gave their check for its payment.

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Defendant at the same time accepted the check, stamped the draft "Paid," and surrendered it to the drawees, and gave the Union National Bank of Kansas City, from whom they received the draft credit for its amount. On the next morning — March 4th — the drawees informed defendant bank that a newspaper had reported that morning that the drawer, Hagan, had killed himself; and they asked defendant if it could do anything to help them to hold the money, and stated that they had not received the cattle on which the draft had been drawn. Whereupon defendant's agent told the drawees that it would assist them in the matter, and did telephone to Kansas City in reference to its payment. The defendant then presented the check it had received in payment of the draft to the Stockyards Bank, upon which it was drawn, and payment was refused; the drawees in the meantime having stopped its payment. Afterwards, on the same day, defendant surrendered the drawees' check, took back the draft, protested it for nonpayment, and returned it to plaintiff. The drawees were live stock commission merchants at St. Joseph. Hagan had on prior occasions shipped them cattle, and drawn drafts upon them, which they had paid. Upon the occasion in controversy he wrote them a letter, stating that he had shipped two cars of steers, and had made a draft on them for $700. On the day the draft was paid, they wrote Hagan as follows: "Your draft came in to-day, but no cattle in sight. We paid your draft as we thought the cattle had been delayed some way. If the cattle are not in to-morrow we will make sight draft on you for amount, but think certainly will get in to-morrow," etc. On March 4th Hagan died, without having shipped any cattle to drawees. The plaintiff paid out on checks drawn by Hagan against the credit for said draft $674.42. There was evidence to the effect that the president of plaintiff bank had some suspicion of Hagan's honesty, and called the attention of its other officers to that effect, but it appeared that he was absent on the day the draft was made, and Hagan got credit. The judgment and finding were for the defendant, from which plaintiff appealed.

The conceded rule of law is that if a bank receives a draft for collection, and takes in payment a check from the party who is bound to pay such draft, and surrenders the same to him, such collection bank is liable to its principal for the amount of the check, as an agent authorized to receive money has no implied power to receive a check in payment. Bank v. Bank, 151 Mo. 329, 52 S. W. 265, 74 Am. St. Rep. 527. And it is admitted that, if the drawees had accepted the draft, they would have been liable, for the effect of an acceptance is to constitute the acceptor the principal debtor; and, if the drawees were liable, plaintiff was entitled to recover. 1 Daniel on Neg. Inst. §§ 480, 532, 534.

But respondent insists that there is a difference between the payment and acceptance of a bill, and that payment never operates as an acceptance; that the effect of the former is to extinguish the bill, and the latter is an admission that the drawee has in his hands funds of the drawer. To support the theory that a payment never operates as an acceptance, we are cited to the case of First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229. It was there held that "a payment to a stranger upon an unauthorized indorsement does not

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operate as an acceptance of a check, so as to authorize an action by the real owner to recover its amount as upon an accepted check." It is hardly perceivable how the holding could have been otherwise, as the indorsement was without the owner's authority, and consequently, as such, created no privity of contract between the drawer and drawee. The court did not hold that a payment was not equivalent to an acceptance, but that under the circumstances it was not, because the payment itself was unauthorized. Under the statute, "no person within this State shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing signed by himself or his lawful agent." An acceptance as provided by the statute binds the acceptor to pay the bill, and he cannot be heard to deny that he has funds in his hands for the purpose. A payment of a bill is more than an acceptance, for the one is an obligation to pay; the other, a discharge of the indebtedness represented by such bill. An acceptance is an admission that the drawee has the funds in his hands to pay. A payment is also such an admission, and, in addition, a discharge of the debt. If the one concludes the drawee, it is inconceivable why the other would not. And it is no defense that the drawees were mistaken in supposing that they would have funds in their hands to pay the bill. A mistake of this kind would not relieve them. Bank v. Bank, 107 Mo. 402, was a case where the draft was drawn on the plaintiff bank, who paid it, supposing the signature of the drawer to be genuine, while in fact it was a forgery. Plaintiff was denied the right to recover on the ground that the law conclusively presumed that the drawee knew the signature of the drawer, and so it was held in Bank v. Allen, 59 Mo. 310; Stout v. Benoist, 39 Mo. 277, 90 Am. Dec. 466; Hoffman v. Bank, 12 Wall 181, 20 L. Ed. 366; Goetz v. Bank, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. The principle of these cases applies to this, as there can be no reason advanced to the contrary.

But the respondent insists that the law and right will not compel defendant or said commission company to pay the debt, as the loss was the result of the negligence of plaintiff. But does the evidence show such negligence? Does the mere fact that plaintiff's agents had a suspicion that Hagan, the drawer of the bill, was not an honest man, prove negligence? We think not. The law is that, where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. "Merely putting a party about to purchase negotiable paper upon inquiry is not per se sufficient, nor is gross negligence." Edwards v. Thomas, 66 Mo. 468. And "the rule that 'a purchaser is not an innocent holder, if there are circumstances connected with the transfer sufficient to put an ordinarily prudent man on inquiry,' is uncertain and devoid of uniformity, and no longer the prevailing law of this State." Hamilton v. Marks, 63 Mo. 167. And "mere circumstances sufficient to put a prudent man on inquiry is not sufficient." Inv. Co. v. Fillingham, 85 Mo. App. 534. "Ordinarily one will be charged with notice of a fact who possesses information which puts him upon inquiry, and which, if followed up with diligence, will lead to the ascertainment of truth." But such rules do not apply to negotiable commercial paper. Jennings v. Todd, 118 Mo., 296, 24 S. W. 148, 40 Am. St. Rep. 373.

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Respondent's final contention is that there was no evidence that plaintiff was the owner and holder of the draft. The evidence shows that plaintiff was the original owner and holder, and it made the following indorsement on the draft: "Pay to any Bank or Banker or order; all previous indorsements guaranteed." The next indorsement was by the Fourth National Bank of Wichita, Kan., and was as follows: "Union National Bank of Kansas City, Mo., or order, previous indorsements guaranteed." The latter indorsed it as follows: "Pay order of any bank or banker; all previous indorsements guaranteed" — and sent it to defendant, who, in its answer, alleges that it protested the same and returned it to plaintiff. The plaintiff claims that the said indorsements place the title to the bill in the Union National Bank of Kansas City, and therefore plaintiff was not the owner of the bill. An indorsement of a bill for collection is not a transfer of the title of the instrument to the indorsee, but merely constitutes him the general agent of the indorser to present the paper and receive payment and remit the proceeds. Eaton & Gilbert on Com'l Paper, p. 329. As a rule, the title of a negotiable instrument passes by an ordinary indorsement, whether special or general. Id. 318. And if the indorsee holds the instrument merely as an agent, the agency may be annulled at the pleasure of the indorser. Id. 330. The indorsement of the plaintiff," to pay to any bank or banker or order," was not such an indorsement as to pass the title to the bill. It merely authorized any bank or banker into whose hands it might come to collect and remit the proceeds. In other words, it was only authority to collect — therefore a restrictive and not an unconditional indorsement passing the title. We think this is clear. The title remained in plaintiff, and no subsequent indorsement could affect such title.

The defendant insists that justice is clearly with it. That may be true. But the Supreme Court of this State, in speaking of hardships of particular cases arising under the law governing commercial paper, said that: "We need not inquire now whether the rule we lay down be the best or not. * * * It may, like all general rules, work occasional hardships, but considerations of convenience and public policy imperatively demand that it be not changed to do what the judge may deem equitable in a given case. The best interests of the commercial world require stability and fixedness in commercial law." We have endeavored to ascertain and apply the general rule of commercial law applicable to this case, with some misgivings, it is true, of the hardship imposed upon defendant, which in ordinary cases would have strongly appealed to the conscience of the court, and which, but for the rule, perhaps, might have influenced a different result.

The case was tried before a jury. Among others, plaintiff asked the court to instruct the jury to find for the plaintiff, which the court refused. This was error, as, under all the evidence, there being no conflict in the testimony whatever, the finding should have been for plaintiff. The cause is reversed, with directions to enter judgment for plaintiff for the amount of the draft, with interest from date of demand of payment from defendant. All concur.

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Decision No. 805.

COMSTOCK et al. v. McDONALD et al.

101 N. W. 55.

(Supreme Court of Michigan. May 17, 1904.)

PARTNERSHIP — SALES OF PROPERTY — DECEASED PARTNER'S INTEREST — ACCOUNTABILITY OF ADMINISTRATOR.

1. Where the administrator and widow of a deceased partner refused to consent to a sale of partnership real estate at a certain price, but latter entered into a secret agreement with the intending purchaser whereby he was to pay a fixed price to the partners for the property, and was also to pay the administrator and widow an additional sum in consideration of their assent, the sale being subsequently made, the sum paid to the administrator and widow would be treated as part of the price, and not as given for a sale of the interest of the deceased partner's estate alone, and would have to be accounted for by the administrator to the surviving partners.

Appeal from Circuit Court, Wayne County, in Chancery; William L. Carpenter, Judge.

Bill for an accounting and other relief by Andrew W. Comstock and another against George R. McDonald, administrator of the estate of Joseph B. Comstock, deceased, and others. From the decree rendered complainants appeal. Modified.

See 85 N. W. 579.

Frank Emerick, for appellants. McDonell & Hall and Elliott G. Stevenson, for appellees.

HOOKER, J. The complainants and a brother were copartners in a lumber business, the latter having a ninth interest. The copartnership was dissolved by the death of the brother, and the bill in this cause was filed by the surviving partners for an accounting and some other relief unnecessary to further mention. During the pendency of the cause one Ryan sought to purchase certain timber limits in Canada, belonging to the firm, and had negotiations whereby it was ascertained and agreed that the complainants would consent to an option upon said property for $500,000, if the widow and administrator of the deceased brother would do so. An interview was had with them, and they refused to consent, expressing the opinion that the property was worth much more, and the complainants informed Ryan that the deal could not be made. A day or two later Ryan and the administrator made a written contract whereby it was agreed that the representative of the deceased brother would consent to a sale of said property for $500,000, in consideration of the payment to the administrator by said Ryan of the sum of $44,444.45 upon the consummation of said sale. The contract is as follows:

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"Articles of agreement, made and entered into this 18th day of September, 1899, by and between M. Louise Comstock, of Alpena, Michigan, widow of Joseph B. Comstock, deceased, and guardian of his infant children, and George R. McDonald, administrator of said estate, parties of the first part, and Peter Ryan, of the city of Toronto, Ontario, party of the second part, witnesseth:

"Whereas, the party of the second part represents to the parties of the first part that he is the owner and holder of an option from Andrew W. Comstock and William B. Comstock, of said city of Alpena, survivors of the firm of Comstock Brothers, of said city, to purchase the property known as the 'Canadian Limits,' situated in and comprising the townships of Trill, Foster, Nairn, and Ermantinger, in the Dominion of Canada, for the sum of five hundred thousand dollars, according to and under the conditions named in said option; and whereas, the said estate of Joseph B. Comstock is interested in, and the owner of an undivided one-ninth interest in, said property and limits, and is desirous of and willing to sell the same for what the parties of the first part deem a suitable price for such interest, which suitable price the said parties deem to be one hundred thousand dollars ($100,000) for such one-ninth interest:

"Now, therefore, the parties of the first part hereby agree that in consideration of the sum of forty-four thousand four hundred and forty-four and forty-five one hundredths dollars ($44,444.45), to be paid to them by the party of the second part, in addition to the sum of five hundred thousand dollars ($500,000) to be paid the said Andrew W. Comstock and William B. Comstock under such option, the same to be paid at the time and in the manner hereinafter set forth, they will and do hereby assent to such sale, and will use reasonable and speedy endeavor to secure, from the Circuit Court in Chancery for the county of Alpena, an order permitting the said Andrew W. Comstock and William B. Comstock and said estate to sell the said property and limits. The party of the second part hereby agrees that, in consideration of the premises, he will pay to and into the Bank of Montreal, of the city of Toronto, Ontario, to the credit of said M. Louise Comstock, guardian and widow, the said sum of forty-four thousand four hundred and forty-four and forty-five hundredths dollars ($44,444.45) concurrent with the transfer of said property, limits, and the licenses therefor, and will pay to said Andrew W. Comstock and William B. Comstock the further sum of five hundred thousand dollars ($500,000) in addition thereto, according to the terms and in the manner provided in such option; the said money so paid into such bank to be and become the property of said M. Louise Comstock, as widow and guardian, at once, upon the transfer of the title of such property and limits to the said party of the second part.

"In witiness whereof, the parties have hereunto set their seals and signed this agreement the day and year aforesaid.

"MRS, M. LOUISE COMSTOCK,
"Widow and Guardian.
"GEORGE R. McDONALD,
"Administrator.
"McDONNELL & HALL,
"His Attorneys.
"PETER RYAN."

The option was thereupon given, and read as follows:

"Articles of agreement, made this first day of September, 1899, by and between Comstock Brothers, of Alpena, Michigan, of the first part, and Peter Ryan, of the city of Toronto, province of Ontario, party of the second part, as follows:

"Said first parties agree to sell the timber berths numbers 94, 98, 99, and 102, known as the townships of Nairn, Foster, Trill, and Ermantinger, North Shore of Lake Huron district, province of Ontario, for the sum of five hundred thousand

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dollars ($500,000) in lawful money of the Dominion of Canada, with New York exchange, payable as follows: The sum of ten thousand dollars ($10,000) cash in hand, the receipt of which is hereby confessed and acknowledged, and the balance four hundred and ninety thousand dollars ($490,000), in New York exchange aforesaid, on or before the first day of November, 1899, at the office of the Crown Land Department, in the Parliament Buildings, in the city of Toronto. Said parties of the first part further agree that they will transfer said licenses for the above timber berths at the time and place and concurrent with the payment of said four hundred and ninety thousand dollars ($490,000). Said party of the second part agrees to purchase said property and pay therefore the sum of five hundred thousand dollars ($500,000) at the time and in the manner above stated. It is, however, further agreed that said second party may, at any time before said first day of November, 1899, surrender to said parties of the first part this contract, by delivering the same, canceled, at the office aforesaid, and in the event of said contract being surrendered said party of the first part shall keep and retain the said sum of ten thousand dollars ($10,000) as their own money, in consideration of their releasing said party of the second part from his obligations under this contract. If said party of the second part shall fail to pay said sum of four hundred and ninety thousand dollars ($490,000) at the time, place, and manner herein agreed, then said failure shall be regarded by both parties hereto as an irrevocable election on the part of the party of the second part to surrender and abandon this contract, and this contract shall, upon said failure, become ipso facto void, and said ten thousand dollars ($10,000) shall be retained by the first parties for and as the consideration above stated.

"In witness whereof, the parties hereto have signed this contract, on the year and day first above written, in duplicate.

"COMSTOCK BROS.
"PETER RYAN.

"Witnesses: Devere Hall.
"Geo. Wm. Moore."

The following order was entered in this cause, then pending, by consent, viz:

"At a session of said court held at the courthouse, in the city of Alpena, in said county, on the 2d day of October, A. D. 1899. Present: Hon. R. J. Kelley, Circuit Judge. On reading and filing of a petition in this cause by the complainants, defendants consenting thereto, praying for leave to sell and transfer so much of the copartnership assets in said cause as are known and described as the timber berths or limits, 94, 98, 99, and 102, comprising the townships of Trill, Ermatinger, Foster, and Nairn, on the Spanish river and tributaries, in the Province of Ontario, for the sum of $500,000, after consideration thereof, it appearing to the court that the complainants, under the name of Comstock Bros., by and with the consent of said defendants and their counsel, have entered into a contract and agreement with the said Peter Ryan to sell and dispose of such berths and limits for said sum, and that the title to the same stands in the name of Comstock Bros., and that said Comstock Bros. consists of the complainants herein and of Joseph B. Comstock, deceased, who is represented by the defendants herein, it is hereby ordered and decreed that the parties hereto be, and they are hereby, authorized to make a sale thereof for an amount not less than said sum, and that said complainants and defendants join in the execution of the papers and documents trans-

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ferring and selling said berths and limits. It is further ordered and decreed that the interest of the said complainants in and to said limits are eight-ninths part thereof, and that they are entitled and authorized to receive such proportionate sum of the amount for which the same shall be sold to the said Peter Ryan, and that the interest of the defendant M. Louise Comstock, in her individual right and as guardian of said minors, in and to said limits, is one-ninth part thereof, and that she, in her individual right and as such guardian, is entitled and authorized to receive such proportionate sum of the amount for which the same shall be sold, under this order, to the said Peter Ryan, and that upon the payment to the complainants by the said Peter Ryan of eight-ninths of the amount for which the said limits shall be sold to him, and the payment to the said M. Louise Comstock, in her individual right and as such guardian, of one-ninth of the amount for which said berths and limits shall be sold to the said Peter Ryan, and not less than the sum of ($55,555.55) fifty-five thousand five hundred fifty-five dollars and fifty-five cents, that the complainants and defendants herein are hereby authorized to convey and transfer the said berths and limits. It is further ordered and decreed that of the said sum of ($55,555.55) fifty-five thousand five hundred and fifty-five dollars and fifty-five cents the said M. Louise Comstock is hereby required and ordered to deposit in her name, individually and as such guardian, the sum of ($20,000) twenty thousand dollars in the Bay City Bank, of Bay City, Michigan, and the further sum of)$20,-000) twenty thousand dollars in the Wayne County Savings Bank. of Detroit, Michigan, and the further sum of ($15,555.55) fifteen thousand five hundred fifty-five dollars and fifty-five cents in the First National Bank, of said city of Detroit, there to remain until the further order of this court: provided, that so much of this order as relates to the payment of said sum to the said M. Louise Comstock shall, as against the said Peter Ryan, be satisfied by the payment to her of the sum of ($55,555.55) fifty-five thousand five hundred fifty-five dollars and fifty-five cents, to the said M. Louise Comstock at the office of the Crown Lands Department, in the Parliament Building, in the city of Toronto, Ontario. It is further ordered and decreed that the aforesaid described copartnership asset, involved in this cause, be, and the same is hereby, eliminated from the other assets in controversy in said cause, and by this order and decree the same shall be treated as if a partition thereof were made of the same before sale thereof. This consent order and decree is in no wise to affect the further accounting and determination of the rights of the parties as to the remainder of the property and assets involved in this suit."

The purchase was made by Ryan, and the defendant administrator was paid the one-ninth share of the purchase price, and also the sum of $44,444.45, provided for in his contract with Ryan.

It seems to be admitted that the arrangement between Ryan and defendant, whereby his one-ninth interest was made to produce $44,444.45 more than an equal share of the purchase price, was kept secret, and did not come to the knowledge of the complainants until some time after the transaction was closed and the sale confirmed. Upon the hearing of this cause the matter was brought

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to the attention of the Circuit Court, which, acting under direction of this court (see 126 Mich. 155, 85 N. W. 579), considered the question of the accounting; and a claim was made by complainants that this sum of $44,444.45 should be treated as an asset belonging to the copartnership. The court held otherwise, and the complainants have appealed.

Counsel for the defendant say that a dissolution of a copartnership by death makes the surviving partners trustees for the representatives of the deceased, but that there is not a similar reciprocal relation, and that the representative, having none of the authority of a copartner, has none of the obligations of such. If it be admitted that the representative has no active share in the settling of the partnership business, we think that it does not follow that he owes no duty toward his intestate's copartners, but is at liberty to seek the furtherance of his own interests to the injury of theirs. If it is true that he may sell his interest in each individual piece of property owned by the firm (which we do not affirm), and captiously insist on a bonus over and above his share of the proceeds of each piece of property that the surviving partners may seek to sell, enforcing the claim by a denial of their authority to sell, and threats to prevent it by litigation, it is not difficult to see that serious embarrassment, if not loss, to the others would result. In the present case the defendant appears to have been correct in the opinion that the complainants were offering this property at too small a price, and no fault can be found on account of their objection to the sale. The sequel has proved that the property was worth much more. Their opinion was confirmed by Ryan's willingness to pay a large additional sum. Had this been communicated to the complainants, it is not improbable that it would have resulted in their selling the property for a sum more nearly approximating its value; but, instead of this, defendant acted upon the assumption that he might sell his assent to the contract to sell for $500,000, and thus keep all of the additional price offered, to the exclusion of the other interested parties, who were allowed to complete the sale in the honest belief that the price was $500,000, whereas in fact it was $544,444.45.

The theory that this was a sale of the defendant's interest is fallacious. It is plain that it could not have been sold to Ryan, who wanted the entire property or none; and the agreement shows that the consent was to the sale of all, and payment of the $44,444.45 was conditional upon it. It is not difficult to see that the defendant might not have been able to realize as much out of the property in any other way; for it is shown that Ryan would not have given $900,000 for the property, and a sale for anything less than that sum would have made the defendant's legitimate share less than $100,000. There was, therefore, a premium upon secrecy, both for Ryan and the defendant. Ryan bought the property for a low price, while defendant got the benefit of a high price; and this was accomplished by leading the complainants to believe the property was going for $44,444.45 less than the real price. If we are to say that the defendant in this case had the right to make such a contract as this, it is not easy to see why any copartner, not actively engaged in settling the partnership affairs, or his represen-

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tatives or assigns, may not do the same; and that would mean that it is legitimate for copartners and their representatives to speculate out of copartnership assets at the expense of their copartners, and the consequences can readily be imagined. We must treat this property as sold for the full amount received for it, and the bonus received by defendant as an asset of the firm, to be accounted for by the defendant. In other respects the decree is affirmed. The complainants will recover costs of this court. The balance due complainants is a matter of computation, and will be fixed in the decree.

MONTGOMERY and GRANT, JJ., concurred. CARPENTER J., did not sit.

MOORE, C. J. (dissenting). I cannot reach the conclusion to which Justice Hooker has arrived. The case was heard in the court below by Judge Carpenter, now Justice Carpenter, who made so clear a statement of the questions involved that I quote from the written opinion he prepared in the case:

"This is a continuation of a suit for an accounting reported 126 Mich. 142, 85 N. W. 579. It is conceded that defendants are entitled to a decree against complainants, on the state of the accounts up to and including September 30, 1901, for $2,714.49, unless complainants are entitled to participate in the distribution of a fund of $44,444.45, received by defendants under the following circumstances: Complainants and defendants as representatives and heirs of Joseph B. Comstock, deceased, owned certain timber berths in the province of Ontario. These berths stood in the name of Comstock Bros. (the name in which said camplainants and said Joseph B. Comstock, prior to his death in 1894, had carried on business as copartners). As the debts of said copartnership were only nominal, these berths were owned by the parties in proportion to their copartnership interests; that is, each of said complainants owned four-ninths, and defendants, as representatives and heirs of Joseph B. Comstock, owned one-ninth. On August 24, 1894, one Peter Ryan, a prominent timber dealer, residing at Toronto, Ontario, addressed a letter to Comstock Bros., Alpena, Mich., requesting their lowest price for said timber berths, stating: 'I can sell them, if you will give me two months to overlook them. Fires are now ranging in your territory, and though I am not sure that there is any on your berths, yet you must realize that settlers, hunters, Indians, and, worst of all, mining prospectors, are very apt to do quite a lot of mischief.' Receiving no answer, on September 1st Mr. Ryan wrote again, addressing his letter, as before, to Combstock Bros., stating: 'May I ask you to let me have an answer to my letter of the 24th. I am informed that townships of Foster and Nairn (two of the timber berths in question) have been on fire and much burned.' September 5, 1899, complainant Andrew W. Comstock answered the letters of Peter Ryan, stating: 'We are not anxious to sell our berths. The fires are not injuring them. We have a man on the ground watching them. That is our last report. We will sell the four berths for $500,000 net. If you wish to examine them, we will not sell to other parties while you are looking, or before November 1st. We will give no option to any one.' On receipt of this letter Mr. Ryan dispatched men to examine the berths and wrote the following letter:

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"'8th September, 1899.

"'Messrs. Comstock Brothers, Alpena, Mich. — Dear Sirs: Yours of the 5th inst. at hand. I beg to say that I am sending men to examine the berths, and beg to express my appreciation of your offer, and hope to be able to close with you before the time mentioned in your letter.

"'Yours truly, PETER RYAN.'

"Before this letter reached Alpena, complainant Andrew W. Comstock had left Alpena for Detroit, and the other complainant was in Toledo, Ohio, so that this letter was not received by the complainants until after the interview next below mentioned had occurred between them and Peter Ryan. On the 11th of September said Ryan met said complainant Andrew W. Comstock in Detroit, for the purpose of securing a formal option in accordance with the correspondence above referred to. Said Andrew W. Comstock would not give said option until his brother, William B. Comstock, who was then in Toledo, Ohio, should give his assent to the arrangement. To secure this assent said Ryan and Andrew W. Comstock visited Toledo on September 12th and had an interview with said William B. Comstock, who approved the proposed arrangement. Either on the 11th of September or the 13th, just which time it seems to me to be unimportant, said Andrew W. Comstock informed said Ryan that he could not sign the proposed option until the defendants should yield their assent. This was the first information that said Ryan had that the defendants had any interest in the timber berths in question. On said September 13th a formal option was prepared by the solicitor for complainants, whereby said Ryan was to have the right to purchase said timber berths, on or before November 1, 1899, for the sum of $500,000. He was to advance $10,000, which was to become forfeited in case the berths were not paid for as agreed. It was arranged that said Ryan should leave his check of $10,000 either with Mr. Comstock or his solicitor, which was to be used by Mr. Comstock in the event of his signing said option, and not otherwise, and that his signing said option depended upon the assent of defendants to the proposed arrangement. On said 13th day of September, 1899, both Mr. Ryan and the complainant A. W. Comstock communicated by telephone with Mr. Hall, of the firm of McDonell & Hall, or Bay City, representatives of the defendants. This was the first intimation that any one representing the defendants had of the proposed sale. Mr. Hall declines to assent to the sale, on the ground that he believed the property to be of much greater value than $500,000. When he was assured that reports had come that the timber was damaged or threatened by fire, he stated his desire to examine said reports. Accordingly it was arranged that on the following Saturday, September 16th, he should meet said complainant Andrew W. Comstock at his office in Alpena and examine said reports. In accordance with this arrangement, both Mr. Hall and his partner, Mr. McDonell, and their client, Mrs. M. Louise Comstock, had an interview with said Andrew W. Comstock at his office in Alpena. Together they examined the letters indicating that the timber had been damaged or was then threatened by fire. Defendants were not satisfied that it was for their interest to have the sale proceed. They stated to complainant Andrew W. Comstock that according to his testimony given the previous December said timber was worth $1,350,000, and ac-

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cording to the appraisal of his brother and his own report as administrator of the estate of Joseph B. Comstock, deceased, the interest of said estate in said timber was worth $127,000. Mr. Hall, speaking for his clients, tried to induce complainant Andrew W. Comstock, at the expense of all parties interested out of the funds of the partnership remaining in his hands, to have an investigation made to ascertain the then worth of said timber. Mr. Comstock declined to do this, and Mr. Hall then said: 'Mr. Comstock, that means that Mrs. Comstock has got to adopt her own course to protect her interest in this property.' To which complainant Andrew W. Comstock replied: 'That is right.' It was finally concluded that complainants would advance to Mrs. M. Louise Comstock, widow of Joseph, the sum of $500, to be charged to her account, for the purpose of making an investigation (though this advance, owing to the circumstances hereafter stated, was not made), and a telegram was sent to Mr. Ryan, Toronto, stating that until this investigation was made the estate represented by defendants would decline to yield its assent to the proposed arrangement. On Sunday, September 17th, said Peter Ryan, who, in the meantime had received the telegram last above referred to, called on Mr. Hall at his office in Bay City, and represented to him that he had a valid and binding contract with Comstock Bros. Mr. Hall threatened to obtain an injunction preventing the carrying out of this contract. Mr. Ryan indicated his great anxiety to have the contract promptly and faithfully executed, and asked Mr. Hall to name a figure which would induce his client to yield their assent to the proposed arrangement. In response to this suggestion, Mr. Hall, assuming the value to be $900,000, and one-ninth interest in said timber to be worth $100,000, agreed, if Mr. Ryan would give $44,444.45, in addition to what they would receive as their one-ninth of the $500,000, to advise his clients to consent to the option being executed in accordance with the arrangement already made. To this proposition Mr. Ryan finally gave his assent, and on the following morning, in the city of Detroit, a writing embodying this agreement was executed. Very shortly thereafter Mr. Ryan and Mr. Hall met complainant Andrew W. Comstock, and Mr. Hall informed him that the defendants yielded their assent to the proposed arrangement, and subsequently on the same day the option prepared on the 13th of September was executed by Andrew W. Comstock in the name of Comstock Bros., and delivered to Mr. Ryan, and the $10,000 check was cashed. Subsequently said Ryan sold said berths for $937,000, and on or about November 1, 1899, carried out his contract, both with complainants and defendants. Nearly all of the berths were sold by said Ryan before November 1, 1899.

"The question, and it is a question of law, is whether or not complainants are entitled to eight-ninths of the $44,444.45. If the complainants had been informed, before they executed the option, on the 18th of September, that the defendants were receiving this amount in addition to the one-ninth, and after such information had proceeded to execute the contract, no one could possibly contend that they had a right to participate in the fund in controversy. Their claim hinges, then, upon the neglect of defendants to disclose the receipt af this sum, in addition to the interest in the $500,000. Was there any obligation on the part of the defendants to make that dis-

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closure to complainants? It is earnestly insisted by the learned counsel for complainants that the relation existing between complainants and defendants was one of trust and confidence. Cases are cited holding that such a relation exists, not only between copartners, but between the representatives of deceased partners and the former partners of their intestate. I have no doubt that such a trust relation often does exist. If the representative of a deceased partner undertakes to deal with the assets of the partnership, rejecting such an undertaking, he occupies a relation of trust toward every one having an interest in said assets. The authorities cited in the brief of complainants' counsel relate, as I understand them, to such situations, and not to a case like that under consideration. Here defendants did not undertake to deal with any asset of the copartnership, nor with any interest in which complainants were concerned They simply undertook, in their dealing with Ryan, to dispose of their interest — that is, the interest of the estate of Joseph B. Comstock, deceased — in the asset in question, and in truth they did not receive for that interest any more than it was realized by Ryan. Defendants, so far as complainants were concerned, had a right to sell their interest in that asset for any price which they could get. Was there any obligation, on the part of defendants, to say to complainant, Andrew W. Comstock, 'We are receiving from Ryan, $44,444.45 in addition to one-ninth of this, $500,000?' Was Andrew W. Comstock in any position to say,' 'I have been misled by your silence?' It seems to me obviously not. Complainants had fixed the value of this property at $500,000 for the purpose of making the deal with Ryan. In fixing this value they had not consulted defendants. They had consulted their own opinion, and their own interests. They had promised Ryan that he should have the land at that figure if the defendants would asent. I am not sure that their letter of September 5th would not have legally obligated them to carry out that agreement. But, whether or not there was a legal obligation, there was the strongest kind of a moral obligation on their part to perform their agreement and to sign the option. It would not have been good faith on their part for them to have said to Ryan, 'Because you have paid defendants $44,444.45 more than their one-ninth of $500,000, you must also pay us eight times this amount, or we will not do as we have agreed.' Complainants, therefore, cannot truthfully say that they have been misled by the silence of defendants, because they have done only what they were bound to do by every principle of morals. This is not a case wherein it can be urged that it was the duty of the defendants to make complainants acquainted with facts of which they were ignorant. This is not a case where silence was fraudulent. There was no trust relations which made it the duty of the defendants to speak. Complainants suffered no injury, because they did nothing but pursue a course which, in honor, they were bound to pursue. It results, therefore, that complainants, in my judgment, are not entitled to participate in the distribution of the fund in question, and that a decree should be entered in favor of defendant against complainants for $2,714.49."

I can add but little to what was said by Judge Carpenter. The case, briefly stated, is that Comstock Bros., were the owners of cer-

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tain timber limits in Canada. After the death of one of the brothers, whose interest is now represented by the defendants, the complainants, who are the surviving partners of the firm, and who in the main had managed its affairs and were very capable business men, thought it best to sell the timber limits, and offered them to Mr. Ryan for $500,000. It is clear the complainants thought that was all the limits were worth, and were willing to sell for that price, and to take eight-ninths thereof as compensation for the eight-ninths interest which they had in the lands. The widow of the deceased partner thought the lands were more valuable, and was not willing to have the lands sold unless she and her children, who succeeded to the rights of her deceased husband, obtained more than one-ninth of $500,000 for their interest. The record is barren of any testimony indicating that complainants were influenced in any way by any act of the defendants in fixing a price upon the lands at the time they gave the option to Mr. Ryan. By the arrangement entered into by the defendants with Mr. Ryan, the amount which was to be received by complainants was not diminished in the least. The complainants put one price upon the limits. The defendants and Mr. Ryan thought they were worth more. An arrangement was made which was satisfactory to the defendants and Mr. Ryan, by which the latter was able to carry out to the letter his agreement with the complainants. I cannot understand how the arrangement entered into by defendants with Mr. Ryan was wrong either in law or morals. Especially I cannot consent to the proposition that defendants, who declined to part with their interest in the limits for less than $100,000, and who received that amount for them, shall be compelled by a decree of this court to have upwards of $39,000 taken from the amount paid them and given to the complainants, when complainants have already received every dollar of value they placed upon their interest in the limits, and all they were to receive under their contract. To do so compels the widow and children to take for their interest what they were not willing to take, and gives to complainants nearly $40,000 more than they themselves asked for their interest. I think the decree entered by the trial court was right and should be affirmed.

Decision No. 806.

KEYSER et al v. WARFIELD.

59 Atl. 189.

(Court of Appeals of Maryland. Nov. 30, 1904.)

CONTRIBUTION — INSTRUCTIONS — APPEAL — QUESTIONS FOR REVIEW — WAIVER — NOTES — JOINT MAKERS — EVIDENCE — SUFFICIENCY.

1. Prayers to take a case from the jury at the close of plaintiff's evidence are not reviewable on appeal where defendant proceeded with his testimony after an adverse ruling.

2. The notes of a corporation, signed by its president and treasurer, were taken

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to a bank for discount. The bank refused to discount them unless the officers indorsed the notes individually, which they did. The notes were subsequently paid by the president individually, and he sued the treasurer for contribution. The name of the payee was not inserted in the notes until the trial, when the name of the bank was inserted by plaintiff. No notice of protest or non-payment had been given. Held, that an instruction for plaintiff on the theory that when a third person writes his name on the back of such notes before delivery the law declares him a joint maker in the absence of agreement to the contrary between plaintiff and defendant was not cause for reversal, a prayer for defendant having been granted which was the converse thereof, except submitting to the jury the question of the understanding of the plaintiff, defendant, and the bank.

3. In a suit for contribution, where the evidence showed that the names of the plaintiff and defendant were placed on the back of the notes before delivery to the bank of discount without any one being named as payee, it was not error to refuse to withdraw the case from the jury because of absence of evidence to show that the plaintiff and defendant were joint makers, though the testimony designated the plaintiff and defendant "indorsers" "guarantors," etc.; it being manifest that the witnesses were not speaking technically.

4. In a suit for contribution, where the evidence showed that the names of the plaintiff and defendant were placed on the back of the notes before delivery to a bank of discount without any one being named as payee, and that no one's name as payee was inserted before payment of the notes by plaintiff, it was error to permit the plaintiff, after a controversy had been raised as to what relation the parties bore to the note, to insert the name of the bank of discount as payee of the notes in the presence of the jury.

Appeal from Superior Court of Baltimore City; Pere L. Wickes, Judge.

Suit by S. Davies Warfield against Henry B. Keyser, continued in name of Irvine Keyser and another, as administrators of Henry B. Keyser, on his decease. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, and SCHMUCKER, JJ.

James M. Ambler and Randolph Barton, for appellants. W. Irvine Cross, for appellee.

BOYD, J. The appellee sued the appellant's intestate to recover one-half of the amounts paid by the appellee on two promissory notes discounted by the Merchants' National Bank of Baltimore. Each of the notes was originally in this form:

"$2500.00. July 31st, 1896.

"On demand afer date Maryland Mnfg and Construction Co. promise to pay to the order of ———— twenty-five hundred dollars at Merchants' National Bank. Value received.

S. Davies Warfield, President,
"Henry B. Keyser, Treasurer.

Indorsed: "S. Davies Warfield,
"Henry B. Keyser."

Mr. Warfield was president and Mr. Keyser treasurer of the Maryland Manufacturing & Construction Company. The two notes were taken to

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Mr. Thomas, the president of the Merchants' Bank, without any security on them. He declined to discount them unless they were indorsed by Messrs. Warfield and Keyser and they signed their names on the backs of them. They were subsequently paid by Mr. Warfield, who sued Mr. Keyser for the one-half so paid by him, and he obtained judgment for $2,836.34. Afterwards Mr. Keyser departed this life, and the appellants were appointed administrators of his estate. There are three bills of exception in the record. The first exception was to the ruling of the court in permitting the plaintiff, after offering his oral testimony, to insert the name of the Merchants' National Bank of Baltimore as payee of the said notes; the second was to the refusal to grant two prayers offered by the defendant at the conclusion of the plaintiff's testimony to take the case from the jury; and the third was to the granting of the plaintiff's prayer and the rejection of the defendant's first, second, third, and fourth prayers, offered at the end of the case.

As the defendant proceeded with his testimony after the action of the court at the conclusion of the plaintiff's case, the prayers embodied in the second bill of exceptions are not open for review by us. Barabasz v. Kabat, 91 Md. 53, 46 Atl. 337. As the principal question is the effect of the evidence as to whether Messrs. Warfield and Keyser were joint makers or indorsers (it being conceded that no notice of protest or non-payment of the notes was given), and the prayers involve that, it will be more convenient to first consider the rulings presented by the third bill of exceptions.

There have been a number of cases decided by this court involving what are usually spoken of as "irregular indorsements." The liability of such indorser is not determined by the fixed rules of the law merchant, but it depends upon the relation he bears to the instrument, and the intention of the parties thereto. 4 Am. & Eng. Encyc. of Law (2d Ed.) 488; 7 Cyc. 669. Courts have differed as to the presumption of such indorsements. Some have held the signers to be liable as indorsers; others as makers, sureties, or guarantors; although the result of each case is largely dependent upon its own particular facts. An early case in this State was that of Sullivan v. Violett, 6 Gill, 181, in which one who had written his name on the back of a note payable to the plaintiffs or order was held to be liable as maker, but no opinion was filed. In Ives v. Bosley, 35 Md. 262, 6 Am. Rep. 411, the note sued on was payable to the order of Bosley, signed by Elisha J. Guyton, and indorsed in blank by Charles T. Guyton and William M. Ives, the appellant. The plaintiff proved that the signatures were all upon the note when it was delivered to him by E. J. Guyton for the payment of the money which he then loaned to him. The defendant, Ives, offered to prove that at the time he placed his name upon the back of the note he signed it as indorser. Upon objection the court ruled the testimony inadmissible, and that ruling was affirmed. This court said, "The obligation of Ives, as established by the proof of the plaintiff, is clearly that of an original promisor," and, after stating the facts which are, in substance, above mentioned, added: "These facts established by conclusion of law the responsibility of Ives as a joint maker or original promisor. . . . It is true, as was urged in the argument, that the contract entered into by a blank indorsement will generally receive such a construction as will give effect to the intention of the parties, and that parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction. . . . If, however, the contract set up

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is different from that which attaches by presumption of law, it must be established by proof, showing that both parties, promisor and promisee, so intended and agreed." After quoting from Rey v. Simpson, 22 How. 341, 16 L. Ed. 260, the court added: "Applying these principles to the present case, it is clear that the defendant cannot avoid the liability of a joint promisor, which the law has attached to his blank indorsement, unless he proves a different understanding of all the parties." That case was followed in Walz v. Alback, 37 Md. 404; Owings v. Baker, 54 Md. 82, 39 Am. Rep. 353; Schroeder v. Turner 68 Md. 506, 13 Atl. 331; Gisriel v. Burrows, 72 Md. 366, 20 Atl. 240; Thompson v. Young, 90 Md. 75, 44 Atl. 1037; and other cases. In those cases the names of the payees were in the notes, all of the signatures were on them before they were delivered to the payees, and the parties were held liable as joint makers, excepting in Owings v. Baker and Gisriel v. Burrows, where the testimony showed that it was the understanding and agreement of all the parties to the notes that those writing their names on the backs should only be held to the liability of indorsers. In Sittig v. Birkestack, 38 Md. 158, the form of the note sued on differed from those in the above-mentioned cases in that the name of the payee was left blank. It was signed by H. Austermuhle, and on the back were the names of Catharine Austermuhle, Henry Sittig, and Henry Birkestack. The latter was the holder, and had loaned H. Austermuhle the money represented by the note. The case had been previously tried, and the judgment then obtained by the plaintiff was reversed by this court, and a new trial awarded, as is shown by the report of the case in 35 Md. 273, At the first trial the attorney for Birkestack, the holder, inserted his name as payee. In speaking of that in 38 Md. the court said: "The question whether the appellant signed his name on the note as maker was submitted to the jury by the instructions granted and conceded; and, if that was the nature of the contract between the parties, the appellee, as holder of the note, acting in good faith, had authority to insert his name as payee." In Dunham v. Clogg, 30 Md. 284, the note was payable to blank order, and given by the maker to one G. D. Vaughn. The blank was filled by making it payable to the order of Stetson Vaughn, who, before maturity, indorsed it, and the plaintiff in that case became the owner. In the course of the opinion it was said: "In the absence of fraud, the appellee having signed the note, leaving a blank for the name of the payee, the holder could fill the blank with his own name, and indorse it in blank, as it was payable to order, which would give it currency, by simple delivery, and the possession of it in such case would be prima facie evidence of title, enabling the holder to sue in his own name. The same effect is given to the note, under such circumstances, as if it had been made payable to bearer." In Boyd v. McCann, 10 Md. 118, it was said that the holder of a note payable to blank order could fill it up with his own name as payee; and other cases might be cited to show how such a note is regarded in this State. So far as the prayers are concerned (which we are now considering), we do not think the fact that the name of the payee in these notes was left blank distinguishes this case from those of Ives v. Bosley and others above cited. While the bank was the holder of the notes it undoubtedly had the right to insert its own name as payee, if there was no understanding to the contrary, and we do not see why the principles announced in Ives v. Bosley are not as applicable to notes held by the bank in which it had the right to insert its name as if it had been actually so inserted.

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The plaintiff's prayer, which was granted, submitted to the jury to find, amongst other things, that the defendant presented the notes to Mr. Thomas, the president of the bank, "and that said Thomas said that he would not discount said notes unless they were indorsed by the plaintiff, Warfield, and the defendant, Keyser, and that the defendant then took said notes to said plaintiff, and reported to him what said Thomas had said, and said plaintiff and said defendant then wrote their respective names upon the back of each of said notes, and that there was no other agreement, contract, or understanding, or intention between said plaintiff and said defendant at that time; and that said defendant thereupon took said notes immediately back to said Thomas, and they were discounted by the bank for the credit of said Maryland Manufacturing & Construction Company;" and further find that the plaintiff has made the payments testified to on account of said notes, etc., then the plaintiff is entitled to recover the half of each payment, etc. We do not find any error in that prayer of which the appellants can complain. What is said in Ives v. Bosley can be repeated here, with change of names of the parties: "These facts establish by conclusion of law the responsibility of Warfield and Keyser as joint makers or original promisors." Then, after saying that parol evidence is admissible to show and explain what liabilities were intended to be assumed, the court added: "If, however, the contract set up is different from that which attaches by presumption of law, it must be established by proof showing that both parties, promisor and promisee, so intended and agreed." The theory of the plaintiff's prayer is that, when a third person writes his name on the back of a note such as this before it is delivered, the law declares him liable as a joint maker, unless there was some agreement, contract, understanding, or intention of the parties that his responsibility should be something else — that of indorser, for example. If this had been a suit of the bank against Messrs. Warfield and Keyser, then, of course, such an agreement, contract, or understanding must have been between all of them; but, as it is simply a suit between these two, we do not see how the defendant could have been prejudiced by the terms used in this prayer, for, if the jury had found that Messrs. Warfield and Keyser had had some understanding, or intended that they should only be responsible as indorsers, the qualification used would have enabled the jury to have found for the defendant without finding that they had such arrangement with the bank. The defendants' sixth prayer, which was granted, is the converse of this part of the plaintiff's prayer, excepting it submitted to the jury the question of the understanding and the intention of the three parties. There was no reversible error in granting the plaintiff's prayer, although the reference to the agreement, etc., might perhaps have been more clearly stated.

The defendants' first, second, third, and fourth prayers, which were rejected, can be considered together. They were based on the theory that there was no evidence to show that Messrs. Warfield and Keyser were joint makers, but we cannot assent to that. It is true they spoke about "indorsers," "indorsements," etc., but it is manifest that they did not use the terms in a technical sense. Mr. Thomas, for example, replied to a question whether anything was said about their being joint makers of the notes: "I said I wished them to guaranty the notes. That was my expression. I wanted them to indorse them. My idea was I wanted them to guaranty the notes." Again, he was asked, "You had in mind they should guaranty them?"

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and he replied, "I said, 'I want a guaranty to this;' the idea being that the officials of the corporation, if you have their personal indorsement on the note, they are more apt to see it paid at maturity." It is, therefore, perfectly clear that he was not using the terms "guaranty," "indorser," or "indorsement" in a technical way, but he wanted security for the bank. All three of these gentlemen were intelligent business men, but there is nothing to indicate that Messrs. Warfield and Keyser intended to limit their liability by any particular method of becoming security other than what they adopted, which, under the law, was as joint makers, in the absence of some other understanding or intention. All of them doubtless knew that the usual way to make themselves indorsers, in a technical sense, was to make the notes payable to their joint order, and then write their names on the back, or payable to the order of the maker, and then let it indorse them first. But they did not make themselves or the company payee, and simply put their signatures on the back, and apparently left the rest to the bank. The inference might be drawn that Mr. Thomas did not look upon them as indorsers in the strict sense, for, if he had, he would doubtless have taken some steps to have made demand for payment within a reasonable time, and to have protested the notes, or have them waive protest. It cannot, therefore, be said that there was no evidence that they were joint makers, and we are of the opinion the lower court was right in rejecting these prayers of the defendant and in submitting the question to the jury.

This brings us to the consideration of the first exception. In the ruling therein presented we think there was error. The real controversy in the case was whether Messrs. Warfield and Keyser were joint makers or indorsers. If the former, they were liable without protest and notice; but, if the latter, Mr. Keyser was not liable, as it is not pretended that he received such notice as an indorser is enttled to. If the understanding and the intention of the parties were that their liability should be that of indorsers, then the bank could have inserted their names as payees, while, if it was understood that the bank should be the payee, the presumption of law was that they were makers. To permit the plaintiff at the end of his case to insert the name of the bank and show the notes to the jury would necessarily, it seems to us, be calculated to prejudice, or at least mislead, the jury. There was no necessity to fill up the blank. The suit was not on the notes, but was to recover one-half of the money paid by the plaintiff on them, and they were used with the other evidence to show what relation the plaintiff and defendant bore towards them. It was not a suit of a holder of a note against one primarily liable to him, but it was wholly on the theory that the plaintiff and defendant were cosureties, as joint makers, and, as the plaintiff had paid the whole debt, he sued the defendant for contribution. Such being the case, we are not aware of any authority that authorized the plaintiff to insert the name of the bank as payee of the notes after he got possession of them, but especially in the presence of the jury, after the controversy had been raised before them as to what relation he and the defendant bore to the notes.

We are unmindful of such cases as Kundel v. Spooner, 9 Md. 462, 66 Am. Dec. 332; Boyd v. McCann, 10 Md. 118; Dunham v. Clogg, 30 Md. 284; Elliott v. Chestnut, 30 Md. 562; Sittig v. Birkestack, 38 Md. 158; and Condon v. Pearce, 43 Md. 83 (most of which we have cited above)—authorizing the holders of notes to fill in blanks with the names of the payees, or other proper entries. But they were cases

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in which suits were brought on notes against those primarily liable — such as makers or previous indorsers sued by subsequent indorsers, holders, or indorsees. In such a case the holder of a note has, to quote from Elliott v. Chestnut, "a very large authority to fill up the blanks in the body of the note;" but in the one now before us the plaintiff took up the notes after maturity as one of the joint makers, according to his contention. When he did so, the name of the payee was blank, and after offering testimony to establish his theory he was permitted by the court to insert a name which, it seems to us, might readily, if not necessarily, mislead the jury, and prejudice the defendant, who was contending for a position that would be weakened, if not overcome, by the fact that the court then permitted the plaintiff to give the note a form which prima facie, at least, sustained the plaintiff's contention. For this error the judgment must be reversed.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

Decision No. 808.

BRITTAIN v. WESTALL.

(Supreme Court of North Carolina. Nov. 30, 1904.)

49 S. E. 54.

AUTHORITY OF AGENT — PURCHASE FOR CASH — PURCHASE ON CREDIT — WHEN BINDING ON PRINCIPAL — ACTION AGAINST PRINCIPAL — INSTRUCTIONS.

1. If express authority to buy on credit is not given to an agent, but he is authorized to make the purchase and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal.

2. In an action for goods sold defendant's agent on credit, the goods having been received by defendant, the defense was that the agent had been given cash to make the purchase, and that he had no express authority to buy on credit, and it appeared from the written contract of agency that the agent could buy only for cash. Held error to refuse an instruction that the contract did not authorize a purchase on credit.

3. It was error to refuse an instruction that, although the goods came into defendant's possession, and were appropriated by him, he would not be liable to plaintiff unless he had authorized the agent to buy on credit, or appropriated the goods knowing that he had.

4. It is only after a prima facie case of agency has been established that the acts and declarations of the agent become competent against his alleged principal.

Appeal from Superior Court, Catawba county; McNeill, Judge.

Action by D. M. Brittain against W. H. Westall. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Self & Whitener, for appellant.
L. L. Witherspoon and M. H. Yount, for appellee.

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WALKER, J. This case was before us at the last term upon an appeal by the plaintiff from a judgment of nonsuit, which the court rendered on motion of the defendant at the close of the testimony. 135 N. C. 492, 47 S. E. 616. We then held there was some evidence that Townsend was the agent of Westall to buy the lumber for him, and, although it was a restricted agency, and Townsend could only buy for cash, yet, if Townsend bought lumber from the plaintiff on Westall's credit, and the latter received and appropriated it to his own use, knowing at the time it had been so bought, he would be liable for its value. In order that this phase of the case might be submitted to the jury, the judgment was set aside, and a new trial awarded. A sufficient statement of the facts for an understanding of the point decided in this appeal will be found in the case as formerly reported. It may be added, though, that there was evidence at the last trial that the defendant had supplied Townsend with sufficient funds to buy the lumber. In Patton v. Brittain, 32 N. C. 8, it appeared that an agent was given authority to purchase personal property for his principal, but only so far as he had cash of his principal with which he was to pay for it. The agent purchased on the credit of the principal without paying any money, and the property was delivered to the principal, who received and converted it to his own use. The court held that, when the agent violated his express instructions, and bought on credit instead of for cash, the principal had the right to repudiate the contract, and to refuse to receive the articles, but, having received and used them with knowledge that they had been purchased for him and upon his credit, the vendor could recover from him the price of the goods. It was said that the same result would follow whether the agent acted contrary to his authority, exceeded it, or had none at all; it being the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive and pay for them. A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account he cannot bind the latter by a purchase on credit, unless, perhaps, such is the well-known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. This is substantially the principle which is involved in this case, and it is sanctioned by the best authorities. See 1 Am. & Eng. Encyc. of Law (2d Ed.), pp. 1020, 1021, where the cases on the subject are collated. This court has said that when the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. Ruffin v. Mebane, 41 N. C. 507. It may be taken, then, as a settled principle in the law of agency, that, if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. Sprague v. Gillett, 50 Mass. (9 Metc.) 91. The case of Komorowski v. Krumdick, 56 Wis. 23, 13 N. W. 881, is much like ours. The court there held that an agent to purchase property must, in order to bind his principal, who furnishes in advance the

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funds to make the purchase, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of such express authority or of such a custom the agent cannot bind his principal by a purchase, upon a credit, of a person who is ignorant of his real authority as between himself and his principal, unless the property so bought is delivered to the latter, and he receives it knowing that his agent actually bought on credit, or that he had no funds in his hands at the time with which to buy the same. See, also, Jaques v. Todd, 3 Wend. 83; Willard v. Buckingham, 36 Conn. 395; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; Paine v. Tillinghast, 52 Conn. 532; Mechem on Agency, § 364. While these principles seem not to have been seriously questioned by the defendant, he contended that Townsend was not his agent, and that, even if he was, he had been supplied by him with more than sufficient cash with which to buy the lumber afterwards received by the defendant, and that Townsend had no express authority to buy on credit.

In order to present these questions, and have the jury pass upon them, the defendant's counsel requested the court to give certain instructions to the jury; and among others the following one, which was the subject of the defendant's second prayer: "The written contract introduced in evidence constituted Townsend the agent of Westall, with limited authority only. As such agent, Townsend had authority to buy lumber for cash, with money furnished him by Westall, but he did not have authority under said written contract to buy lumber on Westall's credit." We do not see why defendant was not entitled to this instruction. On the face of the contract it appeared that Townsend was directed to buy only for cash, and, this being so, he could not, of course, buy on credit, contrary to the instructions of his principal. Whether the defendant subsequently ratified what he did, and is therefore liable to the plaintiff, is quite another and different question.

The instruction requested in the defendant's sixth prayer was a proper one, and should have been given. It was as follows: "Although the identical lumber in controversy came into possession of defendant, and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or accepted and appropriated the lumber with notice of the fact that Townsend had bought it on his (defendant's) credit." The contract expressly required Townsend to buy for cash, and the only possible ground of defendant's liability is that he received and appropriated the lumber to his own use, knowing that his agent had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case he would have implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 Am. & Eng. Enc. of Law, 1021, and notes.

The first and fourth prayers were properly refused, as none of them embraced all of the facts which it was necessary for the jury to find in order to defeat the plaintiff's recovery. They were not complete, but confined only to a single aspect of the case. The instruction asked to be given in the third prayer was not warranted by the state of the evidence. The fifth prayer was substantially given. Indeed, the modification made by the court was virtually but a repetition of the language in the first part of the prayer. The seventh prayer, which was modified, and then given by the court, might well have been refused, as it is subject to the same objection as that already stated to the first and fourth prayers. It

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restricted the right to recover to only one view of the case, when there were others which should have been considered by the jury. Like the first and fourth prayers, it was too narrow, and therefore misleading. But the amendment of the court wrought no material change in the instruction as it was asked to be given.

With reference to the objections to testimony, we may say generally that the declarations of an agent are not more competent to prove the agency. It is only after a prima facie case of agency has once been established that the acts and declarations of the agent become competent against his alleged principal. Francis v. Edwards, 77 N. C. 271; Gilbert v. James, 86 N. C. 244; Daniel v. Railroad (at this term), 48 S. E. 816. When he is shown to be an agent, his acts and declarations in the course of his employment and within the scope of his agency and while he is engaged in the business (dum fervet opus) are competent, as in that case they are, as it were, the acts and declarations of the principal himself. What he says and does, even while engaged in transacting the business of the agency, is not competent to establish the agency, which is a preliminary fact to be shown before his acts and declarations can be admissible at all. We need not discuss the exceptions to the charge, as they may not be presented again. There was error in the refusal to give the instructions contained in the second and sixth prayers of defendant, for which there must be another trial.

New trial.

Decision No. 809.

KUDER v. GREENE, et al.

82 S. W. 836.

(Supreme Court of Arkansas. Oct. 15, 1904.)

BANKS — COLLECTIONS — CHECKS — PROCEEDS — PAYMENT — CUSTOMS.

1. Where plaintiff drew a check payable to the order of "G., Cashier," and delivered it to C. to be deposited for collection in the private bank conducted by G. and another, the bank had no authority to credit the proceeds of the check to C., and permit him to draw against it, but was liable to account for such proceeds to plaintiff.

2. Where the drawer of a check payable to the cashier of a bank for collection had no notice of the bank's custom to pay the proceeds of such checks to the persons depositing them, he was not bound thereby.

Appeal from Circuit Court, Boone county; Elbridge G. Mitchell, Judge.

Action by J. H. Kuder against C. M. Greene and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

In June, 1901, C. M. Greene was the cashier of the Citizens' Bank of Harrison, Ark. In that month J. H. Kuder, while in Harrison, delivered to H. E. Cole two checks drawn by Kuder on a bank in Kansas. One of the checks, for the sum of $150, was made payable to the order of

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H. E. Cole. The other check, for the sum of $600, was made payable to the order of "C. M. Greene, Cashier." Cole took both of the checks to the Citizens' Bank, and had them deposited to his own credit for collection. The checks were paid by the bank in Kansas, and the proceeds were by the Citizens' Bank placed to the credit of Cole, who afterwards drew it out of the bank on his own check. Before the money had been all paid over to Cole, Kuder notified the bank that Cole had no authority to collect the check, and the bank then asked him to find Cole and have the matter settled, but nothing seems to have been done; and afterwards, the bank refused to pay Kuder for his draft, he brought this action against the bank to recover the sum of $600, which he claims that the bank owed him for the proceeds of the check. On the trial the plaintiff, Kuder, testified that he gave the check for $600 to Cole with the understanding that he should deposit it in the bank for collection for plaintiff, Kuder, and that Cole had no authority to use the proceeds thereof. On the other hand, Cole testified that both checks were delivered to him by Kuder in payment of a debt that Kuder owed him for a lease which Kuder had purchased from him. Kuder, in explaining why he sent the check to bank by Cole, stated that he did so becauuse Cole, who was a customer of the bank, told him that, if he would let him (Cole) carry the check over to the bank, the bank would not charge any commission for collecting. Before agreeing to credit Cole with the amount of the check, the bank required him to indorse his name on the back of the check.

The case was submitted to the presiding judge, who made the following among other findings, to wit: "That defendants, R. T. Knight and C. M. Greene, are, and were at all times mentioned in the proceedings in this case, partners and doing a general banking business at Harrison, Arkansas, under the firm name of Citizens' Bank, and that said defendant C. M. Greene is and was at all times cashier of said bank. That plaintiff on the 29th day of June, 1901, drew his draft on Northrup National Bank of Iola, Kansas, in favor of said Chas. M. Greene, cashier, for $600, and on the same day caused said draft to be deposited in said Citizens' Bank for collection, and that said Citizens' Bank collected said draft on the 6th day of July, 1901. That said draft was delivered by plaintiff to H. E. Cole, and by him delivered to the bank, and that at the time of such delivery to Cole there was no express authority given him by plaintiff to collect or appropriate the proceeds of said draft. That plaintiff did not deliver said draft to Cole in payment of the purchase price of a lease, nor did he negotiate or sell the same to Cole. That the plaintiff constituted Cole as his agent to carry the $600 to the bank, and there to cash the same draft, and then for Cole to deposit the sum collected in plaintiff's name in the bank." The court did not make any declaration of law, further than that the law of the case was in favor of the defendants, and he thereupon rendered judgment in favor of defendants, and plaintiff appealed.

B. B. Hudgins, Pace & Pace, and J. W. Story, for appellant. G. J. Crump, for appellees.

RIDDICK, J. (after stating the facts). This is an action by plaintiff, Kuder, against C. M. Greene and R. T. Knight, partners doing business under the firm name of Citizens' Bank, to recover the proceeds of a check for $600 which he claims to have deposited with the bank for collection. There was no denial of the fact that the bank collected the check in question, but the defendants claim that Kuder authorized Cole

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to collect the check, and had him to present the check to the bank for the purpose of avoiding payment of exchange and collection charges. They say that the money was paid to Cole in the ordinary way, and according to the usual course of business of said bank, and that the plaintiff, having placed the same in the hands of his agent, Cole, for the purpose of getting it collected without cost to him, and without giving defendants information of his interest therein, ought now to be estopped from setting up a claim to the proceeds against the defendants. But it seems to us that the check itself was notice to the bank of the fact that Kuder had an interest therein. It was not payable to Cole, but to the cashier of the bank, and the bank should have not turned over the proceeds of the check to Cole or to any one else without an order from Kuder. Cole testified that Kuder delivered the check to him in payment of a debt, but the evidence as to that was conflicting, and the court found on that point in favor of Kuder. He found that Kuder did not deliver the check to Cole in payment of a lease, as claimed by Cole, but that he sent the check to the bank by Cole to be deposited for collection, and that Cole had no "express authority to collect or appropriate the proceeds of said draft." Taking this finding of fact as correct, we think that the bank is liable to Kuder for the proceeds of the check which it paid over to Cole, for it was done without authority. It is true that the bank claimed that the payment was made in the ordinary way, and in accordance with its usual custom. But if there was any such custom, it must have been one peculiar to that bank, for there is no proof and no reason to believe that there is any general custom among banks to pay over to third parties proceeds of checks made payable to the cashier of the bank for no other reason than that such parties have the check in their possession. It must be plain that, when payments are made in that way to third parties on their claim of ownership, it is done on the credit of such party, and with the expectation that he will make good the amount in case his statement of ownership should prove incorrect. If it was the custom of this bank to act differently, and to expect that the owner would shoulder the loss in such cases, it could not affect Kuder without notice to him of such custom, for, as before stated, it is not shown to be a general custom among banks to act in that way, so that plaintiff could be presumed to have known it.

But the last finding made by the court was to the effect that the plaintiff gave Cole authority to cash the draft, and to deposit the sum in the bank in plaintiff's name. This finding seems to be somewhat in conflict with the previous findings of the court. Now, there are only two views of this matter that can be taken under the evidence. Either, as Cole testified, Kuder gave him this draft in payment of a debt he owed him, or, as Kuder testified, he gave it to him to deposit with the bank for collection for him (Kuder). The court found that it was not given in payment of a debt, and that Cole had no express authority to collect it. Taking the whole finding of fact together, we are of the opinion that the judgment should have been in favor of the plaintiff, and that the court erred in holding to the contrary. But as the findings of the court are to some extent conflicting, we have concluded that it would be safer to remand the case for a new trial, instead of rendering judgment here.

Reversed and remanded.

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Decision No. 810.

L. GREIF & BRO. v. SELIGMAN.

82 S. W. 533.

(Court of Civil Appeals of Texas. Oct. 12, 1904.)

SALES — DELIVERY TO BUYER — DELIVERY TO CARRIER — EFFECT — ACTION FOR PURCHASE PRICE — EVIDENCE — INSTRUCTIONS.

1. In the absence of an agreement, the delivery of goods by a seller to a carrier for transportation and delivery to the buyer is a delivery to the buyer.

2. An express agreement in a contract of sale that the seller shall actually deliver the goods to the buyer at the point of destination, and that the buyer is not to pay therefore unless so delivered, is binding, and a delivery to a carrier for transportation and delivery to the buyer is insufficient.

3. A matter not in issue should not be submitted to the jury.

4. Where a contract for the sale of goods is silent as to the person or mode by which the same are to be sent to the buyer, a delivery by the seller to a carrier in the usual course of business transfers the property to the buyer.

5. Where, in an action for the recovery for goods sold, it was not contradicted that a bill of lading for the goods delivered to a carrier for shipment to the buyer was sent to the buyer, a charge presenting an issue as to the negligence of the seller in failing to send to the buyer a bill of lading was erroneous, especially as such negligence, if proven, would have constituted no defense to the suit.

6. Where, in an action for goods sold, the buyer claimed that he had not received the goods, a petition, in a suit by the buyer against a third person for failing to deliver the goods, alleging that the receipt of the goods at the depot of the carrier at the place of destination made him liable to the seller for their market price, was admissible as an admission, though such petition had been prepared by his counsel and had not been signed by him, that being a matter merely affecting the weight of the admission.

Appeal from Guadalupe County Court; W. R. Neal, Judge.

Action by L. Greif & Bro. against H. Seligman. From a judgment of the County Court in favor of defendant, rendered on appeal from a judgment for plaintiffs before a justice of the peace, plaintiffs appeal. Reversed.

Greenwood & Donegan, for appellants. Dibrell & Mosheim, for appellee.

FLY, J. This is a suit on an account for $110 for goods sold by appellants to appellee. It originated in a Justice's Court where judgment was rendered for appellants. The cause was then appealed to the County Court, where a trial by jury was had, resulting in a verdict and judgment in favor of appellee.

Appellants, in compliance with an order given by appellee, delivered the goods to a common carrier in Baltimore, Md., to be transported to Seguin, Tex., where appellee had ordered that they be sent. In obedience to the instructions of appellee, the goods were billed to go over what is known as the "Sunset Route," and were delivered by that railroad at Seguin, Tex. Appellee swore that he never received the goods, although

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he paid the freight on the same. Appellee was to pay for the goods on March 1, 1901, and they were shipped on September 25, 1900. The box in which the clothing was shipped was received by appellee at Seguin, Tex.

The grounds on which appellee seeks to avoid payment for the goods is that the goods were not to be paid for until they were delivered to appellee in Seguin. On this point appellee testified that he never ordered any goods from appellants except upon the basis that they were to deliver them to him in Seguin. He did not order the goods in controversy, but they were ordered by his son, Julius, who swore: "The bargain and contract I made with the plaintiffs, through their salesman, Ike Haas, was that the goods were to be delivered to H. Seligman in the town of Seguin. This was distinctly agreed to, and with this understanding I gave him the order for the goods. We were not to pay for the goods until they were delivered to us at Seguin; that is, delivered to my father, the defendant."

In the absence of an express or implied agreement, it is the general rule that, as between the parties, if the goods are delivered to a carrier by a seller, it is a delivery to the buyer, and a fortiori to one specially designated by the buyer. The rule is that stated in Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787: "When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser; or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected — the goods when delivered to the carrier are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu." If, however, there be an express agreement that the vendor must actually deliver the goods at the point of destination, and not to be paid for unless so delivered, it would be binding upon the parties, and a delivery to the carrier would not be sufficient. From the testimony of Julius Seligman a jury might possibly be justified in concluding that such a contract was made.

The trial judge instructed the jury as follows: "You are instructed that if you believe from a preponderance of the evidence that defendant contracted to buy the clothing described in the pleadings from plaintiff at the stipulated price alleged, and further contracted that the goods should be shipped by a designated route, and that under the terms of the contract between defendant and plaintiff all plaintiff was to do was to deliver the specified clothing to a designated carrier for delivery to defendant, and that plaintiff completed the contract within the time agreed upon by properly delivering the specified clothing for shipment to the carrier agreed upon, in such event you will find for the plaintiff." There was no contest as to the price of the clothing, and it was productive of no good to submit a matter as an issue which was not an issue. The same is true as to the question of a designated route. It was not disputed that the goods were shipped over a route designated by appellee.

Further, it had been shown that no route had been designated, the delivery of the goods to the carrier was a delivery to appellee, in the absence of an agreement requiring the actual delivery of the goods to appellee in Seguin. Should the contract of purchase be silent as to the

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person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Mechem, Sales, § 736, and authorities cited.

The charge was erroneous in presenting an issue as to the negligence of appellant in failing to send a bill of lading to appellee. It was not contradicted that the bill of lading was sent, whether appellee received it or not, and such negligence, if it had been proved, would not have constituted a defense to a suit for the value of the goods.

Appellee, prior to the time of the institution of this suit, had instituted a suit against the Seguin Street Railway Company, alleging that the goods shipped by appellants had been delivered by the Galveston, Harrisburg & San Antonio Railway Company to said street railway company, and had not been delivered by it to appellee, and "that the receipt of said case of clothing at the depot of the G. H. & S. A. Ry. Co., in Seguin, has made H. Seligman liable to the firm of L. Greif & Bro., consignors, for the reasonable market value at wholesale prices of said clothing, to wit, $110." The petition was properly admitted in evidence as an admission on the part of appellee that the goods had been delivered, and that he was liable for their value to appellants. In admitting the petition in evidence to the jury, however, the court said: "I will let the whole thing go to the jury, but don't think it has anything to do with the case." The remark had the effect of destroying the force of the evidence, and was clearly erroneous. The trial judge seeks to explain his remark by the statement "that the petition was drawn by counsel, and defendant Seligman had not signed it." Those were matters that went to the weight of the evidence, and belonged peculiarly to the province of the jury. The jury, and not the court, should have determined whether the allegations in the petition were admissions chargeable to appellee, and this they might have decided, even though appellee may not have read the petition, if he inspired the allegations prepared by his attorney.

Appellants should not have been permitted to prove what he may have written to appellee, unless the latter testified as to part of the correspondence, thus opening up the way for the admission of the whole of it.

The judgment will be reversed, and the cause remanded.

Decision No. 811.

HEDEKIN v. GILLESPIE. (No. 4,855.)

72 N. E. 143.

(Appellate Court of Indiana, Division No. 1. Oct. 13, 1904.)

LANDLORD AND TENANT — DEFECTIVE CONDITION OF PREMISES — PERSONAL INJURIES — ACTION FOR TORT — SURVIVAL.

1. An action in tort does not survive against the personal representative of the tort feasor.

2. A tenant having knowledge of defects in a sidewalk on the premises, which the landlord had promised to repair, cannot recover from him for damages for personal injuries caused by the defective condition of the sidewalk.

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Appeal from Circuit Court, Allen county; E. O'Rourke, Judge.

Action by Elinore Gillespie against Margaret C. Hedekin, administratrix. From a judgment for plaintiff, defendant appeals. Reversed.

Zollars & Zollars, for appellant. Samuel K. Ruick, for appellee.

HENLEY, J. This action was commenced against one Thomas B. Hedekin. The appellee averred in her complaint that prior to October 19, 1901, she and her husband became tenants of Thomas B. Hedekin, and occupied the house and premises until the last-named date; that at the time they rented the house there was a walk leading from the house to an outhouse in the rear of the lot, which walk was dangerous by reason of the boards of which it was constructed being broken and warped; that many of the boards constituting said walk were smooth and apparently safe upon their upper side, but said boards were in fact rotten and decayed on their under surface, which fact was known to the appellee; that the said Thomas B. Hedekin, at the time the place was rented, agreed with appellee's husband that he would from time to time, as required, make all necessary repairs to said premises, and keep the same in good repair, and that in consideration of said promise appellee and her husband entered into and took possession of the premises, and occupied them. It is further alleged that the said Thomas B. Hedekin negligently failed and refused to keep the walk in repair, and that the appellee on the 19th of October, 1901, in walking over the walk, stepped upon a board, which, by reason of it being rotten, broke with her, causing her to fall, and injuring her without any fault on her part. After the complaint was filed, and before the case was tried, the said Thomas B. Hedekin died, and upon appellee's suggestion the administratrix of his estate was substituted as a party defendant.

The judgment in this cause has no ground upon which to stand. The complaint does not state a cause of action, whether regarded as proceeding on the theory of tort or contract. If in tort the action would not survive against the personal representative of the deceased lessor, and if regarded as an action on contract the measure of damages would be the amount paid for making the repairs. And it was incumbent upon appellee to make the repairs upon the refusal of the landlord to do so, and look to the landlord for the cost of the same. But the complaint seeks to recover damages solely for a personal injury to appellee growing out of the alleged failure of the appellant decedent to repair the premises which appellee and her husband occupied as tenants.

The decided cases in the courts of appeal cover every feature of this case.

In Hamilton et al., Ex'rs, v. Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, this court said: "The appellee admits in her complaint that she knew of the existence of the excavation even before she took possession of the premises, and with such knowledge continued to occupy the property for the period of six months, though the appellant had, upon demand, failed and refused to make the repair which he had covenanted to make. The appellant could not have given the appellee any more information of the defect that she admits she possessed. To avoid this dilemma she undertakes to aver that the hidden portion of the defect consisted in the ruinous condition of the banks of the excavation, and not in the excavation itself, and she insists that it was the duty of the appellant to have disclosed these to her. She does not aver that the appellant

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had any peculiar knowledge of these other than she had herself; at least the facts pleaded show that she had ample time and opportunity for investigation, and there is no pretense that the appellant practiced any fraud or deception upon her in connection with the condition of the walls of the excavation. It must be clear, therefore, that if the cause of the injury was a latent, and not a patent, danger, it was no more patent to the owner than to the lessee, and it does not appear wherein he violated any duty in failing to apprise her of the same. If we should treat the complaint, therefore upon the theory of a latent defect, we encounter the insurmountable obstacle that it fails to show the appellant guilty of any negligence; and hence, whether the appellee was guilty of contributory negligence or not, there is no right of action. See Buswell, Pers. Inj. § 84; Taylor, Landlord & Tenant, § 175a. But if we take the other end of the dilemma, and say that the particular duty which the appellant owed the appellee here was not to disclose to her the existence of the latent defect of the banks of the excavation, but to fill up the latter and place the premises in safe condition, we then come back to the other obstacle, already mentioned in reviewing the complaint as upon contract, and the appellee has failed to reduce or moderate the damages, as she could have done by making the repairs herself and charging them to the appellant."

After the judgment in the above-cited case was reversed and remanded it was again tried, and an appeal taken to the Supreme Court of this State. See Feary v. Hamilton et al., Ex'rs, 140 Ind. 45, 39 N. E. 516. In the last-cited case the court, by Monks, J., after stating the facts showing that the landlord had died pending the action, said: "Counsel for appellant earnestly contend that this is an action upon contract; that, the decedent having contracted in his lifetime against the injuries complained of, his contract cannot be avoided by reason of his death. They admit that actions in tort die with the person of either party, but say that actions upon contract do not so die,, but may be enforced against the legal representatives. Counsel do not cite any authority to sustain this broad proposition, and we have been unable to find any going to that extent. On the contrary, it is settled law that actions arising out of contracts, expressed or implied, will not survive where the damages sustained by such breach are for injuries to the person, as mental anguish, pain of body, or injury to character. Boor, Adm'r, v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Wolf v. Wall, 40 Ohio St. 111; Stebbins v. Palmer (Mass.), 1 Pick. 71, 11 Am. Dec. 146; Vittum v. Gilman, 48 N. H. 416; Smith v. Sherman, 4 Cush. 408; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Chase v. Fitz, 132 Mass. 359; Jenkins v. French, 58 N. H. 532; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355. It is true, as a general proposition, that actions in form ex contractu survive, but this is due rather to the substance of the action than its form. The nature of the damage sued for, and not the nature of its cause, determines whether or not it will survive. Cutler v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; 1 Chitty, Pl. 101. The rule is that where the injury complained of affects primarily and principally property and property rights, and the injury to the person is mere incidental, the cause of action survives. The action must involve the injury to the estate, and not to the person. Boor, Adm'r, v. Lowrey, supra, and authorities cited; Hess v. Lowrey, supra. But where the action is brought primarily to recover for injury to the person, and the injury to the property is merely an incident, as

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loss of time while sick and expenses incurred in endeavoring to be cured, the same does not survive. Boor, Adm'r, v. Lowrey, supra; Hess v. Lowrey, supra. In such case the loss of property — that is, the loss of time and the expenses incurred in endeavoring to be cured — was caused by the personal injury, and would not have occurred but for such injury. In this case the appellant's loss of time and inability to attend to and manage her store, and the expense incurred for the services of a physician, were all caused by the personal injury alleged, and would not have been sustained but for such personal injury. This question has been fully considered by this court in the cases of Boor, Adm'r, v. Lowrey, supra, and Hess v. Lowrey, supra, and decided against the appellant. The authorities cited by appellant were examined, distinguished, and explained in those cases, and, after a careful consideration, we see no reason to depart from the rule there stated. Under the foregoing propositions it makes no difference in this case whether the action is on the contract or in tort; the result is the same. It is not, therefore, necessary for us to decide, nor do we decide, whether it is an action sounding in contract or in tort. Neither do we wish to be understood as holding the complaint otherwise sufficient. There are a number of authorities which declare that the covenant to repair does not include any liability for personal injury or death resulting from nonrepair."

Appellee's complaint shows that she knew of the dilapidated condition of the walk upon which she was injured for more than two years prior to her injury. Her means of knowing of the defect was, at least, equal to that of the landlord, and, regardless of the holding that the action died with the person of the defendant, the opinions above quoted from furnish abundant reasons and authority for holding that an action based on the facts stated in the complaint could not have been maintained against the landlord in his lifetime.

The judgment is reversed.

Decision No. 812.

NATIONAL BANK OF COMMERCE v. KENNEY et al.

83 S. W. 368.

(Supreme Court of Texas. Dec. 1, 1904.)

BILLS AND NOTES — TRANSFER BY DELIVERY — DEFENCES — WHAT LAW GOVERNS LAWS OF OTHER STATES — PLEADING — PRESUMPTIONS — NEGOTIABLE INSTRUMENTS — STATUTES — APPLICATION — BANKS — DEPOSITS — EVIDENCE — DECLARATION OF MAKER — BONA FIDE TRANSFEREES — INSTRUCTIONS.

1. In the absence of pleading or proof to the contrary, the laws of another State are presumed to be the same as the laws of Texas.

2. Where, in a suit on a note executed in another State, a section of its Revised Statutes and certain pages of a report of the Supreme Court thereof were introduced in evidence, but neither the article referred to nor the pages of the report were copied in the statement of facts on appeal, the appellate court could not go outside of such statement to ascertain the contents of such citaions.

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3. Where, in an action on a note executed in another State, the laws of such State were proved and the statement of facts on appeal was agreed to, from which the laws so proved were omitted, it would be presumed that such laws supported the judgment.

4. Where an answer in a suit on a note executed in Missouri alleged that all transfers of notes as collateral security for a pre-existing debt under the law of Missouri left such collateral notes in the hands of the transferee subject to all defenses existing between the parties thereto, it should be construed as referring only to defenses existing at the time of the transfer, and not at the time of the trial.

5. In an action on a note executed in Missouri, the law of that State was alleged to be that all transfers of notes as collaeral for a pre-existing debt left the collateral notes subject to defenses existing at the time of the transfer, and the court charged that if the note sued on was pledged without indorsement by the original drawee, then the drawer and his indorser had the right to plead all equities and defenses in their favor, against the note, which existed or arose at any time. Held, that since, under the laws of Texas, a negotiable note transferred without notice of any defenses is not subject to defenses, whether the transfer is evidenced by a writing or not, the instruction was erroneous, both under the laws of Texas and the laws of Missouri as pleaded.

6. Rev. St. 1895, art 307, declaring that any person to whom a negotiable instrument has been assigned may maintain any action in his own name which the original payee might have brought, and a bona fide purchaser shall be compelled to allow only the just discounts against himself, applies only to negotiable notes.

7. A note containing a provision that the makers and indorsers "severally waive protest, demand and notice of protest, and nonpayment in case the note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to the holder," was not thereby rendered non-negotiable on the ground that the time of payment was rendered uncertain.

8. Where a note was deposited by the payees as collateral with a bank, the fact that such payees deposited the proceeds of a second note executed in renewal of the first in such bank, without notifying the bank whence such fund was derived, or that it was to be applied on the first note, was no defense to an action by the bank thereon.

9. Where, in an action on a note deposited with plaintiff as collateral security for a loan to the payees, it appeared that a second note had been executed in renewal of the note sued on, it was not error to permit the makers of the second note to testify as to the circumstances which led them to execute the same.

10. Where, in an action on a note secuured by a mortgage, it appeared that the payees had induced the makers to execute a renewal note, which they had procured to be discounted by defendant bank, the court should have charged at plaintiff's request that statements of the makers and others to defendant bank as to conditions under which they executed such renewal note and mortgage, and as to the agreement and understanding between the makers and the payees of such note, were admissible only for the purpose of showing that defendant bank obtained its note and mortgage without notice of the original note held by plaintiff.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the National Bank of Commerce against J. H. Kenney and others. From a judgment in favor of defendants, affirmed by the Court of Civil Appeals (80 S. W. 555), plaintiff brings error. Reversed.

Elijah Robinson and H. E. Hoover, for plaintiff in error. Tempel & Hardy, C. H. Kohler, and I. N. Watson, for defendants in error.

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GAINES, C. J. This suit was brought by the plaintiff in error against J. H. Kenney, P. W. Kenney, and J. W. Lambert as makers of a promissory note, and to enforce a chattel mortgage upon a stock of cattle, which was executed by J. H. Kenney to secure the note. We speak of P. W. Kenney and J. W. Lambert as makers, though they merely indorsed the note before delivery. As such indorsers they are makers under our law. Latham v. Flour Mills, 68 Tex. 130, 3 S. W. 462, and cases cited. The Third National Bank of Springfield, Massachusetts, was also made a party defendant. The defendants J. H. Kenney, P. W. Kenney, and Lambert pleaded their discharge in bankruptcy. The pleadings need not be further stated in this connection. In this connection it need only be said that they were sufficient to present the issues which were developed by the evidence upon the trial of the cause.

Stripped of irrelevant matter, the facts disclosed by the evidence are as follows: In November, 1899, J. H. Kenney, being indebted to one Moody, who held a mortgage for his debt upon a stock of chattel in Hemphill county, Tex., applied to Ladd, Penny & Swazey, a firm who were doing business in Kansas City, Mo., to pay the debt. This the latter agreed to do, he at the same time agreeing, in consideration of their assumption, to execute to them a note for the amount, together with a mortgage on the same cattle to secure its payment; all of which was accordingly done. It was upon this note and mortgage that this suit was brought. Ladd, Penny & Swazey paid the Moody debt, though it is probable that this was not immediately done. The note was transferred by delivery, but without indorsement, by the payees to th laintiff, in order to secure an indebtedness then due by them to it. The time of this transfer is a matter about which the testimony is conflicting. On the 8th day of February, 1900, the makers of the first note, at the request of Ladd, Penny & Swazey, executed a second note in renewal of the first. The two notes were for the same amount, in the same form, and in the same words, except that the first was dated November 29, 1899, and the other February 8, 1900, and that the second was payable at the Interstate National Bank, whereas the place of payment in the first was the American National Bank. The effect was to extend the time of payment a little more than two months. This note was secured by J. H. Kenney's mortgage on the same cattle. It passed into the hands of the defendant bank in due course of trade, and without notice of the previous note.

As to the time of the delivery of the first note to the plaintiff, one Patton testified, in effect, that he attended to his business as the representative of the plaintiff, and that it was his impression that the note was placed as collateral with the plaintiff bank about the time of the maturity of a large note due from Ladd, Penny & Swazey to the plaintiff, which it was intended in part to secure. The note to be secured fell due December 11, 1889. He also testified that on February 7th he made a list of the collaterals held for the security of that debt, and that the note was among the number. On the other hand, defendant P. W. Kenney testified that he came to Kansas City on February 8th, and was requested by Ladd, Penny & Swazey to have executed a new note in lieu of the old, together with a like mortgage to secure it, and to take the papers back to Texas for the signatures of his co-makers and for the execution of the new mortgage, and to return them to Kansas City. Upon their receipt Ladd, Penny & Swazey were to return the first note. He also testified that when he was in their office he saw the old note

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in their possession. The new note was written in Ladd, Penny & Swazey's office, was carried by P. W. Kenney to Texas, and there executed, as also the mortgage as agreed upon, and the papers were immediately forwarded to the payees at Kansas City. The first note was not returned.

The note sued on was made payable at the American National Bank, Kansas City, but it does not show upon its face whether Kansas City, Mo., or Kansas City, Kan., was meant. However, it was admitted in open court upon the trial that there is a bank of that name in Kansas City, Mo., and it does not appear that there was a bank of the same name in Kansas City, Kan. Therefore we think it must be assumed that the note was to be paid in the State of Missouri, and that the contract is to be construed according to the laws of that State. In the presentation of the case in this court it was argued upon both sides upon that assumption.

It is well settled that in the courts of this State, in the absence of pleading and proof to the contrary, the laws of another State are presumed to be the same as the laws of Texas. As to the law of Missouri, the defendants, the Kenneys and Lambert, pleaded that "by the law of the State of Missouri, where said note is payable, and where said Ladd, Penny & Swazey and plaintiff bank were then and there engaged in business, and where said plaintiff bank acquired possession and control of said note and mortgage, all transfers of notes and mortgages as collateral security for a pre-existing indebtedness leaves such collateral notes in the hands of the transferee, subject to all defenses existing between the parties to such collateral note, and that all the rights, if any, which plaintiff had to said note and mortgage sued upon were acquired under the laws of Missouri, and plaintiff's rights, if any, were and are governed by said laws of Missouri aforesaid, and that plaintiff took said note subject to the rights and defenses of these defendants against said firm of Ladd, Penny & Swazey." In the pleadings of the defendant bank so much of the answer of their codefendants as has been quoted was adopted. The testimony adduced upon the trial in support of this averment is very meagerly given in the statement of facts. Ex-Judge Robinson, who was one of the attorneys for plaintiff, and a practicing lawyer in Kansas City, Mo., was called by the defendants, and testified, in effect, that he only knew the law of commercial paper in the State of Missouri in a general way; that "the courts were always changing," and that "he was not certain about anything;" that "the common law is in force in the State of Missouri as modified by the statute." He also identified a book handed him by counsel as a Missouri report, but what report it was and what it contained the statement of facts does not inform us. Mr Kohler, one of the defendant's attorneys, also testified that he was familiar with the laws of Missouri on the subject of negotiable paper, and presented the statutory provisions upon the subject which were introduced in evidence. It is also stated in the statement of facts that "the defendant introduced in evidence article 4488, Revised Statutes of Missouri, 1899, and page 29, 30, and 31, Missouri Supreme Court Report No. 137." Though not necessary to a decision of the case as here presented, we take occasion to say that we are of opinion that we are not at liberty to go outside of the statement of facts and to consult the references there found in order to ascertain the contents of the statute or of the opinion of the Supreme Court of Missouri, to which such references are there made. Suppose that in a statement of facts

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there should be a reference to the pages of a certain volume of the county records as containing a copy of a deed, and that its contents should not be given, would we be authorized to examine the book in order to ascertain the nature and effect of the deed? We think not. However, we think that in this case we should apply the rule which was followed in Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546. There it appeared that a judgment and execution were introduced in evidence, but by express agreement of counsel they were omitted from the statement of facts. The court held that under the circumstances it was to be presumed that their contents were such as would support the judgment. So here counsel for both parties have agreed to the statement of facts, and it has been approved by the trial judge, and the contents of the statute and of the opinion of the Supreme Court of Missouri have been omitted; and therefore, as we think, we should hold that the statute and opinion were such as would support the rulings of the court. However, a difficulty arises under the pleadings of the defendants as to the Missouri law. The answers, as we have seen, allege that "all transfers of notes and mortgages as collateral security for a pre-existing indebtedness leave such collateral notes in the hands of the transferee, subject to all defenses existing between the parties to such collateral note." This may mean defenses existing at the time of the transfer or defenses existing at the time of the trial. The former would seem to be the more natural construction. At all events, the construction is doubtful, and, such being the case, the doubt must be resolved against the pleader. We conclude that, since as we think the answers should be construed as alleging only that under the law of Missouri the note was subject to defenses existing at the time of the transfer, even if it had been shown that that law went further and made the note subject to subsequent defenses also, it could not benefit the defendants. They must be confined to the pleadings.

After instructing the jury, in effect, that the holder of a promissory note which had been transferred as collateral has the right to collect the note so long as the debt intended to be secured remains unpaid, the court in its charge proceeded as follows: "If such a note so put up as collateral is not indorsed by the original drawee at the time of its delivery to the person or corporation holding the debt against the original drawee, then in such case the drawer of the note and his indorsers have the right to plead and receive the benefit of all the equities and defenses in their favor against the note which existed or arose at any time, and they may plead such defenses and equities against the holder in the same manner and receiving the same benefits under them as if they were contesting the note in the hands of the drawee." Error is assigned upon this charge, and we think the assignment should be sustained. The charge is not in accordance with the law of Missouri as pleaded. The pleading alleged, as we have seen, the law of Missouri as to notes transferred as collateral to secure a pre-existing indebtedness, and did not allege the law of that State as to notes transferred as collateral without indorsement. Therefore the instruction is erroneous, unless the proposition be correct under the laws of Texas. The law of Missouri as to promissory notes transferred without indorsement having been pleaded upon neither side, it is presumed that it is the same as the law of Texas. Under our law, it matters not how a negotiable note has been assigned. Though the transfer be not evidenced by a writing, it is placed upon the same footing as a transfer by indorsement. Word v. Elwood, 90 Tex.

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130, 37 S. W. 414. If transferred without notice of any defenses, as against the transferror it is subject to none. It follows, as we think, that the instruction complained of is erroneous, and that it is fatal to the judgment and should result in its reversal, provided the note sued upon be negotiable by the law merchant. It is only negotiable notes to which the article of our Revised Statutes construed in Word v. Elwood, above cited, applies. See articles 304, 307, and 308, Rev. St. 1895.

The question, therefore, presents itself, is the note in question a negotiable promissory note? The Court of Civil Appeals held that it was not. In this ruling, however, we do not concur. The ground upon which it is claimed that the note is non-negotiable is that the time of its payment is uncertain. This claim is predicated upon the following provision in the note: "The makers and indorsers hereof hereby severally waive protest, demand and notice of protest, and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder." If, as is argued, the effect of the stipulation is to give the right to the maker without the consent of the holder, or to the holder without the consent of the maker, to appoint another day of payment and thereby extend the time, it may be that it would render the instrument not negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision, taken as a whole, was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to the extension of time was simply that, in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may at any time agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable "on or before" a certain date is negotiable. The maker of such a note has the right to pay before the day named, but the holder cannot demand payment before that day. So, in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that, if the holder has the absolute right to demand payment at a certain day, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that therefore it was a negotiable note.

From what has been said it would seem that, in order to defeat this suit, the defendant bank must show that the law of Missouri as to commercial paper is different from the law of Texas. In order to do so, it must plead the law of that State, and prove it as pleaded. Therefore what the precise issues may be upon another trial we cannot foresee.

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In addition to this, the plea in reconvention of J. W. Lambert goes out of the case. There was a verdict and judgment against him on his cross-action, and he has not appealed. For these reasons we do not deem it necessary to pass upon all the other assignments of error. The questions presented by many of them may not arise upon another trial. We will notice some of them briefly.

We think that the assignment that "the court erred in permitting the defendants' witness, J. L. Stratton, to testify that a check for the proceeds of the sale of the second note to the Third National Bank of Springfield was placed in the National Bank of Commerce" should have been sustained. The fact that Ladd, Penny & Swazey deposited the money arising from the second note with the plaintiff without letting them know whence it came, or that it was to be applied to the note in suit, was no defense to the action. On the other hand, we do not think it was error to permit the Kenneys to testify as to the circumstances which led them to execute the second note.

During the course of the trial the plaintiff's counsel asked the court to give a special instruction, which in part is as follows: "The plaintiff asks he court to charge the jury that certain evidence has been admitted as to the statements made by Kenney and others to the defendant, the Third National Bank of Springfield, as to the conditions under which they executed the second note and mortgage, and as to the agreement and understanding between the Kenneys and Ladd, Penny & Swazey. You are charged that this evidence was only admitted for the purpose of showing that the Third National Bank of Springfield obtained its note and mortgage without any notice of the note and mortgage held by the Bank of Commerce, and you are also instructed to consider said testimony for no other purpose." We think so much of the charge as has been quoted should have been given. We incline, however, to the opinion that the part of the request not quoted would have been misleading.

The Kenneys pleaded a discharge in bankruptcy, and it was admitted in open court that they were discharged. Therefore the judgment cannot be disturbed as to them. Lambert also pleaded a discharge in bankruptcy, but, if the statement of facts shows any proof or admission of such discharge, we have failed to find it.

Therefore, the judgment will be affirmed as to the Kenneys on their plea of discharge in bankruptcy, but, as to the defendants in error, Lambert and the Third National Bank of Springfield, it will be reversed and the cause will be remanded.

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Decision No. 813.

CUNNINGHAM v. McDONALD.

83 S. W. 372.

(Supreme Court of Texas. Dec. 5, 1904.)

PRINCIPAL AND AGENT — AGENTS FOR COLLECTION — AUTHORITY — GUARANTY — RIGHTS OF GUARANTOR — BILLS AND NOTES — NEGOTIABILITY.

1. An agent for the collection of interest on a note does not have implied authority to collect the principal.

2. A guaranty of payment of principal and interest on a note, given by the payee on indorsing the same, which stipulated that after a certain time the payee should have the right to take up the note by paying the principal thereof, and on denial of such right should be relieved from its guaranty, did not operate to reserve to the payee any control over the note itself.

3. An agent to collect a note when it becomes due has no authority to receive payment before maturity, and such a payment to him does not discharge the note.

4. A reservation, in a deed of trust securing a note, of a right to the payor to make payments thereon at certain times, does not destroy the negotiability of the instrument.

Error to Court of Civil Appeals, Third Supreme Judicial District.

Suit for injunction by Thula McDonald against D. H. Cunningham. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff (for opinions, see 80 S. W. 871, and 81 S. W. 52), and defendant brings error. Reversed.

F. W. Bartlett, for plaintiff in error. A. B. Rennolds and Gibson & Bryant, for defendant in error.

BROWN, J. The honorable Court of Civil Appeals failed to make such statement of this case as would enable this court to pass upon the question presented; therefore we must look to the statement of facts for the undisputed testimony, from which we make the following statement:

On the 1st day of November, 1898, J. E. McDonald and his wife, Thula McDonald, citizens of Limestone county, Tex., borrowed $725 from the Bunnell & Eno Investment Company, a corporation doing business in the city of Philadelphia, State of Pennsylvania, giving their note for the amount, payable at the office of the said company in the city of Philadelphia on the 1st day of December, 1905, bearing interest from the 1st day of December, 1898, at 6 per cent. until maturity of the note, and, if not then paid, thereafter to bear interest at the rate of 10 per cent. The interest accruing before maturity was payable on the 1st day of December of each year, and for the annual interest for each year a coupon was attached to the note, which, after maturity, bore 10 per cent. interest, and, in case it was put in the hands of an attorney, 10 per cent. attorney's fee. To secure the note a deed of trust was given by McDonald and his wife on the land described in the petition, with power of sale and the usual stipulations, which are unnecessary to be stated here. On the 21st of March, 1898, the Bunnel & Eno Investment Company transferred and delivered the note to D. H. Cunningham, who paid it therefore its face value and accrued interest. The Bunnell & Eno In-

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vestment Company indorsed the note as follows: "Pay to the order of David H. Cunningham without liability except under the accompanying guarantee. The Bunnell & Eno Investment Company, W. S. Eno, President" — and at the same time executed the following written transfer and guaranty:

"For value received the Bunnel & Eno Investment Company agrees as to the annexed note made by J. E. McDonald and Thula McDonald to said company or order for seven hundred twenty-five $^{00}/_{100}$ dollars, dated November 1st, 1898, payable December 1st, 1905, and secured by mortgage of even date therewith.

"First. That it will pay annual interest thereon at the rate of six per cent. per annum one day after the same becomes due in case of default in payment thereof by the maker.

"Second. That in the event of non-payment of the principal of said note when same becomes due and payable it will pay to the owner and holder thereof within two years after maturity seven hundred twenty-five $^{00}/_{100}$ dollars principal or such part of said sum as may remain unpaid on said note.

"Third. That it will make such payments of interest and principal at the office of William McGeorge, Jr., Bullit Bldg., Philadelphia, Pa.

"Provided, that if at any time the said Bunnell & Eno Investment Company shall tender to the legal holder of said note the sum of seven hundred and twenty-five dollars principal or such part of said sum as may be unpaid thereon with accrued interest, the said holder shall thereupon endorse without recourse and deliver said note together with the mortgage securing the same property assigned to the said Bunnell & Eno Investment Company, or if it shall elect not so to do then this agreement shall become and thenceforth be null and void. And provided also that any suit commenced by the holder to collect said note or to foreclose the mortgage securing the same before the expiration of two years from its maturity without the consent in writing of the Bunnell & Eno Investment Company shall render this agreement void. In Witness Whereof said Bunnell & Eno Investment Company has caused its corporate seal to be hereto affixed and this instrument to be signed by its president this 21st day of March, 1889. The Bunnell and Eno Investment Company, W. S. Eno, President."

McDonald paid the interest which fell due December, 1889 and 1900, to the Bunnell & Eno Investment Company, and received from it the coupons for the interest of each year. McDonald died, and his wife, having qualified as survivor of the community, paid the principal of the note on the 29th day of April, 1901, to the Bunnell & Eno Investment Company, but did not receive the original note, which was in the possession of Cunningham. When the Bunnell & Eno Investment Company transferred and delivered the note and the deed of trust, there was no written transfer of the deed of trust, and the coupons for the interest were attached to the note, which coupons and note were retained by Cunningham until the interest for each year was paid to him for the years 1899, 1900, and 1901 by the Bunnell & Eno Investment Company, when the coupons for the year for which payment was made was delivered to that company. No coupon was delivered until the money was paid thereon. The Bunnell & Eno Investment Company did not have authority from Cunningham to collect the principal of the note, except as the facts hereinbefore stated conferred that authority upon it. The interest being in default, the substitute trustee, at the request of the

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holder of the note, and under and in compliance with the trust deed, advertised the land for sale, when Mrs. McDonald instituted this suit to enjoin the sale, because the debt had been discharged, and a writ of injunction was granted which, upon final trial, was made perpetual. The court, by its charge, submitted to the jury the question, whether the Bunnell & Eno Investment Company had authority from Cunningham to collect the debt, which is assigned as ground of error in this court, because there was no evidence submitted to the jury upon which they could find that Cunningham had given authority to the Bunnell & Eno Investment Company to collect the principal of the debt.

To support the judgment in this case, the defendant in error relies upon (1) the fact that the Bunnell & Eno Investment Company received from McDonald payment of three instalments of interest and delivered the coupons therefor, and (2) upon the guaranty which the corporation gave to D. H. Cunningham at the time that it transferred the note. There is no evidence tending to prove that the Bunnel & Eno Investment Company collected the instalments of interest as the agent of Cunningham. On the contrary, the guaranty that the interest should be paid by the company one day after each instalment became due, and the undisputed testimony of David Cunningham that the interest was paid by the Bunnell & Eno Investment Company promptly as it fell due, indicates that the Bunnell & Eno Investment Company paid the coupons as they fell due, took possession of them as it had a right to do, and collected from the makers of the note — not for Cunningham, but for itself. If, however, it were admitted that the corporation, acting as the agent of Cunningham, collected the interest from McDonald, that fact would not tend to prove that it had the authority to collect the principal of the note. How can it be inferred from the agency to collect the interest that the agency to collect the note existed? The one fact does not form a basis for the presumption of the other fact. John Stewart & Co. v. Asher (Colo. App.), 62 Pac. 1051; Walsh v. Peterson (Neb.), 81 N. W. 853.

The terms of the guaranty relied upon as evidence of authority to collect the principal do not reserve to the Bunnell & Eno Investment Company any control over the note. It provides that after the lapse of a certain time the guarantor shall have the right to take up the note by paying the principal thereof, or, in case the holder of the note should refuse, then the guarantor should be relieved from the guaranty; but this does not in any way tend to prove that the Bunnell & Eno Investment Company retained an interest in or control over the note itself. The indorsement shows that the title to the note passed to the indorsee without limitation.

The controversy in this case is over the right of the corporation to collect the principal of the note, and does not involve the question of the collection of the interest coupons. At the time the payment was made the note was not due, and neither did the payor have any right at that time to make payment of any part or all of it under the terms of the deed of trust. If, therefore, it be admitted that the Bunnell & Eno Investment Company was the agent of Cunningham and had authority to collect the note when it should become due, the agent had no authority to receive the payment before maturity, and the note was not discharged. There is no testimony to support the finding by the jury that the Bunnell & Eno Investment Company had authority, at the time that Mrs. McDonald paid the principal of the debt, to collect it as the agent of D. H. Cunningham. It was error for the court to submit to the jury the question of authority in the Bunnell & Eno Investment Company to act

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for Cunningham, for which error the judgment must be reversed and the cause remanded.

The defendant in error presents a cross-assignment of error in which it is claimed that the trial court erred in not giving a charge to the jury to the effect that the note was non-negotiable. By the terms of the note the holder of it could demand payment only on the 1st day of December, 1905, unless by a failure to make payment of an instalment of interest the whole debt should be matured; hence, the time when the payee could demand payment was certain, and the reservation in the deed of trust of the right to the payor to make payments thereon at certain times did not destroy the negotiability of the instrument. Daniel on Negotiable Instruments, § 43; Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; Buchanan v. Wren (Tex. Civ. App.), 30 S. W. 1077; Gill v. First National Bank (Tex. Civ. App.), 47 S. W. 751; National Bank of Commerce v. Kenney (decided at the present term of this court), 83 S. W. 368. The first three cases cited involve the question whether a note payable "on or before" a certain date is negotiable, and in each case it was held to be negotiable. In Buchanan v. Wren, Judge Key wrote a very clear and carefully prepared opinion upon the question, citing the authorities, and supporting the proposition with sound reasoning, showing that such a note was not uncertain as to the date of its payment, although the payor of the note might have the privilege of discharging it at any time. In the case of Bank v. Kenney, Chief Justice Gaines used the following language: "It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable 'on or before' a certain date is negotiable. The maker of such a note has the right to pay before the day named, but the holder cannot demand payment before that day. So, in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand, payment is certain. It follows that, if the holder has the absolute right to demand payment at a certain day, the note is negotiable." If the right to pay the note in full at any day at the option of the maker does not destroy the negotiability of the instrument, certainly the privilege to pay it or a part of it on certain specified days could not have that effect. The trial court did not err in refusing to give the requested charge.

It is ordered that the judgments of the District Court and the Court of Civil Appeals be reversed, and that the cause be remanded to the District Court.

Decision No. 814.

AMERICAN AGRICULTURAL CHEMICAL CO. v. KENNEDY & CRAWFORD.

(Supreme Court of Appeals of Virginia. Nov. 23, 1904.)

48 S. E. 868.

CONTRACTS — MUTUALITY OF ENGAGEMENT.

1. A contract by which plaintiff agrees to sell fertilizer, and defendants agree to buy, having no other consideration than their mutual promises, and providing that plaintiff may cancel it at any time, is void, for lack of mutuality of engagement, so that defendants may refuse to purchase, though plaintiff manufactures the fertilizer, and puts it in sacks marked for them, and makes tender thereof.

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Appeal from Circuit Court, Augusta county.

Action by the American Agricultural Chemical Company against Kennedy & Crawford. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

J. R. Fishburne and Jos. A. Glasgow, for appellant. A. C. Braxton, for appellee.

BUCHANAN, J. The American Agricultural Chemical Company instituted its action of assumpsit against J. A. Kennedy and W. A. Crawford, partners doing business under the firm name of Kennedy & Crawford, to recover damages for the alleged breach of an agreement not under seal.

The plaintiff's cause of action, as set forth in the third count of the declaration — the only count relied on — is as follows:

"The American Agricultural Chemical Company, a corporation, complains of J. A. Kennedy and W. A. Crawford, partners, doing business and trading under the firm name and style of Kennedy & Crawford, of a plea of trespass on the case in assumpsit, for this, to wit:

"3d Count. That heretofore, to wit, on the 14th day of March, 1902, in consideration that the plaintiff, at the request of the defendants, would sell and furnish to the said defendants, certain fertilizer, at and for a reasonable compensation, hereinafter set out, defendants undertook, and then and there promised and contracted in writing with the said plaintiff, in the words and figures following, to wit:

"'March 14, 1902.

"'To Messrs. Kennedy & Crawford, Staunton, Augusta county, Va.: We hereby agree to ship you under the conditions and stipulations hereinafter named, and subject to the approval of the Home Office, the following fertilizers at prices and terms named below.

"'The terms and conditions of this contract are as follows, and the prices named below are net to us in 200-lb. bags.

No. of Tons.	Brands.	Prices per 2,000 lbs.
400 to 600	Your brands 2-10-5	$20.85
	" 2-8-5	19.85
	" 2-8-2	17.60
	" 1-8-1	14.60
	" 1-8-2	15.30
	" 10-2	12.65
	" 14	11.65
	" 2½-12	21.00

"'Goods to be delivered by us free on board cars or steamer at Staunton, Va., in car-load lots, and you are to pay freight on all shipments.

"'All goods ordered by you under this contract shall be settled for in full on July 1, 1902, in cash for spring, and December 1, 1902, for fall.

"'For cash payments made prior to July 1, 1902, interest will be allowed at the rate of seven (7) per cent. per annum from dates of payments to July 1, 1902.

"'All settlements are to be sent to us in full at the date named, and protest, demand for payment, and notice of non-payment of any notes that may have been indorsed by you and transferred to us, are hereby waived, and you also waive all homestead and other exemptions as to any obligations growing out of this contract.

"'It is also agreed that you will hold in trust and separate, for the settlement of

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our account, all of said goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received for goods sold.

"'This contract is subject to suspension in case of fire, accident to our works, or other causes.

"'We have the right to ship said goods, or any part thereof, from any factory.

"'We reserve the right to cancel this contract at any time we may deem proper, but in the event of such cancellation the provisions of this contract shall govern the closing of all business begun thereunder.

"'This contract, written and printed, constitutes the entire agreement, and no verbal understanding will be recognized.

"'Executed in triplicate.

"'The American Agricultural Chemical Company,

"'WM. W. BAKER.

"'We hereby agree to take whatever fertilizers we may require for spring season 1902, not less than, as stated, tons with the privilege of taking more, if mutually agreeable, under above terms and conditions.

"'Name — KENNEDY & CRAWFORD.'

"The said plaintiff further avers that although it, confiding in the said promises and undertakings and contract of the said defendants as above set out, did procure and manufacture the brands of fertilizer as above set out in said contract, and did manufacture and procure and have stamped the sacks or bags to contain said fertilizer, and were and continued ready and prepared to furnish said fertilizer, as above set out, on the terms aforesaid, and were ready and willing so to do to the said defendants during the said spring of 1902, and the said fall of 1902, and during all that time tendered and offered to furnish the said defendants said brands of fertilizer as set out, upon the terms aforesaid, of all of which the defendants during all that time had notice, yet the said defendants failed to designate or order the brands of fertilizer, which were to amount to at least four hundred tons, according to their said promises, but, on the contrary, refused and continued to refuse during the whole spring and the whole fall of 1902, to accept or order said fertilizer according to their promises, without any reasonable cause therefor whatever; the plaintiff in that behalf having performed in every particular the terms and conditions in manner and form and at the time agreed upon in said contract, and was always ready and willing so to do, and the defendants wholly refused and neglected from the time of the making of said promises up to the present time to perform or carry out the said promises, and the said defendants, not regarding their said promises and undertakings, conniving and intending to injure the said plaintiff in this behalf, did not, nor would then or at any other time, designate the brands of fertilizer they desired, not to be less than four hundred tons, nor would accept said fertilizer of the said plaintiff, or pay for it, the said plaintiff, the said prices therefor, or any part thereof, but so to do the said defendants have hitherto wholly neglected and refused, and do still neglect and refuse, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of great gains and profits which it might and otherwise would have derived from the manufacture and sale of said fertilizer, and has been damaged and injured, in that it had prepared, procured, and manufactured bags or sacks stamped for the said defendants, which became worthless to said plaintiff, and wherefore the said plaintiff says that he has sustained damage by reason of the said

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several breaches of the several promises and undertakings in the said several counts in this declaration above set out, to the amount of $1,500."

The defendants demurred to the declaration on several grounds, one of which was that the contract sued on was without consideration, and was therefore nudum pactum. This contention is based upon that clause of the written agreement which provides that "we (the plaintiffs) reserve the right to cancel this contract at any time we may deem proper, but in the event of such cancellation, the provisions of this contract shall govern the closing of all business begun thereunder."

The general rule of law is — and this seems to be conceded by the plaintiff company — that, where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound, or neither is bound. 1 Parsons on Contracts (7th Ed.), 448-452; Clark on Contracts, 165-171; Southern Ry. Co. v. Willcox, etc., 98 Va. 222, 35 S. E. 355.

The plaintiff insists that the averments of its declaration take this case out of the general rule, upon the ground that, while the contract sued on may have lacked mutuality of obligation in its inception, yet that the plaintiff had performed and executed the contract on its part by manufacturing the fertilizer, putting it in sacks, and tendering it to the defendants, and that such performance cured any lack of mutuality in the contract in its inception, and rendered it absolutely binding. Although the contract did not bind the plaintiff to furnish the fertilizer which the defendants agreed to purchase, yet, if the defendants had actually received it, they would have been bound to pay for it; and this would be so even if the agreement in question had never been entered into. But the defendants did not receive it. The offer of the plaintiff to deliver the fertilizer which it had never bound itself to sell could not make the defendants liable in damages for refusing to receive what they, in legal contemplation, had never agreed to purchase. The defendants never having had the right to compel the plaintiff to deliver the fertilizer, the plaintiff could not by its own act make it the duty of the defendants to receive it, nor impose any liability upon them.

The promise of the defendants to purchase from the plaintiff was not a continuing offer, which, when accepted, was mutually binding upon both parties, as was the case in most of the decisions cited and relied on by the plaintiff. In those cases, while one party was not bound when the proposition of the other was made, he afterwards, before the proposition was withdrawn, either did, or bound himself to do, the thing which was the condition of the other's promise.

In discussing this class of cases, Mr. Parsons, in his work on Contracts, p. 450, after stating the general rule that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement, says: "This has been doubted, from the seeming want of mutuality, in many cases of contract — as where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings, or the like. Here it is said the party making the promise is bound, while the other party is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does or begins

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to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore, no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound, also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing in a way that binds him to complete it, here, also, is mutuality of obligation. But if without any promise, while the promisee does the thing required, then the promisor is bound upon another ground. The thing done is itself a sufficient and a completed consideration, and the original promise to do something if the other party would do something is a continuing promise until the party does the thing required of him.

"A very large proportion of our most common contracts rest upon this principle. Thus in a contract of sale the proposed buyer says, 'I will give so much for these goods,' and he may withdraw his offer before it is accepted, and, if his withdrawal reaches the seller before the seller has accepted, the obligation of the buyer is extinguished; but if not withdrawn it remains a continuing offer for a reasonable time, and, if accepted within this time, both parties are bound, as by a promise for a promise. There is entire mutuality of obligation. The buyer may tender the price and demand the goods, and the seller may tender the goods and demand the price." See, also, Clark on Contracts, to the same effect, pp. 168-171.

In this case the plaintiff made a proposition to sell, which the defendants accepted, but the plaintiff's offer left it optional with it whether or not it would sell. It did not bind itself to sell. The defendants made no continuing offer to purchase. Their engagement was to purchase upon the terms and conditions stated in the plaintiff's proposition to sell. As that proposition did not bind the plaintiff to sell, there was no consideration for the defendant's promise to purchase, and, as we have seen, neither party was bound at that time. The plaintiff after that time never did any act or made any promise which bound it to complete the contract. There never was a time when the defendants had the right to tender the price and demand the fertilizer. In the absence of such obligation on the part of the plaintiff, and of such right on the part of the defendants, there never was a binding engagement between the parties which a court of law would enforce.

The language of the justice delivering the opinion of the court in the case of Storm v. U. S., 94 U. S. 76, 24 L. Ed. 42, does sustain the plaintiff's contention; but the contract involved in that case was under seal, and imported a consideration. The question involved here was therefore not involved in that case, and the language used was wholly unnecessary to its decision, and was therefore obiter. That dictum has never been cited or followed by the court which decided the case, so far as we can find, and is not in accord with the great weight of authority.

We are of opinion that the demurrer to the declaration upon the ground discussed was properly sustained by the Circuit Court, and that its judgment must be affirmed.

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Decision No. 815.

ROLLINS ENGINE CO. v. EASTERN FORGE CO.

59 Atl. 382.

(Supreme Court of New Hampshire. Hillsborough. Nov. 1, 1904.)

CONTRACT TO MANUFACTURE — CONSTRUCTION — MEASURE OF LIABILITY — LATENT DEFECTS — IMPLIED WARRANTY — PAROL EVIDENCE — MEASURE OF DAMAGES — INSTRUCTIONS.

1. A warranty not expressed or implied in the terms used in a contract in writing cannot be added to by implication of law or parol proof.

2. Where, pursuant to an order therefor, a forge company agreed to procure the necessary steel, and forge the same into a specified shape with the required finish, to be used by an engine company for a piston rod for some engine to be sold by the latter, the measure of the former's liability on the contract was ordinary care in selecting the material and forging the same pursuant to the specifications, and it was not liable on an implied warranty for defects in the rod, either in respect to the steel or as to its make or manufacture, if they were not discoverable by such care.

3. In an action for breach of contract to manufacture a safe and proper piston rod for an engine, there was no error in informing the jury that plaintiffs refused to permit a test to be made of the steel which they claimed was defective.

4. In an action for breach of contract to manufacture a proper piston rod for an engine, an instruction that the measure of damages was the difference between the value of the piston rod as it was before it was broken and afterwards was properly refused, since the rod, if actually defective, would seem to have been equally valuable after as it was before the defect was discovered.

Transferred from Superior Court; Wallace, Judge.

Assumpsit by the Rollins Engine Company against the Eastern Forge Company for the breach of an implied contract to manufacture, upon the plaintiffs' order, a safe and proper piston rod for an engine. Trial by jury, and verdict for the plaintiffs. Verdict for plaintiffs set aside, and new trial granted.

The plaintiffs are engaged in manufacturing engines at Nashua, and the defendants in making forgings at the same place. In July, 1902, the defendants received from the plaintiffs a written order for "one steel piston rod as per enclosed blue print, 21 x 42." The blue print contained a drawing of the desired rod with the dimensions of its various parts, and the words "rough turn to figures." The figures "21 x 42" in the order mean that the cylinder for which the rod was intended was 21 inches in diameter with a 42-inch stroke. The defendants manufactured the rod under the order, and delivered it to the plaintiffs, who finished it by turning off one-eighth of an inch of material and by polishing the surface, and used it in the construction of an engine which they were under contract to furnish to one of their customers. After the engine had been in use about a week, it was damaged by the breaking of the rod. The plaintiffs claimed that the rod broke because it was made of poor material. The defendants claimed that the break was due to other causes, and their evidence tended to show that the rod was manufactured by

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them from a steel billet purchased from a reputable dealer, and in which there was no defect discoverable by ordinary care.

Subject to the defendants' exception, the court refused to give the jury the following instructions: "(1) If you find for the plaintiffs, the measure of damages will be the difference between the value of the piston rod as it was before it was broken and afterwards. (2) The defendants did not impliedly warrant the material of which the piston rod was made, which was bought of another manufacturer, to be free from all defects, but only to be free from defects of which the defendants must have been informed if due care had been used, and against which reasonable diligence might have guarded. (3) The defendants did not impliedly warrant the piston rod to be free from all defects arising from the process of manufacture, but only to be free from defects of which the defendants must have been informed if due care had been used, and against which reasonable diligence might have guarded."

Subject to the defendants' exception, the jury were instructed as follows: "In the case of executory contracts — that is, contracts which are to be performed in the future — for the manufacture of articles for a special use, the law implies a contract that the articles to be manufactured shall be reasonably fit and proper for the use for which they are ordered and designed. There was under this contract an implied warranty upon the part of the defendants that the piston rod, which they manufactured upon the plaintiffs' order, should, when finished, be reasonably fit and proper for the purposes for which the defendants knew it was designed — that is, to be used as a piston rod to an engine. Such warranty extends to the defects in the piston rod, both in respect to the material of which it was made and as to its make or manufacture, which rendered it unfit for the purposes for which it was designed."

The question of the suitability of the piston rod for the purposes for which it was designed was submitted to the jury. In the course of the trial, the defendants having offered evidence tending to show that the quality of steel could be shown by a chemical test, their counsel, in the presence of the jury, asked the court to order that a piece of the broken rod be cut off and given to them for the purpose of a chemical analysis. The court denied the request as matter of discretion, and the defendants excepted.

In his closing argument the plaintiffs' counsel said: "There is no testimony in the world so biased as the testimony of an expert. I am tired of this kind of testimony from experts, who are just as much parties to this defendants' case as the attorneys who stand here. . . . You know that you can get as many experts on one side as on the other, if you go to work and try." To these remarks defendants excepted.

George B. French, for plaintiffs. John Herbert and Burnham, Brown, Jones & Warren, for defendants.

PARSONS, C. J. The theory of the plaintiffs, upon which the case was tried and submitted to the jury, cannot be sustained. The contract was in writing. A warranty not expressed or implied from the terms used cannot be added to by implication of law or parol proof. Whitmore v. Iron Co., 2 Allen, 52, 58; Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392. The written order which was the basis of the contract was for a steel piston rod of specified dimensions. The plaintiffs were engaged in the manufacture and sale of steam engines at Nashua, and the defendants in the making of forgings, at the same

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place. It is not suggested that the defendants were manufacturers of steel, or that the plaintiffs understood them to be. Read in the light of the surrounding circumstances, the order means that the defendants should secure by purchase the necessary steel, and forge the same into the specified shape with the required finish, to be used by the plaintiffs for a piston rod in some steam engine to be sold by them. The contract was not for a piston rod for the plaintiffs' engine. It is distinguishable from the contract in Randall v. Newson, 2 Q. B. Div. 102, which was for a pole for the plaintiff's carriage, and from that in Brown v. Edgington, 2 M. & G. 279, which was for a rope for the plaintiff's crane. The plaintiffs did not rely upon the defendants to furnish a suitable piston rod for any particular engine, or for a steam engine generally. They prescribed the material and dimensions of the forgings desired; and the fact that, when finished by the plaintiffs and made a part of an engine, the rod proved unsuitable, does not establish the defendants' liability. For any defect due to the kind of material or dimensions prescribed, the plaintiffs, and not the defendants, would be responsible. Nashua Iron & Steel Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456. In these respects the plaintiffs relied upon their own judgment, and not upon the defendants'. Jones v. Just, L. R., 3 Q. B. 197, 202, 203.

"If an article or fabric in the particular line of his profession or business is ordered of, or contracted for with, a manufacturer, for a special and designated purpose, and the parties agree that it shall be constructed of a certain kind of materials, but the selection of the particular articles to be used, and the way and manner of using and adapting them to the fabric, in the completion of the work, are left to the choice and judgment of the latter, without any special stipulations relative thereto, he will not in that case be liable for any loss or damage which may result from the imperfection of, or natural defects in, that kind of material; but he will be held to have impliedly warranted that he possesses the knowledge and skill requisite to use them properly and in the most advantageous manner, and that, in answering the order or in fulfilling his contract, he will use all reasonable care and skill in the selection and use of them; and if, through his failure in either of these respects, the article or fabric furnished is unsuitable or insufficient for the purpose for which it was supplied, he will be responsible in damages therefor." Cunningham v. Hall 4 Allen, 268, 274, 275.

The obligation, implied "from natural reason and the just construction of law" (3 Bl. Com. 162), of one who undertakes to perform service for another, is due care. He contracts to exercise the diligence and skill of the average man of the ability which he professes in like work. If he exercises such care, he is not liable, in the absence of express contract, merely because the expected result is not obtained. Leighton v. Sargent, 27 N. H. 469, 59 Am. Dec. 388; Spead v. Tomlinson, 73 N. H. ——, 59 Atl. 376. If the plaintiffs had taken to the defendants a steel billet, to be forged by them into a particular shape for a piston rod, the defendants' contract would have been to exercise the care and skill of average persons engaged in like work. Similarly, if the plaintiffs had employed the defendants to select for them a billet of steel suitable for such forging, the defendants would not be understood to warrant the correctness of their judgment merely because they undertook the commission. For failure to detect a defect which could not be found by ordinary care in the exercise of the skill they had or professed to have, they would not be liable. The fact that the plaintiffs by one order em-

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ployed the defendants to select the steel and forge it into a specified shape for a certain use does not make the measure of their liability different from what it would have been under the separate contracts suggested. The defendants' evidence that the defect in the steel was undiscoverable by ordinary care tends to establish the possibility of an undiscoverable, inherent defect in the material of which the plaintiffs stipulated the rod should be forged. Having relied upon their own judgment as to the material to be used in the manufacture, or desiring an article necessarily made of such material, they cannot hold the defendants responsible for a defect which the skill and care which the defendants professed to possess, and which they were bound to exercise, could not discover. Ordinary care is such care as persons of average prudence exercise under like circumstances. Nashua Iron & Steel Co. v. Railroad, 62 N. H. 159, 161. The defendants knew the forging was to be used for a piston rod for a steam engine. Merely purchasing the steel from a reputable manufacturer may not be due care in the selection of the material for such a purpose. It may be, and the evidence which the defendants offered indicates, that there are tests which can be applied to determine the character of steel. Whether the defendants did all that due care required was for the jury, and the question should have been submitted to them, as requested by the defendants.

"Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined, and described thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer." Gregg v. Company, 69 N. H. 247, 249, 46 Atl. 26. The forging furnished by the defendants complied with the requirements of the order. It was of steel of the prescribed dimensions, and finished as required. It was not entirely clear that the case is not within the application of the rule made by Judge Carpenter, in the case cited. The principle for which the plaintiffs contend is stated by Judge Bell in Deeming v. Foster, 42 N. H. 165, 173, 174, as follows: "In the case of executory contracts for the making or furnishing goods or articles for a special use, the law implies a contract that the articles to be made or furnished shall be reasonably fit and proper for the use for which they are ordered." It has already been suggested that the case is not within this rule.

But the law has other foundation than a collection of rules applicable to the decision of causes with the rigidity of statutes. It is obvious that a rule which settles one controversy, because consonant with reason and justice as applied to existing facts, may not so apply in another case in which different facts appear. Instead of attempting to merely cover the case before the court with one rule or the other, the proper inquiry is for the underlying reason which must be the basis of all rules. It has been seen that, in interpreting the contract as the employment of the defendants to perform certain services, the measure of the defendants' liability is due care. Such was considered to be the measure of the manufacturer's liability in Gregg v. Company, 69 N. H. 247, 46 Atl. 26. If the same rule measures the defendants' liability under the situation contended for by the plaintiffs — the supply of an article for a particular purpose — the correct classification of the facts reported, as within the terms of either rule, is practically unimportant. The instructions given, with those asked and refused, raise the question of the responsibility of the manufacturer of an article ordered purchased for a known use.

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It has been several times remarked that the confounding of conditions precedent with implied warranties has resulted in great conflict in the decisions. Wilson v. Lawrence, 139 Mass. 318, 321, 322, 1 N. E. 278; Wisconsin Brick Co. v. Hood, 60 Minn. 401, 404, 62 N. W. 550, 51 Am St. Rep. 539; Chanter v. Hopkins, 4 M. & W. 399. A pregnant cause of apparent conflict is the failure to recognize that the real question in each case was as to the contract between the parties. Where there is doubt of the intent of the parties, as disclosed by competent evidence of their purpose, the reasonableness of one conclusion or the other — the probability that men would intelligently enter into this or that engagement — is evidence competent for considerations upon the question what the contract was. Sanders v. Insurance Co., 72 N. H. 485, 497, 498, 57 Atl. 655; Kendall v. Green, 67 N. H. 557, 563, 42 Atl. 178. Tested by this rule, most of the decisions will be found to have reached the right result, although the reasons advanced may seem to be in conflict.

The delivery of the manufactured article from the manufacturer to the customer involves a transfer of title to the thing itself. Looking at the transaction merely as a sale, it has been held that, when an article manufactured or supplied for a particular purpose is delivered, the contract of sale includes, as an implied term or warranty of the contract, the stipulation that the article is reasonably fit and proper for that use. Deming v. Foster, 42 N. H. 165. Under this line of reasoning, it was held in Randall v. Newson, 2 Q. B. Div. 102, 109, that in such contracts "the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must therefore determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description; that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description; that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in the words of the contract, or which would be so contained if the contract were accurately drawn out." It is impossible to criticise the soundness of this reasoning, but the conclusion drawn from these premises does not necessarily follow. The court continue: "And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity does not in fact answer the description of it in the contract, it does do so more or less because the defect in it is patent, or latent, or discoverable." The difficulty with this conclusion is that it assumes that the description of the article in the contract necessarily means a perfect article, or one in fact reasonably so. But it appears from the language or circumstances that, by the terms used, the parties meant an article as reasonably fit and proper as due care could make it, the suggested limitation would not make the article different from what the parties intended. If the article be such that due care in the selection of materials and the process of manufacture will certainly produce a reasonably suitable article, it is

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immaterial whether we regard the engagement of the manufacturer to be to produce a reasonably suitable article, or to exercise due care in its production, for the terms are then synonymous. They were so understood in Jones v. Bright, 5 Bing. 533, by Brett, C. J., whose dictum in that case seems to be the foundation of the rule. The following language used by him has been often quoted (page 542): "If a man sells an article, he thereby warrants that it is merchantable — that it is fit for some purpose. . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose. . . . Reference has been made to cases on warranties of horses; but there is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials a merchant can guard against defects in manufactured articles, as he who manufactures copper may by due care prevent the introduction of too much oxygen; and this distinction explains the case of Bluett v. Osborne (1 Stark. 384), in which Lord Ellenborough held that the defendant, who had sold a bowsprit, was not responsible for a failure arising out of a latent defect in the timber." This language is very far from a suggestion that a manufacturer can reasonably be understood to impliedly warrant against a defect not preventable or discoverable by due care; for the only ground on which it is suggested that such implication is contained in the contract is that the defect understood to be warranted against is discoverable by due care.

In Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290, the question arose upon an exception to an instruction that "any hidden, accidental defect will not impose a liability on the manufacturer to respond in damages." Whether the hidden or accidental defect could have been avoided by due care was not the question raised. A majority of the court conclude the defendants' contract to have been "to procure such materials and apply such workmanship as would furnish the plaintiffs' steam boilers (the subject of the contract) free from all such defects, latent or otherwise, as would render them unfit for the ordinary uses contemplated by the contract," while the minority approve the conclusion reached in Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163, that "the vendor is liable in such cases for any latent defect not disclosed to the purchaser, arising from the manner in which the article was manufactured; or, if he knowingly uses improper materials, he is liable for that also, but not for any latent defect in the material which he is not shown, and cannot be presumed, to have known." Bragg v. Morrill, 49 Vt. 45, 24 Am. Rep. 102, and McKinnon Mfg. Co. v. Company, 102 Mich. 221, 60 N. W. 472, follow the rule as laid down in Hoe v. Sanborn. In Carleton v. Lombard, 149 N. Y. 137, 153, 43 N. E. 422, a case of the sale of refined petroleum, it is said that the obligation of the seller of a manufactured article was to deliver an article "that was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement or in the selection of the raw material, by reasonable care and skill." See Wisconsin Brick Co. v. Hood, 60 Minn. 401, 404, 62 N. W. 550, 51 Am. St. Rep. 539; Id., 67 Minn. 329, 335, 69 N. W. 1091, 64 Am. St. Rep. 418.

The great weight of authority rests the rule that the manufacturer impliedly warrants or agrees to deliver an article made for a special purpose free from latent defects, upon the presumed superior knowledge of the manufacturer and the purchaser's reliance upon the knowledge and skill of the maker. Jones v. Just, L. R. 3 Q. B. 197, 202, 203;

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Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86. Whether the presumption is justifiable in a particular case is a question of fact. Whether any other reasonable inference can be drawn from the facts in evidence is the question of law. The knowledge of both parties upon the subject-matter, the possibility (considering the nature of the material to be used and of the process of manufacture) that due care may or may not fail to produce a reasonably suitable article, or to discover the defect until the article is in use, are circumstances for consideration upon the question of what the contract was. If castings cannot be made without blowholes, it would be unreasonable to infer, in the absence of express language, that a manufacturer of castings contracted to make a casting without any defects of that character, although his contract may properly be that there should be no more defects of that nature than are consistent with due care in the manufacturing process. Tenn. R. R. v. Leeds, 97 Tenn. 574, 576, 578, 37 S. W. 389. In the present case it might be found, from the evidence reported, that the plaintiffs, from their business, were acquainted with the characteristics of the material to be used, and that they knew it might contain defects which would render the manufactured article unfit, which could not be ascertained by due care. Where both parties have knowledge of the subject of the contract, and that it may possess latent defects which cannot be prevented by due care in the selection of materials or in the process of manufacture, it would be unreasonable to infer, in the absence of express language to that effect, that the seller intended to warrant what he could not know to be true, or that the purchaser, in reliance upon the skill and judgment of the manufacturer, which he knows may be insufficient for the purpose, expected to receive a perfect article. It is more probable in such cases that the parties contracted with reference to such an article as would be produced by the skill and judgment which the manufacturer was known, or professed, to possess. In such case the measure of the manufacturer's liability is due care. In whatever light the transaction is examined, this is the measure of the defendants' liability under the contract in this case.

No reason appears from the case why the plaintiffs should have been unwilling to permit a test to be made of the steel which they claimed was defective. The power of the court to order such tests to be made is a question not raised or considered. There was certainly no error in informing the jury that the plaintiffs refused to permit such examination. The exceptions to the instructions given and refused upon the main question are sustained.

There was no error in the refusal to give the instructions requested upon the question of damages. The rod, if actually defective, would seem to have been equally valuable after as it was before the defect was discovered. If the request was intended to limit the damages to the value of a sound rod less the value of the broken metal, that proposition would not constitute a correct statement of the rule. Hutt v. Hickey, 67 N. H. 411, 417, 29 Atl. 456; Noyes v. Blodgett, 58 N. H. 502. It is unnecessary to consider whether the instructions given were entirely correct under the rule of liability adopted at the trial.

The only exception remaining, which has been relied upon, is that to the remarks of counsel in argument. These appear, at least, to be dangerously near the line, but the result already reached renders useless a consideration of the question whether the verdict could be sustained if this were the only error alleged.

Verdict set aside. New trial granted. All concurred.

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Decision No. 816.

THORPE v. MINDEMAN et al.

101 N. W. 417.

(Supreme Court of Wisconsin. Nov. 15, 1904.)

NOTES — NEGOTIABILITY — NOTES SECURED BY A MORTGAGE — CONSTRUING NOTE AND MORTGAGE TOGETHER — INCORPORATION OF COLLATERAL AGREEMENT — FIXED TIME FOR PAYMENT — STATUTES — INDORSEMENT WITHOUT RECOURSE — RECEIVERS — ORDER OF APPOINTMENT — BONA FIDE PURCHASER — EVIDENCE.

1. Agreements in a mortgage that the mortgagor should pay taxes, and exhibit the receipts, and maintain insurance on the buildings for the mortgagee's benefit, and that the mortgagee might insure in case of default, and have a lien on the premises added to the note for the premiums paid, not being intended to qualify the absolute promises of the mortgage note, do not change the note or affect its negotiability.

2. An agreement that premiums paid for insurance by the mortgagee on the mortgagor's default should constitute a lien "added" to the mortgage note did not mean that the note was to be increased by the amount paid, so as to destroy its negotiability but simply meant that a lien should be acquired in addition to the lien of the note.

3. Laws 1899, p. 682, ch. 356, provides in section 1675(1) that negotiable paper must contain an unconditional promise to pay a sum certain on demand or at a fixed or determinable future time. Section 1675(2), p. 684, provides that the sum is certain though it is to be paid "by stated instalments, with a provision that on default in payment of any instalment or of interest the whole shall become due," and section 1675(4), p. 686, provides that an instrument is payable at a determinable future time when it is payable "at a fixed period after date or sight, though payable before then on a contingency." Held, that a mortgage note for a specified sum, and payable at a certain future date, was negotiable, though it provided that on default in interest or failure to comply with any of the conditions of the mortgage then the whole amount of the principal should, at the option of the mortgagee, become due and payable.

4. By the express provisions of Laws of 1899, p. 701, ch. 356, § 1676–8, the addition of the words "without recourse" to an indorsement of a note does not impair the negotiable character of the instrument.

5. A note was indorsed, "For value received I hereby sell, transfer and assign the within note and the coupons thereto attached without recourse." Held, that it was a commercial indorsement, and not a mere assignment, and the transferee did not take it subject to all equities.

6. In an action on a note plaintiff testified that she purchased the note and mortgage securing the same from the payee and mortgagee, telling him she had some money to invest, and that she took his judgment in the matter. Held not to show that plaintiff made the payee her agent, so as to charge her with his knowledge.

7. In a suit to foreclose a receiver was appointed, with power to collect rents, and the mortgagor appealed from the order in so far as it applied to the lower flat of the building, because it was in the possession of a tenant who had paid the rent in advance to defendant for more than the period of redemption, defendant claiming that the receiver could collect nothing from the tenant. Held, that the

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appeal was without merit, since the tenant could protect his rights irrespective of the order, and the inclusion of such flat could not affect defendant, who had received the rents.

Appeal from Circuit Court, Milwaukee county; Orren T. Williams, Judge.

Action by Josephine Thorpe against George Mindeman and others. From a judgment in favor of plaintiff, defendants Mindeman appealed. Affirmed.

This is an action to foreclose a note and mortgage given by the defendants, Mindeman and wife, to one Henry Herman, the defense being an entire want of consideration. The note was a promissory note for $6,500, dated December 11, 1900, payable three years after date, with interest at 5 per cent. per annum, semiannually, and contained the following provisions inserted before the signature: 'The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall at the option of the mortgagee, or his representatives or assigns (notice of such option being hereby expressly waived), become due and payable without any notice whatever." The mortgage accompanying the note contained the following provisions: "Provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the party of the second part, his heirs, executors, administrators or assigns, the just and full sum of sixty-five hundred ($6,500) dollars three years after date with interest at 5 per cent. per annum, interest payable semi-anually according to the conditions of one promissory note and coupons bearing even date herewith, executed by the said George Mindeman, one of the parties of the first part, to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said premises and shall deliver or exhibit receipts therefor to said party of the second part, his heirs, executors, administrators or assigns, on or before the first day of May next after such taxes shall have become due and payable, and shall insure and keep insured the buildings thereon or to be hereafter erected against loss or damage by fire in the sum of eight thousand dollars or over, in insurance companies to be approved by the said party of the second part, his heirs, executors, administrators or assigns, such insurance to be payable in case of loss to the said party of the second part, his heirs, executors, administrators or assigns, as his mortgage interest may appear, and the policy or policies of insurance to be held by him, and in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, and the premiums and other legal expenses and charges paid for effecting the same, together with interest thereon at the rate of 10 per cent. per annum, shall be a lien upon the said mortgaged premises added to the amount of the said note, and secured by these presents until the payment of said note, then these presents shall be null and void. But in case of the non-payment of any sum of money (either principal, interest or taxes) at the time when the same shall become due, or of failure to insure said building agreeably to the conditions of these presents, or in case of failure to deliver or

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exhibit such receipt as above provided, or in case of failure on the part of said parties of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in each case or all such cases, the whole amount of the said principal sum shall, at the option of the said party of the second part, his heirs, executors, administrators or assigns, which may be exercised at any time after any default, without any notice whatever to the mortgagors or either of them, their heirs, executors, administrators or assigns, service or giving of such notice in any manner being hereby expressly waived, be deemed to have become due, and the same with interest thereon at the rate aforesaid shall thereupon be collectible in a suit at law or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid." It appeared from the testimony of the defendant, Mindeman, which was taken under objection, that the note and mortgage was given to cover advances to be made to him by Herman, but that none were ever in fact made. September 11, 1902, Herman sold the note and mortgage to the plaintiff, who was an innocent purchaser thereof, and made the following indorsement upon the note: "For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive (previous interest coupons having been paid and surrendered), to Josephine Thorpe, without recourse." Findings and judgment of foreclosure were made and signed, and the Mindemans appeal from the judgment as well as from a subsequent order appointing a receiver.

Charles J. Weaver, for appellants. T. L. Kennan, for respondent.

WINSLOW, J. (after stating the facts). The important question in this case is whether the note in suit is negotiable. The appellants argue that the note and mortgage must be construed together as one contract; that, so construed, the note requires the performance of other acts besides the payment of money, and is rendered uncertain both as to amount and time of payment, and hence is non-negotiable. The general rule that agreements contemporaneously executed and pertaining to the same subject-matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage, is the question to be considered in this case. The collateral agreements contained in the mortgage, which the appellants claim are imported into the note and destroy its negotiability, are: First, the agreement that, in case of failure by the mortgagor to insure the buildings in the mortgagee's favor in approved insurance companies, the mortgagee may insure the same, and the premiums paid shall be a lien on the premises "added to" the amount of the note; and, second, the agreement that in case of failure to so insure, or to pay interest or taxes when due, or to deliver or exhibit tax receipts showing the payment of the taxes, then the whole principal shall become due at the mortgagee's option, and without notice. It will be observed that the only one of these agreements which the note contains in terms is the agreement that the principal shall become due without notice, at the option of the mortgagee, upon failure to pay interest or comply with any of the other conditions of the mortgage; but the argument is, in effect, that all of the collateral agreements in the mortgage have become a part of the note by virtue of the legal principle just stated. This is a decidedly

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revolutionary proposition. If it be true, both the business world and the courts have been sadly in error for many year. This court held at an early day that a note negotiable on its face retained its negotiable character notwithstanding it was secured by a mortgage upon real estate, and, when transferred before due, carried the mortgage with it relieved of all equities (Croft v. Bunster, 9 Wis. 503); and that the words "secured by real estate mortgage" upon the face of the note were not sufficient to charge the assignee with notice of any defense, nor of the terms of the mortgage (Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904). If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions could not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character. Upon the principle contended for, the most simple real estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well-understood principles of law governing the negotiability of notes and mortgages. The appellants' contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject-matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself — a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like. While the two instruments will be construed together wherever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to

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pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

This idea is quite well expressed in the case of Garnet v. Myers (Neb.), 94 N. W. 803, where it is said: "If the terms and conditions of the mortgage are limited to the proper province of the mortgage — that is, to provide security for the indebtedness — its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterwards allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself." It may be added to this that provisions to that effect in the mortgage do not affect at all the absolute character of the promise to pay contained in the note, and hence do not affect its negotiability. A very interesting and instructive discussion of this question will be found in the opinion in the case of Frost v. Fisher (Colo. App.) 58 Pac. 872, where the same conclusion is reached.

The propositions so far laid down seem incontrovertible if the principle is to be maintained that a note negotiable in form remains negotiable notwithstanding it is secured by an ordinary real estate mortgage. As might be expected, we are referred to no authorities which really take issue with that principle, or squarely hold that the agreements of every mortgage are imported into the accompanying note. The nearest approach to such a holding, perhaps, is the case of Noell v. Gaines, 68 Mo. 649, where a provision in a deed of trust as to the time of payment of the debt was held to control the terms of the note in the hands of a purchaser with notice. A very vigorous and persuasive dissenting opinion was filed in this case, which forms instructive reading on this very question; but, in any event, the case does not reach the proposition that agreements in a mortgage, simply relating to the preservation of the security, are ever to be considered as imported into the note. Starting from the fundamental proposition that the ordinary negotiable note, accompanied by the ordinary real estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, both being a part of the same transaction, but each relating to its own subject-matter and not interfering with the other, just as a building contract and a bond to secure its performance are separate and distinct, let us consider in what respect, if any, the note and mortgage in this case differ from the ordinary note and mortgage.

As will be seen by reference to the papers themselves, the mortgage contains conditions requiring the payment of taxes on the premises by the mortgagor; the exhibition of the receipts therefor to the mortgagee; the maintenance of insurance on the buildings in approved companies, with the right to the mortgagee to insure in case of failure of the mortgagor, the expense to be a lien on the premises "added to the amount" of the note; also a provision that in case of failure to pay interest, taxes, or insurance, or to exhibit the tax receipts, the principal sum shall, at the option of the mortgage, become due without notice. Turning to the note, we find that it provides that, if default is made in payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage, then the principal shall become due, at the option of the mortgagee, without notice. It will be noticed at once that none of

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the collateral agreements of the mortgage are in terms imported into the note except the agreement that the principal shall become due, at the mortgagee's option, in case of failure to perform any of the agreements of the mortgage. It will be noticed also that the other collateral agreements contained in the mortgage are simply agreements providing for the due preservation of the mortgage security, and not affecting in any way either the time of payment or the amount of the note. These agreements are the agreement to pay taxes and exhibit the receipts, the agreement to effect and maintain insurance on the buildings for the mortgagee's benefit, and the agreement that the mortgagee may insure in case of default, and have a lien on the premises "added" to the note for the premiums paid. There was, indeed, a claim made that the agreement that the premiums paid should constitute a lien added to the note meant that the note was to be increased by the amount paid, so that the amount of the note was thereby rendered uncertain; but we think it plain that the clause simply provides for acquiring of a lien upon the premises in addition to the lien of the note. This meaning seems so obvious to us that we will spend no more time upon the suggestion.

These last-named collateral agreements, then, being simply proper agreements for the preservation of the security, and not intended nor fitted to qualify or affect in any way the absolute promises of the note, do not, upon the principles hereinbefore laid down, enter into or change the note in the least, nor affect its negotiability. Such being the case, we have only to consider the question whether the agreement that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage renders the note non-negotiable. Upon this question appellant places reliance upon the cases of Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409, and Kimball v. Mellon, 80 Wis. 133, 48 N. W. 1100. In the first of these cases, an agreement inserted in the note, providing that the payee might sell collateral securities at any time if they declined in value, and apply the proceeds, less expense of sale, on the debt, and the balance should forthwith become due, was held to make the note uncertain as to amount and time of payment, and hence non-negotiable. In the Kimball Case, an agreement that, in case of failure to pay any instalment, or of any attempt to dispose of or remove the chattel for which the note was given, the holder might declare the whole amount due, and collect same by suit or sale of the property, and, if there was a deficiency after sale, it should be payable on demand, was held to make both amount and time of payment uncertain, and hence make the note non-negotiable. It must be admitted that both of these cases have a strong tendency to support the position of the appellant upon the proposition that the time of payment is rendered uncertain by the agreement before us. Especially is this true of the Kimball Case. In that case the uncertainty as to time resulted from the fact that, in case the giver of the note failed to pay an instalment, or attempted to dispose of or remove the property sold, the holder might at once collect the whole. In the present case the agreement is that in case of failure to pay interest or keep taxes and insurance paid the holder may at once collect the whole. In both cases the contingency depends upon the acts or omissions of the maker of the note.

We should find it quite hard, if not impossible, to differentiate the two cases were it not for the provisions of the negotiable instruments law (chapter 356, p. 681, Laws of 1899), which was passed since the decisions cited, and prior to the giving of the note in question. This law

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gives the general requirements of negotiable paper in section 1675(1), p. 682, among which are the following: "(1) It must be in writing signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time." The law then provides, in section 1675(2), p. 684, that the sum is certain within the meaning of the law though it is to be paid "(3) by stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due." The law further provides, in section 1675(4), p. 686, that an instrument is payable at a determinable future time, within the meaning of the law, which is payable "(4) at a fixed period after date or sight, though payable before then on a contingency." These two provisions seem to cover this whole case, and leave really nothing to discuss. This note is payable at a fixed period after date, but may be made payable before that time upon the happening of certain contingencies which are within control of the maker. The latter clause quoted would seem to have been added to meet just such cases as the present. Such agreements as we have here are of very frequenty occurrence, and it was evidently the purpose to provide for them.

The case of Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678, is also somewhat relied on by appellant, but it evidently has no bearing on the case. In that case it was held that a clause in a note authorizing the confession of judgment at any time, whether due or not, rendered the note non-negotiable, because the time of payment depended entirely on the whim or caprice of the maker. As an additional reason for the ruling, the fact that the negotiable instruments law allows the insertion of a clause authorizing a confession of judgment if not paid at maturity was also referred to.

While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and carefully consider the numerous cases cited by the appellants, mostly from western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas Court of Appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be "a part of this contract," and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any such agreements, this renders the bond or note non-negotiable. Such are the cases of Lockrow v. Cline, 46 Pac. 720; Chapman v. Steiner, 48 Pac. 607, and Wistrand v. Parker, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies.

Another line of cases, from Nebraska, hold that, where a mortgage provides that the mortgagor shall pay the taxes levied on the mortgagee

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for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain. Garnett v. Meyers, 94 N. W. 803; Consterdine v. Moore, 96 N. W. 1021; Allen v. Dunn, 99 N. W. 680. Such seems also to be the effect of the case of Brooke v. Struthers (Mich), 68 N. W. 272. Without stopping to consider whether these decisions should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note.

In the cases of Donaldson v. Grant (Utah), 49 Pac. 779, and Gilbert v. Nelson (Kan. App.), 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced non-negotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our negotiable instruments law before cited.

The cases of Dilley v. Van Wie, 6 Wis. 209, and Elmore v. Hoffman, Id. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the Dilley Case the note contained an express clause subjecting it to the provisions of another agreement, made on the same day, by which it appeared that the payment was subject to certain equities beween the parties. This clause was rightly held to deprive the paper of its negotiable character. In the Elmore Case it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency, was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present negotiable instruments law the note in the present case is negotiable, and in so holding it is evident that the cases of Bank v. McGeoch, supra, and Kimball v. Mellon, supra, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment.

The next contention made by the appellants is that the written transfer of the note was not a commercial indorsement, but a mere assignment, and hence that the transferee took it subject to all equities. We think this contention cannot be sustained. The addition of the words "without recourse" does not impair the negotiable character of the instrument. Laws of 1899, p. 701, ch. 356, §§ 1676-8. While there is doubtless some authority tending to support appellants' claim, we think that there can be no doubt that the transfer in the present case must be held to be a commercial indorsement under the decisions of this court in the cases of Crosby v. Rout, 16 Wis. 616, 84 Am. Dec. 720; Bange v. Flint, 25 Wis. 544; Murphy v. Dunning, 30 Wis. 296. In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby "assigned and transferred" to the holder of the bond as security for the payment of the bond, there being no indorsement on the note itself; and this was held an indorsement within the law merchant. Here there is an agreement on the back of the note itself, signed by the payee, by which he sells, assigns, and transfers the note by indorsement and delivery afterwards seems very plain. Such, also, to the plaintiff. The intent to pass title and make the note transferrable

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seems to be the current of authority. 1 Daniel, Neg. Inst. (5th Ed.) § 688c.

But it is argued that the evidence shows that the plaintiff made Herman her agent in buying the note and mortgage, and that Herman's knowledge was consequently her knowledge. There is really nothing in the evidence which substantiates this claim. The plaintiff was the only witness on the subject, and she testified that she purchased the mortgage of Herman herself, and paid the full principal sum therefor; that she went to his office for the purpose of buying mortgages, and told him she had some money to invest, and purchased this mortgage of him; that she looked at a number, and he read over several he had for sale; that he said they were first mortgages, and she took his word for what they were, and trusted his judgment. There is nothing to show that Herman was at any time plaintiff's agent, or had her money to invest, or that the transaction was anything but a purchase by the plaintiff and a sale by Herman. True, she says that she presumed Herman was acting for her, and that she took his judgment in the matter, but these statements are clearly merely the expression of the idea that she was relying on his statements that the mortgages were first mortgages, and desirable securities to purchase.

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Decision No. 817.

VOGT v. SHIENEBECK.

100 N. W. 820.

(Supreme Court of Wisconsin. Sept. 27, 1904.)

CONTRACT — CONSTRUCTION — JUDICIAL NOTICE — PAROL EVIDENCE — ACTION FOR BREACH — DAMAGES.

1. One who undertakes to accomplish a certain result, by implication agrees to supply all the means necessary thereto.

2. Courts take judicial notice that, where one agrees to sell to another property "f. o. b. cars" at the place of shipment, such erm means that the seller, will, without expense or act of the buyer, deliver to the latter the subject of the sale on cars at such place.

3. The term "f. o. b. cars" in mercantile contracts means free on board cars, and so plainly as not to admit of explanation or change by reference to extrinsic evidence or circumstances. It prima facie means, also, when used as regards the seller, that he will procure the cars for use in executing the contract, and such ordinary meaning cannot be changed without clear and satisfactory evidence of a custom to the contrary, known to both parties to the transaction at the making of the contract.

4. When a contract has been reduced to writing, evidence of what occurred between the parties in respect thereto at the time thereof or prior thereto is inadmissible.

5. The rule that where a written contract is made as a mere part execution of an entire verbal contract, that portion not embodied in the paper may be shown by

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parol, applies only where such portion is in itself a distinct, complete contract, not to mere stipulations in regard to and varying the terms of the written contract.

6. In an action to recover damages for the breach of an executory contract to sell and deliver goods, the general rule is that the difference between the market value thereof at the time and place of delivery, and the contract price, with interest from the time of the breach, is the true measure

7. The basis of such rule is that the buyer at the time of the breach presumably could have supplied himself with the goods at the time and place agreed upon for the delivery; and where such is not the case the rule does not apply, but the matter is goverened by the broad principle that recoverable damages in such circumstances are "such as may fairly and reasonably be considered as either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

8. When the general rule of damages does not apply as above stated, and there was a market value for such property at the time agreed upon for the delivery, at the point to which the property was to be consigned, the difference between the contract price and such value, less any expense which the buyer, if the contract had been performed, would have been put to in delivering the goods at such place, with interest on the residue at the legal rate, from the date of the breach, is the proper measure of damages.

(Syllabus by the Judge.)

Appeal from Circuit Court, Ashland county; John K. Parish, Judge.

Action by Paul Vogt against Joe Shienebeck. Judgment for defendant, and plaintiff appeals. Reversed.

Action to recover damages for breach of contract for the sale of lumber. The complaint was to the effect that defendant contracted to sell plaintiff 100,000 feet of one-inch pine lumber then owned by the former and piled at Stadler's mill, near the village of Butternut, Wis., at $8 per thousand feet for the culls, and $15 per thousand feet for common or better, delivery to be made to the plaintiff free on board cars at Butternut upon demand by him within two months from November 15, 1902, and the customary inspection fees to be paid one-half by each party; that defendant breached such contract by refusing to deliver the lumber when the same was duly demanded, or at all, to the plaintiff's damage in the sum of $1,500.

The defendant, for answer to the complaint, denied all the allegations thereof, and alleged the making of a contract substantially as stated in the complaint, except that it was agreed, as part of such contract, that the cars for use in delivering the lumber to the plaintiff were to be furnished by him, the lumber to be delivered upon his demand within two months after November 15, 1902; that he would furnish the inspector to examine, grade and measure the lumber, the expenses to be paid equally by the parties; and that plaintiff did not within the time specified, or before the commencement of the action, demand the lumber or furnish cars for use in delivering the same, or furnish or offer to furnish the inspector; that on the contrary he at all times neglected to make any demand for the lumber, and refused to accept the same.

The evidence showed that the contract was in writing and as follows:

"Received of Paul Vogt, of Milwaukee, Wis., Five (5) Dollars on account of sale to him by me, made this 15th day of November, 1902, of 100,000 feet more or

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less of pine one-inch lumber at Eight Dollars per 1,000 feet cull, & Fifteen Dollars per 1,000 feet common or better, now at Stadler's Mill, f. o. b. cars Butternut, Wis., to be delivered upon demand within two months from above date. Inspection fees paid by both of us.

"Dated at Butternut, Wis., Novbr. 15th, 1902. Josef Schienebeck."

Evidence was allowed, against objections by plaintiff's counsel, in effect that at the time such contract was made plaintiff verbally agreed to furnish the cars for use in delivering the lumber; also as to what the custom was between buyer and seller in regard to such matters. The court instructed the jury, in substance, that the burden of proof was on plaintiff to establish by a fair preponderance of the evidence that defendant agreed to furnish the cars, and that if the jury were satisfied that he did so agree, defendant was entitled to recover; otherwise plaintiff was so entitled, and to the extent of the difference between the contract price for the lumber and the value at the time and place the same should have been delivered as agreed, if there were lumber, purchasable, of the quality and quantity contracted for at such time and place; otherwise the difference between such contract price and the value at such time at Milwaukee, less half the reasonable fees for the services of an inspector and what it would have cost to transport the lumber from the agreed delivery point to Milwaukee. The court required the jury to find whether "f. o. b." as used in the contract meant free on board cars, instructing them that if such were the case it was defendant's duty to furnish the cars unless there was an agreement to the contrary. The court further instructed the jury that plaintiff, in order to recover, must prove by a fair preponderance of the evidence that the words "f. o. b. cars," as used, mean that the defendant would furnish the cars for the shipment of the lumber.

At the close of the evidence defendant's counsel moved the court for a verdict, which was refused. The verdict was in favor of the defendant, and judgment was entered thereon, from which this appeal was taken, questions being duly saved for review discussed in the opinion.

Bohmrich & Williams, for appellant. Salter & Holland, for respondent.

MARSHALL, J. (after stating the facts). The motion for a verdict in appellant's favor was based on the assumption that from the contract or evidence, or both, it conclusively appeared that it was respondent's duty to furnish the cars. The trial court's view, as indicated in the statement, was that prima facie the contract requiring respondent to deliver the logs f. o. b. cars at the point where the transit by rail was to commence, burdened appellant with the duty of furnishing the cars. So the jury were instructed: "The plaintiff must prove by a fair preponderance of evidence that the words 'f. o. b. cars' as used in this case mean that the defendant is required to furnish the cars for the shipment of the lumber in question." That is consistent only with this broad proposition being correct: As between buyer and seller of property to be conveyed by a common carrier, the seller having agreed to deliver the subject of sale to the buyer "f. o. b. cars" at the place where the transit is to begin, the implication of law or of fact is that the latter is to furnish the cars in place ready for loading. Doubtless the learned Circuit Court was guided by Boyington v. Sweeney, 77 Wis. 55, 45 N. W. 938, where, as regards a contract, the same in effect as the one

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before us, requiring the seller of logs to deliver the same on board cars for shipment, though the set phrase " f. o. b. cars " was not used, it was said:

" The duty of the defendant in regard to the delivery of the logs under contract ended when they were placed on the cars. By the terms of the contract the plaintiffs were to receive them on the cars, and then the absolute title passed to them. The defendant was in no way bound to pay for the use of the cars on which they were to be loaded, or to pay for their transportation after they were placed on the cars. The plain inference to be derived from the contract is that the plaintiffs were to furnish the cars to receive and transport the logs to their destination."

No authority is cited to the proposition. Reference in the opinion to the attitude of counsel in respect to the matter and the printed arguments, indicate that the point was not contested in such a manner as to stimulate a very careful consideration of a doubtful question. The proposition seems contrary to universal understanding, and ought to be deemed a matter of judicial cognizance without the aid of evidence or adjudged cases. We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him f. o. b. cars at the point of starting, such other, as a matter of course, is expected to obtain from the railway company the necessary cars upon which to load the subject of the deal. Yet the doctrine of the Boyington Case (77 Wis. 55), is not wholly without support. Kunkle v. Mitchell, 56 Pa. 100; Dwight v. Eckert, 117 Pa. 508, 12 Atl. 32; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836. However, this court, in the recent case of John O'Brien L. Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337, expressly repudiated such doctrine, holding that a seller, in the circumstances stated, impliedly agrees to obtain the cars and not hold the buyer to any obligation till the goods are loaded thereon. So far as Boyington v. Sweeney is to the contrary it was, in effect, though not in express terms, there overruled. This language was used by Mr. Justice Dodge, speaking for the court:

" The general rule is that one who undertakes to accomplish a certain result, by necessary implication agrees to supply all the means necessary to such result. . . . Under this general rule it would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work. Both are alike in the open market, as much at the command of one as another, and the obtaining of each is equally essential to the accomplishment of the result.

" For the reasons stated, we cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on appellants the duty of obtaining the cars upon which they had agreed to load the logs."

That is supported by authorities generally holding that a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage in transitu. Neimeyer L. Co. v. Burlington R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Congdon v. Kendall, 53 Neb. 282, 73 N. W. 659; Capehart v. Furnam F. I. Co., 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; Sheffield F. Co. v. Hull

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C. & C. Co., 101 Ala. 446, 14 South. 672; Knapp Electrical Works v. New York I. W. Co., 157 Ill. 456, 42 N. E. 147; Silberman v. Clark, 96 N. Y. 522; Ex parte Rosevear China Clay Co., 11 Ch. Div. 560; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Benjamin on Sales (6th Ed.) 682; Mechem on Sales, vol. 1, § 741, note; Elliot on Railroads, § 1425. All of such authorities declare that a sale " f. o. b. cars " so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier that the term is not open to construction. Some hold that evidence is admissible to show that the letters " f. o. b." as used in mercantile contracts stand for the words " free on board;" but, generally speaking, it is held that the courts will take judicial notice that such is the meaning, and that the import of the words is too plain to call for or permit judicial construction. It may be that such meaning would only prima facie include procurement by the seller of the carrier of cars, in place, ready for loading and that a general custom, so well established as to become a part of the contract, might vary such prima facie meaning. But the burden would necessarily be upon the seller to establish such custom. It follows that the instruction under consideration is erroneous, and that, so far as such error led to the decision against appellant on the motion for a verdict, such decision is erroneous.

There was evidence on the part of the defendant to the effect that at the time of the verbal agreement preceding the making of the written contract, plaintiff said he would furnish the cars. The learned trial court denied the motion for judgment, assuming that such evidence raised a question for the jury. That is plain, because he expressly referred to such evidence in submitting the cause as to whether the plaintiff did or did not agree to furnish the cars. In that it seems the rule, that a written contract cannot be varied by parol evidence of what was said between the parties prior to or at the time of the making of the writing, was overlooked. The final result of all negotiation eventuating in the making of a contract which is reduced to writing, in the absence of relievable fraud or mistake, is conclusively presumed to be embodied therein, unless the writing appears clearly to be merely a part execution of an entire verbal contract, which is not the case in the instance before us. Here was the ordinary occurrence of closing contractual negotiations by reducing the consequent verbal agreement to writing. If, in doing so, anything was left out, the party prejudiced is without remedy upon the contract except to appeal to equity for its reformation and the enforcement thereof as corrected. John O'Brien L. Co. v. Wilkinson, supra; Braun v. Wisconsin R. Co., 92 Wis. 245, 66 N. W. 196; Herbst et al. v. Lowe, 65 Wis. 316, 26 N. W. 751. In Braun v. Wisconsin R. Co. it was said that the exception mentioned, to the exclusion of evidence of what was said or occurred at the time of making a written contract, is never to be so extended as to permit evidence of mere contemporaneous stipulations or conditions, the writing being the agreement reached and not a mere part performance or incident of it. It follows that the oral testimony as to what plaintiff said respecting who was to furnish the cars, when the contract was made, cannot be regarded as a justification for denying appellant's motion for a verdict.

Whether, in denying the motion, the learned Circuit Court was in doubt as to whether the term " f. o. b. cars " was ambiguous in that it might or might not mean that the seller was to place the lumber on cars and procure them to be put in place for that purpose, and that such doubt in-

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volved a question of fact, is not altogether certain. This language was used in the charge:

"The evidence that 'f. o. b.' means free on board cars is not disputed. In deciding this case you must take into consideration the written contract, . . . and you will observe the letters "f. o. b.' are used therein, and if you find 'f. o. b.' mean free on board cars, it was the duty of the defendant to furnish the cars."

There being no question, as we have seen, but that the meaning of "f. o. b." as used in the contract is free on board cars, the court erroneously denied the motion for a verdict upon the theory that it was permissible for the jury to find some other meaning.

It does not seem to have occurred to the learned Circuit Court that "free on board cars" might not so conclusively indicate that the seller was to provide cars in place for him to load the lumber as to preclude evidence of a binding custom to the contrary. Witnesses were erroneously permitted to testify as to the meaning of "f. o. b." when, as we have seen, it is so plain that it was not permissible to explain it by custom or otherwise. The meaning of language used in a contract can only be shown by custom when it is ambiguous. Such evidence is permissible to interpret or explain or aid in that regard, not to contradict or add something not within the reasonable meaning of the language of the contract. Greenl. Ev. 294, 295. In Sheffield F. Co. v. Hull C. & C. Co., 101 Ala. 446, 481, 14 South. 672, and the other case to which we have referred, it is held correctly, as we believe, that the meaning of "f. o. b." and "free on board," as customarily used in mercantile contracts, is so obvious as not to be open to interpretation. Whether such meaning includes, under the circumstances of this case, the duty of the seller to procure the cars in place for his use in loading the merchandise, and that evidence is not permissible to show the existence of a custom which the parties contracted with reference thereto, is not altogether plain, but we are constrained to hold that it is. In any event, the inference from the use of such term could only be changed by clear proof of the existence of a custom, and that the buyer knew thereof at the time of contracting, or that it had existed so long that, presumably, he knew thereof. Hall v. Storrs, 7 Wis. 253. There was no such clear evidence here. There was no definite evidence at all in the matter.

The court correctly instructed the jury that plaintiff duly demanded of the defendant shipment of the lumber under the contract. That, in connection with what has heretofore been said, shows there was nothing to submit to the jury as to whether defendant was guilty of an actionable breach of the contract as alleged in the complaint. Therefore the court erred in refusing to take all the questions from the jury except such as related to the damages appellant was entitled to recover.

Complaint is made because the court permitted evidence to go to the jury as to the market value, at the agreed time and place for the delivery, of such lumber as that in question, though there was no evidence that there was a like quantity of such lumber then and there, or in that vicinity, which could have been purchased. A careful examination of the record satisfies us that error was committed in this respect. Respondent's counsel refers to places where it is said evidence can be found supporting his contention, but we are unable to find it. It is not in the record. On the contrary, the evidence referred to establishes the contention of appellant. The statement is made that lumber like that in question could have been obtained in most any lumber yard in the vicinity

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of Butternut or along the Central Railroad, referring to the evidence of Mr. Altman, who testified, however, in effect, that no such quantity of lumber of the agreed quality was so obtainable. A like quantity of lumber of better quality could have been so obtained, but none of consequence of the same quality. As the evidence stood when the case was submitted to the jury, it seems that the rule in Cockburn v. Ashland L. Co., 54 Wis. 619, 12 N. W. 49, governed, as claimed by appellant's counsel. The general rule, as there stated, is:

"In actions to recover damages for the breach of an executory contract to sell and deliver goods, the difference between the market price of the goods at the time and place specified in the contract for delivering the same and the contract price, is the measure of damages. The basis of this rule is, that on failure of the vendor to deliver, the purchaser may go into the market at the time and place of delivery, and supply himself with the same kind of goods at the market price. Hence, the difference between what he is compelled to pay for the goods, and what they would have cost him had the vendor performed his contract, justly measures the damages which he has sustained by the breach of the contract. But this rule presupposes that the purchasers may go into the market at the agreed time and place of delivery and obtain the goods."

But it is said that, where the basis for the rule does not exist, then some other rule must be applied that will, so far as practicable, satisfy the broad principle that recoverable damages for breach of contract are "such as may fairly and reasonably be considered as either arising naturally, i. e., according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Respondent knew at the time the contract in question was made that the subject thereof was to be shipped to appellant at Milwaukee, Wis. He must have apprehended that if he failed to make the delivery according to agreement, and appellant could not supply himself with the same amount and quality of lumber at or in the vicinity of the delivery point, he would probably suffer damages to the extent of the difference between the market value of such lumber at Milwaukee at the agreed time for delivery, and the contract price, less what it would have cost appellant for inspection fees and freight had the contract been performed, with interest on the principal sum of damages at the legal rate from the time of the breach to the date of the recovery. That is the rule of damages contended for by appellant's counsel, and is approved.

Some other questions are presented by appellant's counsel, but they are all covered incidentally by the conclusions heretofore reached, or are rendered thereby immaterial, and therefore specific reference thereto and a discussion thereof becomes unnecessary and will be omitted.

The judgment is reversed and the caused remanded for a new trial.

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Decision No. 818.

UNAKA NAT. BANK v. BUTLER.

83 S. W. 655.

(Supreme Court of Tennessee. Dec. 19, 1904.)

BILLS AND NOTES — LOST BANK CHECK — INDORSEMENT — BONA FIDE PURCHASER.

1. Where the payee of a bank check indorses it in blank and it is lost, he cannot recover of the bank for paying it to a bona fide purchaser, though he had notified the bank of its loss.

2. Negotiable Instrument Law, § 56 (Acts 1899, p. 150, ch. 94), provides that, to constitute notice of an infirmity in an instrument, or defect of the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge thereof, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Held, that where a check was drawn on November 24th, and was indorsed in blank and lost, a merchant who accepted it some time before December 1st from a customer who was unknown to him, but supposed to be the payee, without further indorsement or inquiry of identity, was a bona fide holder, and entitled to payment.

Appeal from Circuit Court, Washington county; C. J. St. John, Judge.

Action by Henry Butler, for the use of Thomas Davis, against the Unaka National Bank. Judgment for plaintiff, and defendant appeals. Reversed.

Kirkpatrick, Williams & Bowman, for appellant. J. B. Cox, for appellee.

SHIELDS, J. This action involves the title of a bona fide purchaser of a bank check payable to a particular payee or order, and indorsed in blank by the payee, as against that of the rightful owner, who lost it; and the construction of certain sections of the negotiable instrument law (chapter 94, p. 139, Acts 1899).

W. B. Harris, a manufacturer, of Johnson City, Tenn., a regular depositor in the Unaka National Bank, of that city, plaintiff in error, drew his check upon that bank November 24, 1903, in favor of Henry Butler or order, for $16.25, and delivered it to him. Henry Butler indorsed it in blank and delivered it for value to Thomas Davis, who next day lost it, presumably upon the public highway. On the second day, Thomas Davis gave notice to Harris, the drawer, of his loss; and both he and Harris then notified the bank, and directed it not to pay the check if presented for that purpose. The check was accepted by Ward & Fryberg, merchants in Johnson City, between November 24 and December 1, 1903, for goods sold, from a customer who was unknown to them, but supposed at the time to be the payee, without further indorsement, or inquiry of the identity of the holder or the nature of his title. They indorsed and presented it to the bank, and it was paid and charged to the account of the drawer, W. B. Harris. This action is brought by Henry Butler, for the use of Thomas Davis, against the plaintiff in error, to recover the proceeds of the check. The circuit judge tried the case without the

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intervention of a jury, and gave judgment in favor of the plaintiff below, and the bank brings the case here for review and assigns error.

The theory upon which this suit is brought is that the bank having been notified of the loss of the check by the former rightful owner and the drawer, and directed not to honor it, the subsequent payment was unauthorized, and a wrongful interference with the property of the defendant in error, for which it must answer, and, further, that Ward & Fryberg were not bona fide holders, and acquired no title to the check, because the suspicious circumstances attending its negotiation, and their negligence in failing to require identification of their customer, fixed them with constructive notice of the infirmity in his title.

1. The defendant in error, in support of his first contention, cites and relies upon the case of Chism v. Bank, 96 Tenn. 644, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863, in which it is said: "And it is equally true that, where a banker pays a draft or check drawn upon him, he, at his peril, pays it to any one but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill under apparent title does not necessarily imply the right to demand or receive payment, and, when it is paid to such holder, the drawee has put upon him the risk of seeing that the apparent is the real title to the paper. For the banker holds the funds of his depositor under an obligation to pay them to him or to his order, and, if he pays them otherwise, he cannot treat such a payment as a discharge of his liability."

And that of Pickle v. Muse, 88 Tenn. 381, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900, in which it is held that "a check drawn in favor of a particular payee or order is payable only to the actual payee, or upon his genuine indorsement; and, if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible."

The law undoubtedly is as held in these cases, that a check payable to a particular payee or order cannot lawfully be paid to any other than the payee, or upon his genuine indorsement, and the bank must judge of the identity of the payee and the genuineness of his indorsement at its peril.

But these principles have no application to the case presented by this record. There was no mistake made in the identity of the payee, and the indorsement is genuine. The check, while payable to the payee or order, was indorsed by the payee in blank before it was lost, and was purchased by Ward & Fryberg in due course of business, for value, and without notice of any defect in the title of the holder from whom they received it. They acquired a perfect title, and payment to them by the bank was authorized.

A check drawn as this one is a negotiable instrument, and, when indorsed in blank, is payable to bearer, and passes by delivery as freely and absolutely as a bank note, and a bona fide purchaser in due course of business acquires a good title. Negotiable Instrument Law, Acts 1899, ch. 94, § 9 (5), and sections 57 and 185; Chism v. Bank, 96 Tenn. 644, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Farmer v. Bank, 100 Tenn. 188, 47 S. W. 234; Gardner v. Bank, 1 Swan, 425; Neely v. Morris, 2 Head, 595, 75 Am. Dec. 753; King v. Fleece, 7 Heisk. 277; Bearden v. Moses, 7 Lea, 459; Smith v. Mosby, 9 Heisk. 501; Lookout Bank v. Aull, 93 Tenn. 647, 27 S. W. 1014, 42 Am. St. Rep. 934; Daniel on Negotiable Instruments, § 693; Morse on Banks and Banking, § 393.

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The title of Ward & Fryberg was not affected by the fact that the check had been lost by Davis, and found by their customer, further than that, when this was made to appear, the burden was on the bank to show that they received it in due course of trade, for value and without notice; and, having successfully done this, the title of Davis was destroyed.

Mr. Daniels, in his work on Negotiable Instrument, § 1469, says: "Although the robber or finder of a negotiable instrument can acquire no title against the legal owner, still, if it be indorsed in blank, or payable or indorsed to bearer, a third party acquiring it from the robber or finder, bona fide, for a valuable consideration, and before (but not so, if after) maturity, without notice of the loss, may retain it, as against the true owner, upon whom the loss falls, and enforce payment by any party liable thereon, upon the principle that, whenever one of two innocent persons must suffer by the act of a third, he who has enabled such a third person to occasion the loss must sustain it."

See, also, Jordan v. Jordan, 10 Lea. 134, 43 Am. Rep. 294; Caulkins v. Gaslight Co., 85 Tenn. 693, 4 S. W. 287, 4 Am. St. Rep. 786; Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546; Merritt v. Duncan, 7 Heisk. 156, 19 Am. Rep. 612; Hunt v. Sandford, 6 Yerg. 387; Van Wyck v. Norvell, 2 Humph. 195; Ryland v. Brown, 2 Head, 273; Memphis Bethel v. Bank, 101 Tenn. 131, 45 S. W. 1072; Cyc. of Law & Procedure, vol. 8, 57; Rand. on Commercial Paper, § 1683.

2. The contention of the defendant in error that Ward & Fryberg are not bona fide purchasers, because, while they had no actual knowledge that the check had been lost and was being fraudulently negotiated, the circumstances attending their purchase were calculated to excite suspicion and put an ordinarily prudent man upon inquiry which would have led to knowledge of the defect in the title of the holder, and this and their negligence in failing to require identification of their customer, charged them with constructive or implied notice of all the facts that inquiry would have developed, is also unsound and untenable, both in law and upon the facts disclosed in this record. The doctrine of constructive notice here insisted upon, contrary to the rule administered in the courts of nearly all the States, and those of the United States and England, did obtain for many years in this State, and this court uniformly held that if a purchaser of negotiable paper had implied notice of prior equities or infirmities of any nature in the title of the holder from whom he purchased — that is, if anything appeared upon the face of the paper, or from the facts and circumstances attending its possession or sale, which would put one of ordinary prudence upon inquiry that would lead to actual knowledge of the equities or infirmities, he was bound to pursue such inquiries, and was charged with notice of the facts he could have learned. Merritt v. Duncan, 54 Tenn. 164, 19 Am. Rep. 612; Hunt v. Sandford, 6 Yerg. 387; Van Wyck v. Norvell, 2 Humph. 195; Ryland v. Brown, 2 Head, 273.

The original rule governing the transfer of commercial paper as first held in the courts of England and this country, protected the purchaser for value, in due course of trade, unless he had actual knowledge of the defects in the title of the holder, or of facts which convicted him of bad faith in the transaction.

This was held to be the law until in 1824, when Lord Chief Justice Abbott (Lord Tenderden), in the case of Gill v. Cubitt, 3 Barn. & Cress. 446, anounced the principle that, although the holder had paid value for the instrument, yet, if he received it under circumstances which ought

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to have excited the suspicions of a prudent and careful man, he could not recover; and this case was followed by the courts of that country, and some of those of America, but not without serious question, until 1834, when a return was had to the original rule by the courts of England and the Supreme Court of the United States and a large number of the States, and since then it has been almost uniformly held in these jurisdictions that in the absence of actual knowledge of defects in the title of the holder, the only question was one of good faith in the transaction, and negligence and want of diligence in ascertaining the previous history of the instrument were only circumstances to be considered in determining that question. Daniels on Negotiable Instruments, §§ 770–775.

This court, however, continued to adhere to the doctrine announced in Gill v. Cubitt, supra, and applied the rule of constructive or implied notice, until April, 1899, when it was abrogated, and what may be called the majority rule was adopted, by the enactment of the Negotiable Instrument Law, § 56, of which is in these words: "To constitute notice of an infirmity in an instrument, or defect of the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

This statute — the Negotiable Instrument Law — is a substantial reproduction of that enacted in the State of New York in 1896, and which has since been enacted in a majority of the States for the obvious purpose of securing uniformity in the law of commercial paper in all the States. Section 56 of our statute (Acts 1899, p. 150, ch. 94), above set out, embodies the majority rule upon the subject of notice as it has been held and administered by the courts of New York and other States and the federal courts for many years. This section has not been construed by this court, and what facts will constitute bad faith in the purchase of comercial paper has not been declared, but the question has frequently been before the courts in which the majority rule had obtained previous to the enactment of the statute in those jurisdictions; and the decisions of those courts in furtherance of the legislative policy to promote uniformity in the law of commercial paper are entitled to great weight with this court in interpreting the meaning of our statute. These courts all seem to hold that the purchaser of a negotiable instrument owes no dut to the former holders to actively inquire into the title of the party in possession, and that circumstances of suspicion and gross negligence are not of themselves bad faith, but only evidence tending to establish it. The rule is as stated in the leading case of Cheever v. Pittsburgh, S. & L. E. R. Co., 150 N. Y. 65, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, in these words: "There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avoid the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he has acted in mala fides, his title, ac-

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cording to settled doctrine, will prevail." Citing Magee v. Badger, 34 N. Y. 249, 90 Am. Dec. 691; Am. Ex. Nat. Bank v. New York Belting, etc., Co., 148 N. Y. 705, 43 N. E. 168; Knox v. Eden Musee American Co., 148 N. Y. 454, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727.

In the case of Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193, it is said: "There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was a mercantile paper, and not due. One who purchases such paper from another who is apparently the owner, giving consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause an ordinarily prudent man to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit; and, though by ordinary diligence he could have ascertained these facts, he can lose his rights only by actual knowledge or bad faith. It is true that, if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and its purchase will not be held to be bona fide."

And in Murray v. Lardner, 2 Wall. 710, 17 L. Ed. 857, Judge Swayne, for the court, said: "I believe we are all of the opinion that gross negligence only would not be sufficient where the party has given a consideration for the bill. Gross negligence may be taken as evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill is passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

The text of the Cyclopedia of Law & Procedure, vol. 7, 944–945, citing numerous cases decided by the Supreme Court of the United States, and those of last resort of the States of Alabama, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Virginia, Connecticut, Delaware, Texas, and Minnesota, states the law upon the subject thus: "The principle is now well established that neither the circumstances of defect of title, knowledge of circumstances which would excite suspicion in the mind of a prudent man or put him upon inquiry, nor gross negligence upon the part of the taker, will affect his right, unless the circumstances of suspicion are so cogent and obvious that to remain passive would amount to bad faith. In other words, the question is one of good or bad faith, and not of diligence or negligence, so far as the want of caution is material as bearing upon the question of good faith; and suspicions or knowledge of facts which falls short of bad faith do not amount to notice. In jurisdictions where this rule obtains, it is nevertheless held that, where circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, such indorsee would be charged with knowledge."

We think the rule announced by the authorities is in accordance with

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the spirit and purpose of our statute, and supported by reason and justice, and we are content to follow it.

There is no doubt, upon this record, that Ward & Fryberg purchased this check for value, in due course of trade, and without actual knowledge of the infirmity in the title of the holder. It is equally clear that there was no bad faith in the transaction. The result is, they acquired a perfect title to the check by their purchase, and had the right to collect it; and at the same time, in consequence of the same facts, Thomas Davis lost his title, and is not entitled to recover its proceeds from the bank.

The judgment of the Circuit Court is reversed, and the suit dismissed.

Decision No. 832.

101 N. W. 692.

SMITH v. WILLING.

(Supreme Court of Wisconsin. Dec. 13, 1904.)

BILLS AND NOTES — NEGOTIABILITY — UNCERTAINTY AS TO PARTIES — EXECUTION IN BLANK — MERITORIOUS DEFENSE — ESTOPPEL.

1. A note on a printed form, after the words "pay to the order of," contained a single blank line terminating in the word "dollars," and the words "twenty-five hundred" were written at the extreme left of this line, so as to leave no space in front of them for the name of the payee. Held, that its silence as to he name of the payee could not be supplied by a provision for confessing judgment in favor of the holder, and the note be thereby transformed into a negotiable instrument, payable by its terms to bearer, as the note showed on its face that the payee's name was omitted by mistake, and it was therefore non-negotiable because of its uncertainty as to the payee.

2. The omission of the name of the payee was not, in practical effect, the leaving of a blank which any person in possession of the note was thereby impliedly authorized to fill.

3. That a note was given to a bank for money to be loaned to the maker's son personally constitutes a meritorious defense thereto, when it is sought to be enforced for pre-existing debts of an insolvent corporation of which the son was president.

4. There was nothing on the face of the note itself to mislead one whose name was inserted therein as payee, contrary to the maker's intention, in believing that he was the payee intended, and so estop the maker from asserting a defense thereto.

Cassody, C. J., and Marshall, J., dissenting.

Appeal from Circuit Court, La Crosse county; J. J. Fruit, Judge.

Action by Edward E. Smith against John Willing. From a judgment for plaintiff, defendant appeals. Reversed.

Action upon a judgment of the Circuit Court for Cook county, Ill., entered July 24, 1899, without service of process, upon cognovit, based upon a certain writing in following words: "$2,500.00. La Crosse, Wisconsin, Sept. 2, '97. Four months after date for value received, — I

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promise to pay to the order of twenty-five hundred dollars, at the office of People's Bank, Bloomington, Illinois, with interest at 7 per cent. per annum until paid. And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such an amount as may be due and also for such an amount as may become due thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, or in execution thereon, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof. John Willing." That note was upon a printed form which, after the words "pay to the order of," contained a single blank line terminating in the word "dollars;" the words "twenty-five hundred" being written at the extreme left of that line, so as to leave no space whatever in front of them for the name of a payee. The plaintiff's attorney, before taking judgment in Illinois, had interlined between the words "pay to the order of" and the words "twenty-five hundred" the name of Edward E. Smith. The defenses alleged were, first, that the judgment was taken irregularly under the statutes of Illinois, in that no proof by affidavit was made that the defendant was living, or that some part of the debt was still due; and, as counterclaim, set up the alteration of the note, without authority or right, by the insertion of the name of Edward E. Smith, and that Smith came into possession of the note fraudulently and without consideration. Judgment was prayed for dismissal of the complaint, and for injunction against further enforcement of the Illinois judgment. There was evidence that the defendant's son, L. G. Willing, being engaged in mercantile business in Bloomington, Ill., in association with one Nelson, as a corporation, applied to his father for a note to be used at the Bloomington bank for the purpose of obtaining money to buy out his partner, and that accordingly this note was given for that purpose only, the son, L. G. Willing, at the same time giving to his father his own note for a like amount; that both parties supposed that the note was payable to the Bloomington bank; that a day or two afterward a negotiation took place with the plaintiff, who was a creditor for goods furnished to said corporation to nearly the amount of $2,500, whereby it was agreed that he should advance, either in money or goods, so as to bring the debt up to $2,500, should take a note from the corporation, and receive this note as collateral. There is dispute whether L. G. Willing participated in this arrangement, or, as he claims, it was made by the partner Nelson, without his knowledge or participation, he having reached the conclusion that the note was worthless. In the fall of 1898 the Bloomington department store failed, and, on application of its assets, such sum was received by the plaintiff as reduced his debt to about $800. The trial court found that the note was delivered to L. G. Willing by the defendant to enable the former to obtain credit for himself on the same, and refused a requested finding that it was delivered for the purpose of borrowing money at the Bloomington bank. He also found the delivery of the note to the plaintiff for the purpose above stated, and the alteration thereof at the direction of the plaintiff, and concluded that there was due the plaintiff from the defendant the sum adjudged by the Illinois judgment, whereupon judgment for the plaintiff was rendered, from which the defendant appeals.

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McConnell & Schweizer, for appellant. Benjamin F. Bryant, for respondent.

DODGE, J. (after stating the facts). The parties seem not to controvert the proposition that under the law of Illinois, as under that of Wisconsin, a judgment entered upon cognovit under power of attorney, and without service of process or other notice to the defendant, is subject to review either by direct attack or motion, by suit in equity, or by defense when the judgment is made the basis of an action. Brown v. Parker, 28 Wis. 21; Lake v. Cook, 15 Ill. 353; Wyman v. Youmans, 84 Ill. 403. Nor do they disagree upon the proposition that the judgment of the Illinois court must be accorded exactly the same faith and credit by our courts as it would be given by the courts of Illinois, by virtue of the provisions of the Federal Constitution. Brown v. Parker, supra. A further proposition as to which there is and can be no dispute is that, however irregular may have been the procedure resulting in the judgment on cognovit, it will be disturbed collaterally only in case of meritorious equitable defense thereto. Brown v. Parker, supra.

Plaintiff's principal contention is that this is a negotiable promissory note on either of two theories: First, that, by reason of the provision in the power of attorney embodied in the note that judgment may be confessed in favor of the holder, the silence of the promissory part of the note itself as to a payee is supplied, and the note becomes, by its terms, a note payable to bearer; secondly, that omission of the name of the payee is, in practical effect, the leaving of a blank which any person having possession of the note is thereby impliedly authorized to fill up; the further contention being that, if this is a negotiable promissory note, the defendant has no meritorious defense based upon the agreement, at the time it was given, that it should be used only for a special purpose, since the very purpose of the law merchant is to give such currency and certainty to negotiable paper that equities existing only between the original parties cannot affect subsequent bona fide holders for value. Young v. Ward, 21 Ill. 226.

The first ground on which plaintiff asserts negotiability, we deem untenable. The part of the entire writing which seeks to express the promise made clearly shows an intent that it be payable only to some person or that person's order, and thus negatives intent to make it payable to whoever may happen to acquire possession, without indorsement from the original payee. The two conceptions are antagonistic. We cannot think the mere authority to confess judgment in favor of the holder sufficient to overcome that clear declaration in the promissory portion. That would be an entirely proper and enforceable provision if some person had been in fact named as payee. It surely would not then suffice to transform the note into one payable by its terms to bearer. We cannot avoid the conclusion that the paper on its face shows that a payee was intended to be named, but by mistake was not named. That this was the intent is confirmed by the evidence, which shows clearly that both parties to the making of the instrument intended to make it payable to the order of the People's Bank of Bloomington, and supposed they had done so. A promise to pay, other than to bearer, which is not certain as to the payee, is not negotiable, with certain well-defined conventional exceptions not at all applicable here. McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983; Alexander v. Thompson, 42 Minn. 498, 44 N. W. 534; Brown v. Gilman, 13 Mass. 158.

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The next contention rests upon a perfectly well-established rule, that the delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come. Snyder v. Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Johnson v. Weed & Gumaer Mfg. Co., 103 Wis. 291, 295, 79 N. W. 236; Angle v. N. W. I. Co., 92 U. S. 330, 23 L. Ed. 556; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534. This rule is based on implied agreement with any one who may become the owner, and is not to be confused in principle or application with those cases, some of which are cited above, where an incomplete instrument is delivered to one, not as payee, but as agent, with authority to make it complete, and where the agent exceeds his authority; for the insertion of plaintiff's name in this paper was not made by defendant's agent, but by plaintiff himself, under his claimed rights as owner. This implied authority depends, however, on the very existence of a blank. There is no right in the holder of a contract, negotiable or otherwise, to rewrite it or insert omitted provisions except where the signer, by leaving a blank, obviously delivers it with such intention. In the instrument before us there was no blank; the writer joined to the printed portion without physical break or separation. True, there was an hiatus in sense, but that does not carry with it any authority to supply the missing term.

We must therefore reach the conclusion that this instrument is not negotiable. Whether it is absolutely void as a contract, either originally, because containing no promise to pay to any one, or subsequently, because of illegal alteration by plaintiff, for both which contentions there is authority, we need not decide. Being non-negotiable, the plaintiff could gain none of these technical protections or advantages which run with that class of contracts. He can, at most, rely on equitable doctrines of estoppel, if he was not misled to his hurt by defendant's act. Defendant, of course, had a perfect right to make his own contract. He had the right to say he would be liable to the Bloomington bank for money to be loaned to his son, personally, and to refuse to become liable for pre-existing debts of the corporation of which his son was president. He did agree to the former, and not to the latter, to which, however, the judgment subjects him, obviously to his injury, for the corporation is bankrupt and out of existence, and he can have no hope of reimbursement from it. His defense, therefore, to the liability asserted is not technical, but meritorious and equitable. It is that he never agreed to assume it.

Notwithstanding all this, however, he might still be equitably estopped to deny liability if plaintiff had been induced to change his position in reliance upon acts of defendant which the latter intended to have such effect, or ought reasonably to have anticipated would do so. Gove v. White, 20 Wis. 425, 437; Anderson v. Coburn, 27 Wis. 558, 566; Kingman v. Graham, 51 Wis. 232; Simonsen v. Stachlewicz, 82 Wis. 338, 52 N. W. 310; Brothers v. Bank, 84 Wis. 381, 397, 54 N. W. 786, 36 Am. St. Rep. 932; Mygatt v. Tarbell, 85 Wis. 457, 467, 55 N. W. 1031; Loizeaux v. Fremder (decided Nov. 15, 1904), 101 N. W. 423. The plaintiff does not claim that there was any express representation to him by L. G. Willing that defendant had given any authority to use the note as collateral to the corporation's debts; hence, if misled at all, such misleading must have been by the instrument itself. He testifies, how-

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ever, that at the time of taking the note he did not observe the absence of any payee's name; hence, so far as he knew, it might have been payable expressly to some third person; so that on no theory could he reasonably expect to get any title to it without such payee's indorsement. Such negligence would seem to preclude him from any right to invoke estoppel; it is not reliance upon any act of defendant. Pier v. Bullis, 48 Wis. 429, 434, 4 N. W. 381; Kingman v. Graham, supra; Trenton Banking Co. v. Duncan, 86 N. Y. 221. Independently of this, however, we cannot discover anything in the note itself to justify him in supposing it was intended for him. As already stated, it showed on its face an intent by defendant to become bound to some person or that person's order. He did not assume that L. G. Willing was the person, for he did not require him to indorse. If he assumed that from the omission to name a payee there resulted a right in any holder to insert his own name, then he made a mistake of law; but surely defendant cannot be charged with duty to anticipate such a mistake. He had the right to expect that any one dealing with the paper would act in recognition of established rules of law. Loizeaux v. Fremder, supra. If, however, plaintiff had inferred, as he must if he read the paper, that there was a mere omission, that some one was intended to be named as payee, and that to complete the instrument that person's name must be added, he certainly was put upon inquiry to ascertain that person. There was nothing to warrant him in believing that he, of all the world, was the one.

The legal principles above announced, applied to the undisputed facts that the only contract made by defendant and attempted to be expressed by the so-called "was" was merely to be liable to the Bloomington bank, or its order, and only for money to be loaned L. G. Willing personally, result in the conclusion that defendant never became liable at all to the plaintiff, and therefore is entitled to judgment denying plaintiff any recovery, and enjoining any further attempted enforcement of the judgment entered in Illinois upon cognovit.

Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the answer and counterclaim.

CASSODAY, C. J. (dissenting). The defendant's signature to the written instrument in question is undisputed. At the time of signing that instrument, the defendant received from his son his note for the same amount — $2,500. The son resided at Bloomington, Ill. He was president of the corporation mentioned in the opinion of the court, and testified that his father gave him the paper to see if he could get money on it from the People's Bank of Bloomington, and, among other things, said: "I had no arrangement at all with my father concerning getting money on this paper, only I gave him another note in place of it. I was intending to use the money I was to get at the bank to buy the shares of my former partner." The defendant testified to nothing to the contrary. The instrument in question, therefore, was based upon a good consideration, being a note of equal amount. It was given for the very purpose of raising money to aid the son in the business of the corporation — buying out his partner's stock. The attorney who appeared in the case in behalf of the defendant was expressly authorized to appear for him and confess judgment without process. Certainly the Illinois court had jurisdiction over the defendant and the subject-matter in entering judgment against the defendant. That judgment is entitled to full faith and credit, and to the same validity and effect in this State that it

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had in Illinois. Section 1, art. 4, Const. U. S.; Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; Sanborn v. Perry, 86 Wis. 361, 366, 56 N. W. 337, and cases there cited; Frame v. Thormann, 102 Wis. 653, 669, 79 N. W. 39; s. c. 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500. Such full faith and credit, in my judgment, precludes a collateral attack, in the court of another State, based upon mere irregularities and errors not going to the jurisdiction of the court rendering the judgment, nor to the consideration upon which the judgment is based. The power of a court to set aside its own judgments for irregularities or errors, within a limited time, may be conceded, but the power of other courts — not appellant — is limited to matters of jurisdiction and substantial rights. Whether the instrument was used to raise money from the People's Bank of Bloomington, or otherwise used by his son to help out the corporation of which he was the president, or to buy out his partner, was of no material consequence to the defendant; and the son is not here complaining. The liability of the defendant does not depend upon the negotiability of the instrument, but upon whether there was a good and valid consideration for his promise to pay. Equity regards substance, not form. The defendant executed and delivered the instrument in consideration of his son's note for the same amount, and without any fraud being practiced upon him. To my mind, there is a failure to present any meritorious defense such as could be established in a court of Illinois, outside of the one in which the judgment was rendered. Atkinson v. Foster, 134 Ill. 472, 25 N. E. 528; Hempstead v. Humphrey, 38 Ill. 90; Hansen v. Schlesinger, 125 Ill. 230, 17 N. E. 718; Burch v. West, 134 Ill. 258, 25 N. E. 658; Farwell v. Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; Blake v. The State Bank of Freeport, 178 Ill. 182, 52 N. E. 957.

MARSHALL, J. (dissenting). I cannot concur in the decision in this case. It seems that my Brethern have overlooked two important matters, either of which properly applied would have led to a different result. I will state them briefly.

In Illinois where the judgment sought to be enforced was entered the doctrine does not prevail that there must be a certain payee mentioned in a paper as an essential to its being a promissory note, or that there must be a blank in such paper suggesting authority to the holder to fill up the same by writing in the name of a payee, and that the filling up of the blank is a condition precedent to the instruments being treated as a promissory note. A writing worded thus: "Good for 50 cents. H. C. Meyers, Sut." — in Weston et al. v. Myers, 33 Ill. 424, was held to be a good promissory note, enforceable by the holder without the addition of any words thereto, although the holder might, if he saw fit, have written after the word "cents" "payable to the order of myself." The doctrine that a note complete in form, except as to the name of the payee a blank being left therein therefor, suggesting authority to the holder to properly fill the same, was in effect, said to be applicable to any paper indicating clearly intention by the maker to execute a negotiable promissory note. That is recognized by text-writers to be somewhat out of harmony with the general rule. Randolph on Commercial Paper, § 167 (2d Ed.). However, it being the law of Illinois it seems that the instrument in question would be regarded there as a good negotiable promissory note in the hands of any holder for value, and that the familiar doctrine referred to by my Brethern permitting the impeachment

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upon equitable grounds of a judgment entered by confession upon an attempt being made to enforce the same does not apply. It could not be successfully invoked in the courts of Illinois, and it is conceded that such being the case it cannot properly be so invoked here.

My brethern considered the rights of the parties only from the standpoint of the ordinary relations existing between the maker and a bone fide holder by indorsement of a negotiable promissory note, as if the holder of such a note, or a mere assignee for value of a contract to pay money, could not under any circumstances be safe from defenses possessed by the mayor against the original payee. No time need be spent, it seems, demonstrating that upon principle and authority such holder may by the law of estoppel in pais, in some circumstances, be safe against such defenses. Wiggin v. Damrell, 4 N. H. 69; Bradford v. Williams, 91 N. C. 7. If a person puts another in possession of a chose in action under such circumstances as to suggest to others that it is free from any defense in such person's behalf, he cannot charge that apparent situation to the predjudice of a third party dealing therewith in the exercise of ordinary care. That is the effect of the cases cited. The principle requires no discussion to demonstrate its correctness. It applies to this case in my judgment. In any view that can be taken thereof, appellant, in effect, held out his son to be the owner of a defective promissory note and the possessor of an equitable right to its reformation and of authority to transfer the defective instrument with such incidental right. Therefore as to one who parted with value relying upon such appearances, he is estopped from changing his apparent position to that one's prejudice. Appellant's secret agreement with his son as to the use to be made of the note cannot properly be regarded as the foundation of an equity superior to that held by the purchaser from the son who acted with due care and in good faith, relying upon appearances for which appellant was responsible.

Decision No. 820.

SMITH v. PACIFIC VINEGAR & PICKLE WORKS. (S. F. 2,674.)

78 Pac. 550.

(Supreme Court of California. Feb. 11, 1904.)

CORPORATIONS — POWERS OF OFFICERS — CONTRACTS WITH THEMSELVES INDIVIDUALLY — VALIDITY — RATIFICATION — EXPRESS — IMPLIED.

1. Under Civ. Code, § 2230, providing that no trustee or his agent may take part in any transaction concerning the trust in which he or his agent has an interest adverse to the beneficiary; section 2234, providing that a violation of this provision is a fraud against the beneficiary; and section 2322, declaring that no general authority shall authorize an agent to do any act which a trustee is forbidden from doing — the president of a corporation is prohibited from purchasing notes payable to the corporation and indorsing them to himself individually.

2. The court will not permit any inquiry into the question of the honesty or fairness of a transaction whereby the president of a corporation purchases notes payable to the corporation and indorses them to himself.

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3. The by-laws of a corporation providing that the president thereof "shall sign, as president, all certificates of stocks, checks, notes, . . . and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors," does not authorize the president to purchase notes payable to the corporation and indorse them to himself individually.

On Rehearing.

4. A maker executed notes to a corporation. The president indorsed the notes to himself individually, making the corporation liable as indorser. Renewal notes were given, indorsed in the same manner. The directors of the corporation had no knowledge of the transaction, and did not know of the existence of the renewal notes. At directors' meetings they asked the president if the notes were being paid at maturity, and they received an affirmative answer. The vice-president testified that while he acted as president he indorsed some of these notes to raise money, but he knew nothing of the renewal notes. Held not to show an express ratification on the part of the corporation of the unauthorized acts of the president.

5. On the issue whether a corporation impliedly ratified the unauthorized act of its president in indorsing to himself indivdually notes belongng to the corporation, it was shown that the secretary joined with the president in indorsing the name of the corporation on the notes. Knowledge of the transaction was concealed from the directors by the president and secretary, who made false statements on being asked whether the notes were being paid at maturity. Held, not to show an implied ratification by the corporation.

In Bank. Appeal from Superior Court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Consolidated actions by the Pacific Vinegar & Pickle Works against Sidney M. Smith, by Sidney M. Smith against the Pacific Vinegar & Pickle Works, and by, Elizabeth E. Smith and another against the same defendant. From adverse judgments in each action, the Pacific Vinegar & Pickle Works appeals. Reversed.

J. C. Campbell (W. H. Metson, Campbell, Metson & Campbell, J. J. Kennedy, W. H. Metson, and John Garber, of counsel), for appellant. Carter P. Pomeroy, for respondents.

LORIGAN, J. These cases are both presented on a consolidated transcript on appeal, and as the same general principles of law are are applicable to both, they will be considered together.

The first action is brought by the Pacific Vinegar & Pickle Works (which for brevity will hereafter be referred to as the "Pickle Works" or corporation) to enjoin the said Sidney M. Smith from selling or transferring certain promissory notes not yet due, given by a corporation known as the California Packing Company to said pickle works, and indorsed by said Smith, as president of the latter, to himself; also for the cancellation of such indorsements. The second action is brought by said Sidney M. Smith against the pickle works to obtain judgment on notes executed by the same packing company to the pickle works, and similarly indorsed and held by him. The pleadings in both cases fully raise the legal questions to be disposed of and the facts under which it is presented are as follows:

Said Sidney M. Smith, was at all the times herein mentioned, a director and president of the pickle works, and the by-laws thereof provided that

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"he shall sign as president all certificates of stock, checks, notes, bills payable, acceptances, bills of exchange, contracts, and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors;" that said pickle works was doing business with a corporation known as the California Packing Company, under a contract which provided that the pickle works should supply the packing company with material, and binding the latter not to contract with any other parties for such material; that the pickle works sold goods to the packing company under such contract, and, upon monthly statements rendered, notes were given by the later in favor of the former, indorsed by one A. B. Patrick; that some of said notes so delivered were retained by the pickle works, some respondent Smith had discounted by the Bank of British Columbia for the benefit of the pickkle works, and others were purchased by said Smith, in which later case, as when discounting them to the bank, he transferred the same by an indorsement of the name of the Pacific Vinegar & Pickle Works thereon, by himself as president; that when he purchased said notes from the pickle works he paid over for its benefit the face of the principal and accrued interest thereon, and that no better terms could have been obtained at a bank. On December 13, 1899, said Smith held notes of said packing company so indorsed, and maturing on that date, amounting to the sum of $16,992.28, which on that day he surrendered, and took from said packing company a series of notes, each for about $1,500, maturing monthly. These renewal notes were also indorsed by A. B. Patrick, and when delivered to said Smith by the packing company he indorsed them to himself as before, with the name of the Pacific Vinegar & Pickle Works, by himself as president; that said renewal notes were so taken at the request of the packing company, and were drawn in such series of small amounts so that said company could meet them monthly, and were renewed so that the time of payment might be extended. Aside from the renewal notes, Smith held other notes of the packing company, purchased by him from the pickle works, and similarly indorsed. Of these, three, for upwards of $1,500 each, were paid by the packing company to respondent Smith in September, October, and December, 1899, and of the renewal notes of December 16, 1899, three for $1,500 each, were likewise paid him in January, February, and March, 1900. No payments were paid during these periods of any of the notes executed by the packing company to the pickle works and retained by it, although at these times the secretary of the latter had in its safe unpaid notes of said packing company, which in March, 1900, amounted from twelve to fifteen thousand dollars, besides which there were outstanding, on that date, notes of said company, indorsed by the pickle works, by said Smith as president, and held by the Bank of British Columbia, amounting to about $20,000. That none of the other four members of the board of directors of the pickle works had any knowledge of these transactions. It further appears that the pickle works is solvent. As to the actual condition, in that respect, of the packing company, or A. B. Patrick, the prior indorser of its paper, the record is silent, although it appears from the evidence that the packing company had stated to Smith that it could not pay its bills monthly and pay the full amount of the notes, and it was for that reason that he had put them in such a shape as to mature in the neighborhood of $1,500 per month. These are some of the principal facts in the case, and are all that are necessary here to be stated in order to fully present and consider the main proposition of law involved.

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Judgments were rendered in favor of Sidney M. Smith in both actions; in the first for his costs; in the second for the amount of the notes therein sued on — $7,654.96; and from both judgments the pickle works appeals.

Several points are made by appellant for a reversal, but we will consider only the main one, which we deem controlling and decisive of the case. The others are merely subsidiary and unimportant. Broadly stated, the legal proposition insisted on by appellant is that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into any express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at the mere election of the corporation, if not absolutely void; and that, when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary. Such an inquiry cannot be entered into. And, specially applying the rule to the facts in the case at bar, it is claimed that as the respondent Smith, at the time he acquired ownership of said notes, occupied a fiduciary and trust relation to the appellant corporation, both as president and director, and that as the contracts of indorsement guarantying the payment of said notes by said corporation were made by himself as president to himself individually, without the authority, knowledge, or approval of the corporation, they cannot be enforced by him against it. We are satisfied that this contention of appellant is sound, and sustained, not only by the Code provisions of this State, but by an unbroken line of authorities.

It will be observed that no question is involved in this action of the right of a director, who has advanced or loaned money to a corporation, to recover it back on a quarantum meruit, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself individually, as indorsee, and is now seeking to enforce such contract of indorsement against his corporation. His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law. In this regard the general principle is clearly stated in Bensiek v. Thomas, 66 Fed. 104, 13 C. C. A. 457: "It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property or loan his own funds, without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer." Wardell v. R. R. Co., 103 U. S. 651, 26 L. Ed. 509; Mallory v. Mallory-Wheeler Co. (Conn.), 23 Atl. 708; Bigelow on Fraud, 217; Perry on Trusts, § 207. And in Morawetz Priv. Corp. § 517, it is said: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally. . . . Thus a president, cashier, or managing agent, having authority to sign the name of a corporation

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to negotiable instruments, cannot execute or indorse a note to himself, or certify a check for his own benefit." This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself. In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors, or with other agents thereof. He was dealing with himself, contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to, or contract of indorsement thereof, with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 411, may pertinently be applied: "A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent." In Clark & Marshall's Private Cor. vol. 3, § 759, the rule is concisely summed up in this language: "A person cannot, as director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation on one side, and for himself on the other, can make no difference."

Recurring now to the main legal proposition under discussion, it is provided by section 2230 of the Civil Code that "neither a trustee nor any of his agents, may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except when the beneficiary, having capacity to contract with the full knowledge of the motive of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so." And by section 2234 of the same Code it is provided that "every violation of the previous preceding sections of this article is a fraud against the beneficiary of a trust." These Code provisions apply to directors of a corporation in their relation to it as trustees, and by section 2322 of that Code they are made to apply to the respondent, as the agent of such corporation, in the case at bar. This last section declares that "an authority (of an agent) expressed in general terms, however broad, does not authorize an agent . . . (3) to do any act which a trustee is forbidden to do by article 2, chapter 1, of the last title," which chapter includes the sections above quoted. As it does not appear in this case that the respondent had any special authority from the corporation to enter into the transaction in question here, he ncessarily must claim to have been empowered to make it under an authority expressed in general terms, and hence the sections — 2230, 2234, Civ. Code — in regard to trustees must apply to him, as a mere agent of the corporation. So applied, the law is inflexible that one acting in such fiduciary capacity will not be permitted to deal with himself in his individual capacity relative to the trust property.

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Upon this point, as we have said, the current of authority in this State is unbroken, and it will only be necessary to refer at length to a few of the cases which clearly and uncompromisingly announce the rule, with general citations to such others from our own court as affirm the doctrine. In the case of Davis v. Rock Creek Co., 55 Cal. 364, 36 Am. Rep. 40; where the facts are stated, as well as the law declared, it is said: "But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolff as a member of the firm of A. Wolff & Co., and his position as a trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at any discount, to that extent he assumed to himself an advantage not common to all of the stockholders. To permith this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolff assumed the demands against the corporation at any discount. Neither does it appear that he did not. Nor does the policy of the law permit an inquiry into that question. Occupying, as he did, the position of trustee, he should not have put himself in a position adverse to his cestui que trust. One cannot faithfully serve his two masters whose interests are diverse." In the still later case of Sims v. Petaluma Gaslight Co., 131 Cal. 659, 63 Pac. 1012, it is said: "The court was clearly correct in holding that, for the seasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, § 308); and, as such, he occupied a fiduciary relation to the corporation and its stockholders. 'A trustee may not use or deal with the trust property for its own profit, or for any other purpose unconnected with the trust, in any manner.' Civ. Code, § 2229. He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary. Civ. Code, § 2230. In fact, this rule did not have its origin with the codes, but it is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. 'Hence the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary.' Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 788. In Aberdeen Ry. Co. v. Blaikie, 1 M. A. C. Q. 461, it is said: "So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the interests of the cestui que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is trustee have been as good as could be obtained from any other person; they may even at the time have been better; but still, so inflexible is the rule, that no inquiry on that subject is permitted.'"

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These authorities lay down two propositions: First, that an expressed contract cannot be entered into by a director with himself relative to the trust property; and, second, that the court will not permit any inquiry into the question of the honesty or fairness of the transaction. The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities — individual and representative — there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal. His self-interest prompts him to make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction. As said by the Supreme Court of New York in Munson et al. v. S. G. & C. R. Co. et al., 103 N. Y. 74, 8 N. E. 358: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. . . . The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempted discrimination, all transactions in which they assume the dual character of principal and representative."

So harmonious is the law on this subject that authorities might be cited indefinitely, but reference is made only to those in this State where the principles have been discussed, reiterated, and approved: San Diego v. S. D. & L. A. R. Co., 44 Cal. 112; Andrews v. Pratt, Id. 317; Wilbur v. Lynde, 49 Cal. 292, 19 Am. Rep. 645; Chamberlain v. Wool Growing Company, 54 Cal. 106; Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327; Smith v. Immigration Association, 78 Cal. 292, 20 Pac. 677, 12 Am. St. Rep. 53; Graves v. Mining Co., 81 Cal. 319, 22 Pac. 665; San Francisco Water Co. v. Pattee, 86 Cal. 629, 25 Pac. 135; Wickersham v. Crittenden, 93 Cal. 301, 28 Pac. 788; Gas Co. v. Young, 109 Cal. 143, 41 Pac. 869, 29 L. R. A. 463; Curtin v. Salmon River, etc., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132.

We have examined the cases cited by counsel for respondent to support the validity of this contract and the right of respondent to recover upon it, but they have no relevancy to the real point involved. We will not discuss at all the authorities cited from other jurisdictions, and, as to the cases in this State, will mention them briefly, and then only to

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point out their special inapplicability. All the cases cited by counsel are cases where either the director of the corporation whose dealings were questions dealt directly, but illegally, with the board of directors of a solvent corporation, assuming to act for it, or dealt with such board with the knowledge or approval of the stockholders, or they are cases where the illegal action of the director was subsequently ratified and approved by the corporate authorities. In none of these cases is it held that he could deal with himself, or that a contract made with himself without the knowledge of the other directors or the stockholders, or without the subsequent ratification or approval of the corporation, could be sustained or enforced against the corporation. This marked distinction is plainly declared in a line from one of the cases cited by respondent (Lick Oil Co. v. Marbury, 91 U. S. 590, 23 L. Ed. 328), where the court says: "The defendant was not here both seller and buyer." In the case at bar he was both seller and buyer, with the additional relation created by himself, with himself, of indorser and indorsee.

Referring now briefly to the authorities cited by respondent from this court: In the case of Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802, no question of a director dealing with himself was involved. The plain point decided there was that, the corporation having borrowed money from the director Hilm, the latter was entitled to be repaid. But this is practically declared to be the rule in Davis v. Rock Creek, Graves v. Mining Co., and Sims v. Petaluma Gaslight Co. — that, where the corporation has dealt with the director, he can recover upon a quantum meruit; not, however, that a director can recover upon an express contract made with himself without the knowledge or sanction of the corporation. In the cases of Sutter St. Ry. Co. v. Baum, 66 Cal. 44, 4 Pac. 916, and Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439, the note and mortgage involved there were given by the corporation to a director. In Seeley v. San Jose, etc., 59 Cal. 25, the plaintiff paid off a note of the corporation at the request of its president and superintendent, and thereupon the corporation gave a note to plaintiff to secure repayment. At an annual meeting of the board of directors and stockholders, this note was recognized, sanctioned, and approved by them. There was nothing in the case calling for the application of the rule declared in Davis v. Rock Creek, or cases affirming a similar principle. In fact, the court in Seeley v. San Jose, etc., recognized the distinction, and particularly stated in its opinion that the case then in hand was not "at all like unto Davis v. Rock Creek, or like the cases of San Diego v. S. D. & L. A. R. Co. and Wilbur v. Lynde," previously referred to by us in this opinion. Neither is Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749, applicable. The only point decided there was that the corporation had ratified the contract claimed to be illegal, and was bound by the ratification. These are all the cases from this court cited by counsel, and none of them run counter to, but clearly recognize the distinction between, cases where the director deals with the corporation, or his act, while illegal, is subsequently ratified by it, and cases where he deals with himself without the knowledge and approval of the corporation, and where there is no ratification. While some claim is made that the corporation in this case ratified the respondent's acts, it is only a claim. There is not only no evidence to support it, but the evidence is that none of the other officers of the corporation were informed by respondent of the matter, or knew of the transaction. It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him au-

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thority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, general authority to act for the corporation must necessarily have existed, in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority.

In disposing of this matter, it may be said that, if a director wishes to take security for advances made to the corporation, it is not requiring too much of him to ask for such security, or for whatever contract he would equitably be entitled to, in order to protect his advances. If he fails to do so, and has any equitable claim arising from such advances against the corporation, he may bring an action on a quantum meruit to recover. He cannot, however, make an express contract with himself which can be enforced against the corporation against its will; nor can the fairness of such a contract be inquired into, or affect the rule.

The principles here announced apply to both cases considered on this appeal, and, for the reasons given, the judgments therein appealed from are reversed, and the causes remanded.

We concur: Beatty, C. J.; Henshaw, J.

McFARLAND, J. (concurring). I concur in the judgment of reversal, and in nearly all that is said in the opinion of Mr. Justice Lorigan; but I think that some of the quotations to be found in the opinion state the principle of law under discussion rather too broadly. It may be well to say, also, that it is quite likely that the respondent Smith did not intend to do any unlawful act, and that what he did probably inured to the benefit, rather than the injury of the pickle company; but well-established and just general principles of law can occasionally be invoked so as to work hardship in particular cases.

On Rehearing.

(Nov. 12, 1904.)

HENSHAW, J. From the decision of this court in bank, rendered in the above-entitled cause, a rehearing was granted, to the end that a finding made by the trial court, to the effect that the Pacific Vinegar & Pickle Works ratified and approved each and every indorsement placed upon the notes of the California Packing Company by Smith as president and King as secretary, should receive further consideration. It was urged in the petition for rehearing that, although the principle of ratification was fully recognized in the opinion, through some oversight, the finding declaring a ratification, which finding fully supported the judgment of the trial court, had been overlooked. Our attention, therefore, upon this hearing, is limited to the single question whether or not the finding of ratification is supported by the evidence. Respondent contends that the finding is supported, first, under evidence showing express ratification, and second, under evidence showing implied ratification.

1. The express ratification, it is contended, finds support in the evidence of Mr. Koster, the vice-president of the pickle works, who, during a three months' absence of the president, Mr. Smith, performed the latter's duties. During Koster's incumbency as president he indorsed three

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of the California Packing Company's notes. Respondent in his brief asserts that "Mr. Koster himself testifies that at the time he made this indorsement he knew that at least one of those notes belonged to Mr. Smith, although he denies any personal knowledge of the fact that he was effecting a renewal." The evidence of Mr. Koster, with the inferences and deductions which may legitimately be drawn from it, is the only evidence touching express ratification. Mr. Koster's testimony, however, is at variance with respondent's statement of it. It is brief, and may be set forth in full: "I never knew until March, 1900, that Mr. Smith had assigned or indorsed any of those notes to himself. I never knew that there was any notes of the California Packing Company in existence outside of those which we held in the safe, amounting to $12,000 or $15,000. By reason of what had been told me at the directors' meetings, I believe it was all paid up. I acted as vice-president of the company during Mr. Smith's absence. During that time I indorsed three notes, one of which may have belonged to Mr. Smith, but I did not know that any of them were renewal notes. I never knew anything about renewals. I was told that some money was needed from the bank, and I indorsed some California Packing Company paper, which the Pacific Vinegar & Pickle Works had, for the purpose of getting money to run the business. I knew that the company had paper of the California Packing Company, but did not know any of it was renewed until after Mr. King's defalcation. I did not see any renewal notes brought to me. If there had been any renewal notes brought to me, that would have stopped right there. No notes were brought to me which had already been renewed by the Pacific Vinegar & Pickle Works. In every instance I asked Mr. King if the notes of the California Packing Company were being paid, and he told me 'yes.'" It is to be remembered that the directors, one and all, testified that they had no knowledge of any of these transactions; that they knew nothing of the existence of the California Packing Company notes held by Smith, upon which their company (the pickle works) was liable as indorser; and that at every directors' meeting, in the presence and hearing of Mr. Smith, the president, they asked if the California Packing Company's notes were being paid at maturity, and always received an affirmative answer from the secretary. Bearing in mind that an express ratification can only be found against a party when it is shown that he is in possession of all the facts, and has acted after such knowledge, it is at once apparent, without futher discussion, that the testimony of Mr. Koster falls far short of establishing such a ratification.

2. The doctrine of implied ratification is invoked to support the finding. The doctrine of implied ratification is thus expressed: "An implied ratification may also arise if the corporation accepts the benefit of the unauthorized act; but a corporation will not be held to have ratified an act impliedly by accepting the benefit of it, unless knowledge of the act was actually possessed by some corporate agent who had authority to act for the corporation in the matter, or whose function it was to report it to the proper authorities, or unless knowledge of the act would have been possessed by some such agent, had there not been neglect of duty on his part, the consequences of which are to be borne by the corporation, rather than by the party from whose performance it has been benefited. Consequently, in order to constitute an implied ratification on the part of the corporation, arising from acquiescence, or from accepting the benefit of an act, it may not be necessary that the circumstances

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should be such as to warrant a jury in finding actual knowledge on the part of the corporation, or corporate agents competent to ratify; for the knowledge of one agent may, at least in the absence of proof to the contrary, be imputed to other agents, who have authority to do the acts in question, or even to the corporation." Taylor on Private Corp. (2d Ed.) §§ 214, 215.

It is urged that the facts in this case show that the corporation received the benefit of the money paid by its president, Smith, in discounting the notes of the packing company, and that as the secretary King joined with Smith in indorsing the name of the pickle company upon the notes, and as it was King's duty to inform the corporation of these facts, the negligence upon his part in not doing so is not negligence of which the corporation can avail itself while retaining the proceeds of the notes, and that, therefore, by conclusive implication the corporation had knowledge of the transaction and thus ratified it. This whole structure, it is to be observed, is built upon the somewhat flimsy foundation of a mere disputable presumption — a presumption which, while in strictness evidence, has been characterized as evidence "the weakest and least satisfactory." The case here presented is not at all parallel with those where the directors themselves are infault for not knowing the things with knowledge of which they are sought to be charged. Here it affirmatively appears that knowledge of these transactions was concealed from the board of directors, not by the secretary, King, alone, but by the president of the company, who was drawing a salary for his services, who attended the directors' meetings, and who never — such is the record — informed his board as to any of these matters, but sat silent when his directors asked as to the payment of the notes of the California Packing Company, and when the secretary answered with the false statement that they were being promptly met. It appears, therefore, that the directors did what in reason they might have been expected to do — made inquiries in open board, and were deceived, not alone by the answers of the secretary, but by the silence of their president, whose duty, equally with the secretary, it was to tell them the truth. So telling them, the directors would have known that their corporation stood liable upon the paper of the California Packing Company as indorser for thousands of dollars which they knew not of; that their liabilities were to this extent increased; and they would have been in a position to take steps to reduce that liability and enforce the obligations of the California Packing Company. By the method which Smith adopted, however, they were kept in ignorance of these things, their corporate name was affixed to renewal notes, thus continuing their liability, and not that alone, but continuing a corporate liability which they did not know existed. Under these circumstances it cannot be successfully argued that the president of the corporation is entitled to invoke the doctrine of implied ratification, and thus reap the fruits of his own concealment.

For the foregoing reasons, in addition to those given in the opinion above cited, which opinion is hereby adopted and affirmed, the judgment appealed from is reversed, and the cause remanded.

We concur: Beatty, C. J.; McFarland, J.; Lorigan, J.; Van Dyke, J.

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Decision No. 821.

MANHATTAN WEB CO. v. AQUIDNECK NAT. BANK.

133 Fed. 76.

(Circuit Court, D. Rhode Island. November 10, 1904.)

No. 2,715

1. CORPORATIONS — USE OF FUNDS BY TREASURER FOR PRIVATE PURPOSES — PRESUMPTION OF AUTHORITY.

Where the treasurer of a corporation draws a check in its name, which he uses in payment of his individual notes, in the absence of circumstances giving rise to a reasonable inference of authority to do so the payee is put upon inquiry, and charged with notice of all the rights of the corporation, there being no presumption of authority to use its funds for such purpose from the mere fact that they are so used.

2. SAME — PAYMENT OF NOTE OF THIRD PARTY.

The use of the funds of a corporation by its treasurer in the payment of notes to a third person is not beyond the apparent scope of his authority so as to entitle the corporation to recover the money, where it was accepted in good faith, without notice of any want of authority, and especially where the relation between the maker of the notes and the corporation was such as to warrant the belief that the payment was authorized.

3. SAME — RECOVERY OF UNAUTHORIZED PAYMENT — ESTOPPEL.

Where a bank which held individual notes of the treasurer of a corporation received a check of the corporation signed by him as treasurer, with directions to apply the proceeds in payment of the notes, and did so, surrendering the notes with its rights against indorsers and collateral security which it held, without any inquiry as to whether the payment was authorized by the corporation, which would have disclosed that it was not, the corporation is not estopped from recovering the money by the fact that no demand therefor was made for four years, although the check was entered on its passbook, and was itself returned by the bank, with other canceled checks, soon after the transaction.

At Law. On defendant's motion for a new trial.

Edwards & Angell and Wm. R. Martin, for plaintiff. Wm. P. Sheffield, Jr., for defendant.

BROWN, District Judge. The Manhattan Web Company, a corporation of New Jersey, was a depositor in the defendant bank. Its treasurer, E. Read Goodridge, drew against its account a check for $7,750, dated February 20, 1900, payable to the order of E. Read Goodridge, and signed "Manhattan Web Co., E. Read Goodridge, Treasurer." This check, indorsed, "Pay Aquidneck Nat. Bank or order E. Read Goodridge," was sent by Goodridge to Hopkins, cashier of the bank, in a letter directing the application of the check to the payment of six notes then held by the bank. The bank followed instructions, and charged the check against the plaintiff's account. Four of these notes, amounting to $5,150, were notes of E. Read Goodridge for his personal

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indebtedness to the bank. Two of the notes were signed, "Manhattan Web Co., E. Read Goodridge, Treas.," and were indorsed, "Manhattan Web. Co., E. Read Goodridge, Treas.," "H. L. R. Goodridge," and "E. Read Goodridge." These two notes were dated, respectively, November 7 and November 20, 1899. The plaintiff offered evidence to the effect that these two notes were made by the Manhattan Web Company of New York, and were not notes of the plaintiff, the Manhattan Web Company of New Jersey. Upon a trial with a jury a verdict was rendered against the bank for the full amount of $7,750. The bank now petitions for a new trial.

The plaintiff contends that it is well settled as a matter of law that where an agent draws a corporation note or check payable to himself, and uses it to pay his individual debts or debts of third parties, the payee takes with notice of the fraud, and the burden is cast upon him to establish by proof that the act was authorized or ratified by the corporation; citing the following cases: Rochester & Charlotte Turnpike Road Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Campbell v. Manufacturers' National Bank, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; Gale v. Chase National Bank, 104 Fed. 214, 43 C. C. A. 496; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; Randall v. R. I. L. Co., 20 R. I. 625, 40 Atl. 763; New York I. Mine v. First National Bank, 39 Mich. 644; Reynolds El. Co. v. Merchants' National Bank, 55 App. Div. 1, 67 N. Y. Supp. 397; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. While there is a question whether this rule is not too broadly stated, since perhaps it would not be an unusual business transaction for a treasurer to draw corporate funds for his own salary, and to deposit them in his own account subject to check for his private bills, yet the cases cited are at least sufficient to justify the propositions that, where a treasurer of a corporation draws and uses its funds for private purposes, in the absence of circumstances giving rise to a reasonable inference of authority to do so, the bank is put upon inquiry; and that a presumption of a treasurer's authority to apply corporate funds to his private purposes does not arise from the mere fact that he does so apply them.

As to the individual notes of Goodridge, there apparently was no fact, additional to the assumption of authority by the treasurer, to give rise to any fair inference of special authority to use the funds of the corporation to pay his individual notes.

As to the application of the corporate funds to the payment of the notes of the Manhattan Web Company of New York a very different question arises. This was not, on its face, an application of the funds to the treasurer's private use; and I think it cannot be said, as a matter of law, that the payment of a note of a third person is prima facie illegal, or apparently without the scope of the authority of a treasurer conducting the business of a corporation. Even if the bank officers knew that the Manhattan Web Company of New Jersey and the Manhattan Web Company of New York were distinct corporations, and were ignorant of their relations, they were not bound to inquire as to the special authority of a treasurer having general authority over the funds. In the absence of notice that he was appropriating the funds to his own or to unauthorized purposes, they might fairly assume his authority to direct the payment of money to a third person. As a matter of evidence, however, the similarity of the names, officers, and stockholders of the two corporations, and information that one was about to succeed

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the other, would bring this branch of the case within the doctrine of Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979, affirmed 155 N. Y. 637, 49 N. E. 1096, cited in Rochester & C. T. R. Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790. I am of the opinion that the evidence did not warrant a finding that there was apparently no authority to pay the notes of the Manhattan Web Company of New York, and that this was prima facie illegal.

The defendant relies upon the fact that after paying the check of February 20, 1900, for $7,750, the bank, on April 2, 1900, made up the passbook of the plaintiff, showing the withdrawal, and sent it, with the check vouchers, to the plaintiff, and that it was retained without objection until 1904, when suit was brought. It is contended that the plaintiff failed in its duty of reasonable diligence to examine its account and to give notice of irregularities within a reasonable time; citing Leather Mfrs. Bank. v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811.

The applicability of this doctrine to the present case is very doubtful. The bank knew at the outset that money was to be used to pay Goodridge's individual debts. Without inquiry it at once surrendered its rights against indorsers of the old notes and its collateral security as well. Knowing the facts, it could not complain because it was not informed of them by the plaintiff. The bank did what was prima facie unlawful — surrendered its security — and then communicated the fact through the passbook and vouchers. There is a clear distinction between a case where a bank unwittingly has taken a forged check and the depositor has failed to give the bank timely information of the forgery, thus acting negligently, and preventing the bank from taking steps for its protection, and the present case. In Leather Manfrs. Bank v. Morgan, 117 U. S. 96, 112, 6 Sup. Ct. 657, 663, 29 L. Ed. 811, it was said:

"Of course, if the defendant's officers, before paying the altered checks, could, by proper care and skill, have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of the account."

This is applicable to the present case. The bank knew the facts, and knowingly gave up its securities. This either cut it off from all recourse against the original parties to the old notes, or it could at will seek to cancel the transaction. If it chose to wait, in the hope that the plaintiff would not object, its delay in proceeding against the original indorsers and original collateral is voluntary, and not caused by neglect of any duty of the plaintiff.

While the finding of the jury is substantially correct as to the sum of $5,150, the amount of Goodridge's individual notes, I am of the opinion that the instructions as to the notes of the Manhattan Web Company of New York were not sufficiently favorable to the defendant, and that the verdict as to those notes, amounting to $2,600, is against the evidence.

Petition for a new trial granted, unless the plaintiff shall within 10 days file a remittitur as to $2,600. If such remittitur is filed, the plaintiff may take judgment for $5,150.

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Decision No. 822.

MORRIS et al. v. BEAUMONT NAT. BANK.

83 S. W. 36.

(Court of Civil Appeals of Texas. Nov. 3, 1904.)

BANKS — RELATION TO DEPOSITOR — FORGED CHECK — LIABILITY FOR HONORING — NEGLIGENCE OF DEPOSITOR — CUSTOM.

1. As between the depositor and the bank, the latter is held to a knowledge of the signature and handwriting of the former, and, in the absence of some fault on the part of the depositor affecting the question of liability, a forged check, whether the forgery is of the signature of the depositor or consists in a material alteration, is honored by the bank at its peril.

2. An alteration of a check by the holder, consisting in a change of the name of the bank on which the check is drawn, is a material alteration.

3. It is not the duty of a depositor in a bank, who has transferred his account to another bank, to foresee that the holder of a check which was drawn on the first bank, and on which he has stopped payment, will fraudulently alter the check so as to make it appear to have been drawn on the bank to which the account is transferred, and notify that bank as against such check.

4. In an action against a bank for paying a forged check, the name of the payee bank having been changed after delivery of the check, evidence that it was the legal custom for banks to pay checks where the printed name of the bank was erased, and another inserted in writing, is immaterial, as such custom could not render the forged check valid.

Appeal from Jefferson County Court; D. P. Wheat, Judge.

Action by H. J. Morris and another against the Beaumont National Bank. From a judgment for defendant, plaintiffs appeal. Reversed.

Hardy & Hardy, for appellants.

GILL, J. On April 29, 1901, the firm of Morris & Browne had a deposit in the First National Bank of Beaumont. The deposit was in the name of Morris, the senior member of the firm. On the day named they subscribed for stock in a corporation thereafter to be organized by one H. M. Turner, and gave him two checks on the First National Bank of Beaumont, one for the sum of $100 and one for $200, payable to the order of Turner, each being signed by H. J. Morris. They at once countermanded the checks for some reason, and notified the First National Bank not to pay them. They also notified Turner, but he did not surrender the checks. The officials of the last-named bank suggested that, in order to guard against their payment through inadvertence, the entire deposit be withdrawn and placed elsewhere. Acting upon this suggestion, the firm on May 3d withdrew the deposit and placed it with the Beaumont National Bank saying nothing about the outstanding checks in the hands of Turner. The checks were written upon the printed blanks of the First National Bank, and Turner presented them to that bank for payment, which was refused. Thereupon Turner, without the knowledge or consent of the firm or either member thereof, ran a pencil through the printed word " First " in each of the checks and wrote in pencil " Bmt.,"

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so that the checks thereafter appeared on their face to be addressed to the Beaumont National Bank as payor. The alteration was not in the handwriting of Morris. This was the only respect in which they were altered. He thereupon presented them to the last-named bank, and they were paid in full and charged against the deposit of the firm. They were paid May 6th, six days subsequent to their date, which showed they were drawn prior to the time the firm had a deposit in the Beaumont National Bank. On discovery of the facts the firm demanded the full balance of their deposit without reference to the checks, which they denounced as forgeries, but the bank refused the demand and the firm brought this suit for the recovery of their deposit, their pleadings setting up the facts. The defendant, the Beaumont National Bank, resisted the suit on the ground that they were innocent holders of the checks without notice of the forgery, and pleaded further that it was the local custom for banks to pay checks where the printed name of the payor was erased and another inserted in writing; that they had paid other checks of plaintiffs written the same way, which were genuine; wherefore it claims it is not liable. The trial court after hearing the evidence, instructed a verdict for defendant, and judgment was rendered upon the verdict. Plaintiffs have appealed.

It is true that the defendant paid two other checks of the firm written upon the printed blanks of the First National Bank, the word "First" being erased by Morris in the same way, and the word "Beaumont" substituted in ink. The checks were genuine. Plaintiffs contend in their briefs that, as the checks were forgeries, the innocence of defendants is no defense. The defendants have filed no briefs. We understand the law to be in line with the contention of plaintiffs. As between the depositor and defendant, the latter is held to a knowledge of the signature and handwriting of its customer, and, in the absence of some fault on the part of the customer affecting the question of liability, a forged check, whether the forgery was accomplished by material alteration or the forgery of the signature, is honored by the depositee at its peril.

There can be no question as to the materiality of the alteration. The plaintiffs are not shown to have been guilty of any negligence in respect to these checks, and it certainly cannot be contended with any show of reason that it was their duty to foresee Turner's fraudulent act and notify defendant as against checks which had not been drawn against it. No local custom can give vitality to a forged check.

The facts being undisputed, the judgment of the trial court is reversed, and judgment here rendered in favor of plaintiffs for the amount sued for, with interest from the date of their demand upon defendant.

Reversed and rendered.

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Decision No. 823.

LOIZEAUX v. FREMDER.

101 N. W. 423.

(Supreme Court of Wisconsin, Nov. 15, 1904.)

NOTES — ASSIGNMENT — PAYMENT TO ASSIGNOR — EFFECT — ESTOPPEL — MARRIED WOMEN — SEPARATE ESTATE — CONTRACTS — VALIDITY — LIABILITY ON NOTE.

1. Where, after the assignment of a note by the payee, the assignee retained possession of the same, but from time to time delivered to the payee the interest coupons to collect for her, a payment of principal on the note to the payee by the maker, which was converted by the payee, was not binding on the assignee.

2. The fact that the silence of the assignee of a note might have led the maker to believe that the payee then owned the note could not estop the assignee from denying the payee's ownership at any subsequent time.

3. Where a husband and wife executed a mortgage on lands belonging to the wife and on lands belonging to the husband, and gave their note secured by the mortgage, and the consideration for the note did not inure to the private use of the wife and was not for the benefit of her separate property, she could not be held liable for a deficeincy decree.

Appeal from the Superior Court, Milwaukee county; J. C. Ludwig, Judge.

Action by Margaret E. Sanderson Loizeaux against Augusta Fremder. From a judgment in favor of defendant, plaintiff appeals. Reversed.

On August 19, 1898, John Fremder, husband of the respondent, borrowed of Henry Herman $4,000 for use in his business of a boot and shoe dealer, of which no part came to the private use of the respondent or was for the benefit of her separate property. On the same date the husband and wife executed a note in same form as that described in Thorpe v. Mindeman (decided herewith), 101 N. W. 417, payable in three years, with 6 per cent. semiannual interest, and also executed a single mortgage upon two parcels of real estate, one of which belonged to the respondent and the other to her husband; said mortgage being in substantially the same form as that described in the above-mentioned case, which was duly recorded. On September 6, 1898, the note and mortgage were transferred to this plaintiff under her then name of Sanderson, and to her sister, Sarah Sanderson, who, on April 16, 1903, assigned her interest to the plaintiff. Neither of said assignments was recorded until about April, 1903. Continuously subsequent to the first transfer of said note and mortgage the papers remained in the possession of the assignees, and were never in the possession of Henry Herman. The mortgagors paid interest regularly to Henry Herman, receiving from him the interest coupons which had been attached to the note. On August 19, 1901 — being the original maturity of the note — the mortgagors signed an extension agreement for an additional three years, which recited the extension as a consideration, and made no reference to the ownership, except it declared that the mortgagors, John and Augusta Fremder, agreed " to and with Herman to pay interest thereon at the rate of five per cent.

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thenceforth." Additional interest coupons were affixed to this extension agreement, which was, shortly after its execution, delivered to the plaintiff, and retained by her. Interest continued to be paid as before until February 18, 1902, when the defendant, her husband having died, paid to Herman $2,200 to apply upon the principal, and on the 11th day of April, 1902, made an additional payment of $900. These payments were made with no knowledge of any facts warranting the belief that the note had been transferred, and upon the supposition that Herman still owned them. They were receipted for by Herman, but, unlike the previous interest, were not paid over to the owners of the mortgage, to whom thereafter he periodically remitted interest on the whole amount of the mortgage, receiving from the defendant merely the interest on the remaining balance of $900. Later — but at what date is not disclosed — the defendant desired to pay the remaining $900, and demanded delivery of the note and mortgage, whereupon she was informed by Herman that he would have to get them from a man in New York. She thereupon refused to pay until the papers were ready for delivery. Some time early in 1903, at a date not definitely disclosed, Herman absconded, insolvent, whereupon plaintiff placed her assignment of this mortgage on record, and notified defendant to pay only to her. In August, 1903, upon the maturity of an instalment of interest, defendant tendered $22.50, the interest on $900, which plaintiff refused to accept, demanding $100 as the semiannual interest on $4,000. Thereupon suit was commenced to foreclose the mortgage; also praying for deficiency judgment against defendant, claiming full amount of $4,000 to be due. The findings are substantially in accord with the facts above stated, from which the superior court concluded, as appears by an opinion filed, that the note in question was non-negotiable; that the defendant was without fault or negligence in paying to Herman on the supposition that he was the owner, and that plaintiff had estopped herself from denying Herman's ownership, and hence that no more than $900 was due; and that no default in payment of interest had occurred; whereupon he rendered judgment dismissing complaint, from which the plaintiff appeals.

Nath. Pereles & Sons and Chas. S. Carter, for appellant. John Toohey, for respondent.

DODGE, J. (after stating the facts). When one enjoying the confidence of the community in which he has acted as intermediary between investors and borrowers of money proves to have been both dishonest and insolvent, complications arise of the most serious character, in which the attempt to do justice must of necessity, be painful to the courts; for whatever the result, one party or the other — and often both — must suffer injury; sometimes ruin. The strain upon the human sympathies is frequently such as to render difficult adherence to settled rules of law, which, in individual cases, may seem to cast the burden of the wrong on him who can least well bear it. Such rules, however, become established upon many and varied considerations as likely, in the long run, to approximate most nearly to justice, and to minimize the wrong as far as possible, and must be applied by a court until, if the desired results are not obtained, the lawmaking power shall readjust them Within some six years past this court has confronted various entanglements arising out of too notable instances of abuse of confidence generically like that of Henry Herman now presented, and has, with much anxiety of research, ascertained and sought to clearly declare certain of the rules which must

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govern the rights of the sufferers. We cannot forbear expression of our disappointment that counsel in this case have seemingly wholly failed to discover or avail themselves of those efforts in performance of their duty to aid both the trial court and this in administering justice.

Discussion of the negotiability of the note in suit may be dispensed with in this opinion, for that is considered and settled in Thorpe v. Mindeman (decided herewith), 101 N. W. 417. Such negotiability being established, there results the rule that the debtor's duty is to pay to the person who owns the note at the time of payment, or to an agent of such owner actually authorized to receive payment; that no payment to any other person can be of any effect unless made in reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment as to estop the owner from denying such authority. Possession of a negotiable instrument is generally the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so. Miller Brewing Co. v. Manasse, 99 Wis. 99, 74 N. W. 535, 67 Am. St. Rep. 854; Winkelmann v. Brickert, 102 Wis. 50, 78 N. W. 164; Bartel v. Brown, 104 Wis. 493, 80 N. W. 801; Kohl v. Beach, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. Rep. 849; Spence v. Pieper, 107 Wis. 453, 83 N. W. 660; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904; Joy v. Vance, 104 Mich. 97, 62 N. W. 140; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659. Of course, there may be subsequent ratification, of which, however, nothing is claimed in this case. Platt v. Schmitt, 117 Wis. 489, 94 N. W. 345. This rule has been held sufficient to deny efficacy to such acts as permitting collection of interest, or even prior instalments of principal, which, in relation to other business not involving collection of negotiable paper, might well suffice to establish apparent agency. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder, and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next. Of the probability of such change the negotiability of the instrument is a continual warning.

The last consideration is conclusive against the estoppel sought to be raised against plaintiff as a result of her failure to protest her ownership, when, in August, 1901, she gained knowledge that Herman, in taking the extension agreement, had, in effect, assumed to act as the owner of the note and mortgage. Conceding for the moment that her silence might have confirmed defendant in the belief that Herman then owned the security, no estoppel could result to deny his ownership at any subsequent time, for the debtors had no right to assume that ownership of a negotiable note would continue, nor, as shown by the above authorities, could they, without negligence, act on such assumption. Estoppel arises only when a person may reasonably anticipate, or, as is sometimes said, intends, a change of position by another in reliance on the former's act.

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Kingman v. Graham, 51 Wis. 232, 242, 248, 8 N. W. 181; Two Rivers Mfg. Co v. Day, 102 Wis. 328, 332, 78 N. W. 440. One is not required to anticipate negligence nor ignorance of the law in others in so governing his conduct as not to mislead them to their hurt. Long prior to 1901 the law was well settled that one indebted on negotiable paper had no right to pay to any one not in possession of the instrument. Why, then, should the plaintiff anticipate that the debtor would forego that care? Certainly not. She exercised the very precaution against any collection of principal which the law required, by retaining possession of the principal note while she put Herman in position to bind her in receiving interest by delivering into his custody the coupons as they matured. Further, the conduct of defendant strongly negatives reliance by her on any mere silence of plaintiff, for when she came to make final payment she demanded presentation of the note, and, in its absence, refused payment. Had she exercised that same care on the other occasions which she herself deemed proper on the last, she would have been safe.

We can find nothing to remove this case from the carefully considered rule of the above authorities, nor to avoid the conclusion that between these two innocent persons the negligence of defendant in paying to one not having possession is so responsible for the loss that it cannot be imposed on the plaintiff, who at all times guarded against such result by keeping the note in her own possession. It is the former, and not the latter, who trusted Herman so as to enable him to do the wrong.

The conclusion thus reached in favor of the plaintiff's right to maintain action of foreclosure necessitates consideration of the very slightly argued question as to the personal liability of this defendant. It will be observed that upon the undisputed evidence and the findings the money promised to be repaid by the note was borrowed, to the knowledge of all parties, for the use of defendant's husband in his own business. It was not borrowed by her, and did not in any respect come to her private or separate use, nor was it borrowed with any purpose or understanding that it was to be used with reference to her separate estate, nor was it so used. While, of course, under her statutory power to contract with reference to her separate estate, she could make a perfectly valid mortgage thereon to secure this or any other debt, she could not bind herself to a legal liability by the mere promise to pay. Gaynor v. Blewett, 86 Wis. 399, 57 N. W. 44; Hollister v. Bell. 107 Wis. 198, 83 N. W. 297; Stack v. Padden, 111 Wis. 42, 86 N. W. 568; Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361. The conclusion, therefore, is irresistible that she is under no such liability for the indebtedness represented by this note, and the plaintiff is not entitled to any personal judgment against her for any deficiency that may arise upon a sale of the mortgaged premises.

Judgment reversed, and cause remanded, with directions to enter judgment in favor of the plaintiff in accordance with law.

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Decision No. 824.

TURNER v. HOT SPRINGS NAT. BANK.

101 N. W. 348.

(Supreme Court of South Dakota. Nov. 17, 1904.)

BANKS AND BANKING — LIABILITY ON UNACCEPTED CHECK.

1. Under Rev. Civ. Code 1903, § 2279, providing that a check drawn on a bank or banker is payable on demand, where the drawer of a check has sufficient funds on deposit subject to check, a bona fide holder of a check which has been duly presented and payment refused may maintain an action against the bank to recover the amount of the check.

Haney, J., dissenting.

Appeal from Circuit Court, Fall River county.

Action by Frank Turner against the Hot Springs National Bank, a corporation. From a judgment for defendant, plaintiff appeals. Reversed.

Chauncey L. Wood and Frank Turner, for appellant. Dudley & Eastman, for respondent.

FULLER, J. The only question presented by this appeal from an order sustaining a general demurrer is whether facts sufficient to constitute a cause of action are stated in the following complaint, from which the caption and demand for judgment are omitted: "(1) That the defendant is a national banking corporation, organized, existing, and doing business under and by virtue of the United States Banking Law. (2) That prior to the 19th day of June, 1903, one G. M. Cleveland deposited in the defendant bank a sum of money in excess of the amount of the bank check hereinafter mentioned, to the credit and in the name of said Cleveland, and to be drawn out of said bank upon the checks of said Cleveland. (3) That on June 19, 1903, the said Cleveland, for a valuable consideration, and in the usual course of business, drew, issued, and delivered to this plaintiff, as payee, his bank check, in writing, signed by said Cleveland, and addressed and directed to the said defendant bank, ordering and directing the defendant bank to pay to this plaintiff the sum of five hundred and seventy-nine dollars and forty cents ($579.40). (4) That on the 25th day of June, 1903, during business hours, and while a sum of money in excess of said sum of five hundred and seventy-nine dollars and forty cents ($579.40) so remained in defendant bank in the name and to the credit of said Cleveland, this plaintiff caused the said bank check to be presented to and at the defendant bank for payment, properly indorsed by this plaintiff. (5) That the defendant bank wholly refused and declined to pay the check, and that thereupon the same was duly protested as for non-payment; that the defendant bank still refuses and declines to pay said check, and that the same has not been paid, or any part thereof. (6) That this plaintiff necessarily expended and paid the same of three dollars and fifty cents ($3.50) for the expense of said protest, no part of which has been paid by defendant. (7) That there is due and owing to plaintiff from defendant, as statutory damages for defendant's failure to pay said check and allowing the same to go to

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protest, the sum of eleven dollars and fifty-eight cents ($11.58), no part of which has been paid. (8) That this plaintiff is still the owner and holder of said check." It being conceded by the demurrer that the drawer of the check had funds on deposit, subject to check, in excess of the amount demanded, the question is whether a bona fide holder of a check, which has been duly presented and payment refused, is entitled to maintain an action to recover from the bank the amount for which such check was written.

As section 2279 of the Revised Civil Code of 1903 expressly declares that a check drawn upon a bank or banker is payable on demand, without interest, it would be logical to hold that payment must be made by the bank on presentment of a properly drawn check by the lawful holder thereof, provided the funds deposited for that purpose are sufficient. Consistent with safety and the systematic course of trade throughout the civilized world, the great bulk of business is done by the use of checks drawn on funds deposited for that purpose at the solicitation of banks, and in consideration of an implied promise to promptly pay checks drawn thereon in such amounts as the depositor may order. According to a general custom expressive of the parties' intention, and for their mutual convenience, all banks provide checks containing a blank space for the name of the person to the order of whom any check may be drawn and to whom the amount written therein lawfully belongs upon presentment. The doctrine that presentment of a check transfers the funds to the full amount for which it is written, and constitutes an assignment thereof by the depositor to the payee named, or his order, furnishes ample protection to the bank paying such check, while its wrongful refusal to do so might greatly disturb important business transactions, impair the credit of the drawer, or, in case of his subsequent bankruptcy, ruin an innocent checkholder, who became such upon the faith that the bank would perform its duty according to the established usages of the law merchant. In rejecting the doctrine of the early cases sustaining the view that a check is neither an assignment between the drawer and the payee nor a sufficient foundation for an action by the holder against the bank refusing payment, Mr. Morse, in his excellent treatise, writes convincingly in support of the proposition that "all advanced, clear, independent thought and reasoning sustains the right of the checkholder to sue the drawee." 2 Morse, Bk. 492 to 511, inclusive. From Munn v. Burch, 25 Ill. 35, we quote at considerable length as follows: "Where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it. Such is the custom governing checks on bankers. The general rule is that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels. But everybody knows, and courts no less than commercial men, that an exception to this rule exists as to deposits in bank. It has been so long and so universal a custom with bankers to receive deposits from time to time, as the convenience of the depositor may require, and to allow him to draw out his funds on checks, in parcels, in such sums as he sees fit, that the mere fact of opening a deposit account with a banker implies a contract on the part of the banker to allow the depositor to withdraw his deposits in parcels. The books are full of cases where the courts have implied such a contract on the part of the banker, and, for the purpose of raising such implication, have taken notice of such custom; for it is only by force of such a custom that such a contract,

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which is against the general rule of law, can be implied. We advance thus far in this case upon well-trodden judicial ground, about which there is no dispute. But there is another bankers' custom, scarcely less ancient, not less universal, and as generally recognized and acted upon, and that is that the depositor may draw his check in favor of any third party, to whom, upon presentation, the banker pays the amount of the check out of the funds in his hands belonging to the depositor. Indeed, it is comparatively a rare occurrence that the depositor presents his own check to the banker for payment. In a vast majority of cases the check is presented by a third party, in whose favor it has been drawn, or to whom it has been passed in the regular course of business, in payment and satisfaction of some debt or demand. In strictly commercial circles a hundred times more debts are paid with checks than with coin or currency. They are received and passed and deposited with bankers as cash, subject, of course, to be made good if not paid on presentation. When presented, these checks are paid as the property of the presenter, and not of the depositor; and not as a matter of favor to him, but as a matter of right. The custom of banks recognizes this mode of changing the title of money in their hands from one person to another. There is no custom known among banks, or any other departments of finance or commerce, more universally recognized and acted upon than this. If it is possible for any custom to create a right by entering into and forming an implied part of the contract, this would seem to be that one, for its antiquity, its universality, and, above all, its convenience, nay, its absolute necessity to meet the wants of the vast commercial contracts of the present day. To say that the holder of a bank check has not both a legal and equitable right, after presentation of the check, to the money of the drawer in the hands of the banker, would destroy the most valuable feature of bank deposits and checks. Without it, this whole system would become worthless and destroyed. Unless the depositor can be thus accommodated, it is worth no man's while to keep a deposit account with a bank. And no man will wish to be troubled with the check of the best drawer, if he acquires no right by its presentation, and is only to receive pay upon it as a matter of favor. But we are entirely satisfied that such is not, and cannot be, the law. Well-recognized legal principles lead us inevitably to the same result which commercial convenience requires. This universal custom shows us what the contract of all the parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them; and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner, and entitled to receive, the amount called for by the check, provided the drawer shall at that time have the amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person — to anybody and to everybody? Surely, every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side and the receiving of the check for value and presenting it on the other. It is a familiar principle of daily illustration that a promise made to the public that the performance of a particular act shall entitle the person performing the act to a particular right is a valid assumpsit to such person. The promise on the one hand and the performance on the other creates a

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privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person. We hold, then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery; and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented." The foregoing conclusion was reached after the most studious investigation, and its correctness stands confirmed by all subsequent decisions of that court. The following carefully considered and more recent cases are to the point that the holder of a check, the payment of which has been refused, may sue the bank to recover the amount thereof: Bloom v. Winthrop State Bank (Iowa), 96 N. W. 733; Fonner v. Smith (Neb.), 47 N. W. 632, 11 L. R. A. 528, 28 Am. St. Rep. 510; McGrade v. German Savings Institution, 4 Mo. App. 330; Dodge v. National Exchange Bank, 20 Ohio St. 234, 5 Am. Rep. 648; Roberts v. Corbin & Co. et al., 26 Iowa, 315, 96 Am. Dec. 146; Forharties v. State Bank, 78 Am. Dec. 468; Miliani v. Tognini (Nev.) 7 Pac. 279; 2 Daniel, Neg. Ins. 1617. Consistent with all the authorities, and contrary to the view that the bank pays only as a matter of favor, it was held by this court in the very recent case of Manitoba Investment & Mortgage Company v. Weiss et al., 101 N. W. 37, that the receipt of a check as provisional payment of a note secured by mortgage operated as absolute payment and discharge of the indebtedness by reason of unwarranted delay in the presentment of such check until the funds against which it was drawn were exhausted and the drawer had become insolvent. By the act of receiving a deposit subject to check the bank accepts in advance, and promises to pay on demand, all properly drawn checks of the depositor, so long as the credit is sufficient and not previously incumbered. This promise of the bank to allow funds to be withdrawn by third persons and in parcels to suit the convenience of the depositor takes effect on a definite amount as often as a check is presented, and constitutes an assignment thereof between the drawer and holder, which the bank, by accepting the money, obligated itself to recognize. To hold otherwise would be repugnant to the universal custom of all commercial countries, and greatly impair the most important characteristic of systematized banking.

It follows that the demurrer should have been overruled, and the order appealed from is therefore reversed.

Haney, J., dissenting.

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DECISIONS.

Decision No. 825.

NATIONAL BANK OF BRISTOL v. BALTIMORE & O. R. CO.

59 Atl. 134.

(Court of Appeals of Maryland. Nov. 18, 1904.)

SALES — TITLE OF VENDEE — TRANSFER TO INNOCENT PURCHASER — RIGHTS OF VENDOR — CARRIERS — BILLS OF LADING — CHARACTERISTICS — NEGOTIABILITY — TRANSFER — RIGHTS OF ASSIGNEE — EQUITY — STOPPAGE IN TRANSITU — INSTRUCTIONS — EVIDENCE — PRESUMPTIONS — LAW OF FOREIGN STATE.

1. A bill of lading issued in Virginia is governed as to its legal qualities by the law of Virginia.

2. In the absence of evidence to the contrary, it will be presumed that the common law prevails in Virginia.

3. At common law a bill of lading is not, in an unrestricted sense, a negotiable instrument, but quasi negotiable only, and this limited negotiability may be destroyed by stamping or printing across the face of the instrument the words "Not negotiable."

4. A bill of lading, though made non-negotiable by its terms, may, like any other non-negotiable instrument of chose in action, be transferred by assignment, the assignee taking subject to the equities between the original parties.

5. An assignee of a non-negotiable bill of lading takes title to the goods represented by the bill, subject only to the equities of those whose names appear upon, or are in some way connected with, the bill, and is not affected by equities existing in favor of strangers whose interest in no way appears upon it.

6. Where there is a collateral fact which is known to an assignee of a chose in action, and which is sufficient to put him on inquiry, knowledge of such collateral fact will be held equivalent to knowledge of the ultimate fact, where inquiry would disclose the same.

7. Evidence that a vendor had sold lumber to his vendee, had loaded it on a car for him, and shipped it to him, and had accepted from him a check for the price, dated one day after the sale, authorizes a finding that there had been a sale on credit and a delivery to the common carrier, under which title had passed to the vendee.

8. Where there has been a sale and delivery to the vendee, he is authorized to procure a bill of lading in his own name as shipper and owner, and a subsequent

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failure to pay the price does not divest his title or that of his assignees of the bill of lading.

9. The indorsement and delivery of a bill of lading transfers the title to the property to the vendee, is a complete delivery of the goods, and divests the vendor's lien, subject only to his right of stoppage in transitu in the event of the vendee's insolvency before payment for the goods, and if the rights of no third person have intervened.

10. One who in good faith takes a bill of lading from a vendee acquires an unassailable title to the goods, notwithstanding fraud of the vendee, even as against the defrauded vendor.

11. Where a vendor put it into the power of his vendee to deal with the property as his own, and thereby enabled him to mislead a bank, which in good faith discounted his draft and accepted a bill of lading on the goods sold as collateral security, any loss arising out of the transaction must fall upon the vendor.

12. A vendor who has parted with title to the goods sold and has delivered them to a common carrier for the vendee has no right of stoppage in transitu after the vendee has transferred the title to another by assignment of the bill of lading.

13. An instruction denying a recovery and making no reference to facts relied on authorizing the same in effect withdraws all such facts from the consideration of the jury, and is erroneous if such facts constitute a ground of action.

Appeal from Superior Court of Baltimore city; Pere L. Wickes, Judge.

Action by the National Bank of Bristol against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSherry, C. J., and Fowler, Briscoe, Boyd, Pearce, and Schmucker, JJ.

Francis E. Pegram and Edwin T. Dickerson, for appellant. George P. Bagby, for appellee.

McSHERRY, C. J. This is an appeal from a judgment rendered by the Superior Court of Baltimore city. An action of trover was instituted in that court by the appellant, the National Bank of Bristol, against the Baltimore & Ohio Railroad Company, to recover the value of a car load of walnut lumber of which the appellant claimed to be the owner, and which it was alleged the appellee had converted to its own use. The declaration, which sets out at large the facts upon which the appellant relies to make out its case, need not be particularly alluded to, inasmuch as no questions arise on the pleadings. The only matters with which we are concerned on this appeal are those presented by the two bills of exception contained in the record. The first bill of exception brings up a ruling of the court on the admissibility of evidence, and the second concerns the action of the trial court on the prayers for instructions to the jury. There is some conflict in the evidence, but that is not of material consequence in dealing with the legal principles which will control this controversy, because the facts must ultimately be found by the jury. It appears that on the 7th day of November, 1902, a certain E. L. De Camp drew at Bristol, Tenn., a draft on Cameron & Co., 29 P. O. avenue, Baltimore, Md., payable to the order of John B. Baumgardner, cashier, for $400, which was cashed by the Bristol National Bank, and the proceeds were carried on the books of that bank to the credit of the drawer. Attached to the draft was a bill of lading issued by the Norfolk &

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Western Railway Company at Marion Station, Va., on November 7, 1902, for the transportation of one car load of walnut lumber in car No. 23914, shipped by E. L. De Camp, "shipper as owner," and consigned "To the order of E. L. De Camp, Locust Point." Upon the face of the bill of lading there was printed in full-faced type the words "Not negotiable." Immediately beneath these words appears the following clause: "If the word 'order' is written immediately below or after the name of the party to whose order the property is consigned, the surrender of the bill of lading properly indorsed shall be required before the delivery of the property at destination, as provided by section 9 of the conditions on the back hereof." When the draft was discounted by the bank in the regular course of business, the bill of lading was indorsed by De Camp, and attached thereto as collateral security, and the draft, with the attached bill of lading, was forwarded for payment, but was returned to the appellant bank in about five days, protested for non-payment. At the time the draft was discounted for De Camp he represented himself to be the bona fide owner of the bill of lading and the lumber, and it was solely on the faith and security of the bill of lading that the discount was made. Within five days after De Camp had been credited with the proceeds of the draft by the Bristol Bank, he checked out the funds. After Cameron & Co. had refused to accept the bill of lading and pay the draft, and after both had been returned to the bank on November 13th, the bank forwarded the bill of lading to Price & Heald, in Baltimore, with instructions to receive the car load of walnut lumber described in the bill of lading, and to sell the same for account of the appellant bank. Price & Heald, on November 14th, exhibited to the Baltimore & Ohio Railroad Company the bill of lading for the car load of walnut lumber, and demanded that the lumber be turned over to them, but the appellee declined to comply with that demand, and delivered the lumber to the agents of Atkins Bros., who had given the appellee a bond of indemnity to secure the railroad company against loss by reason of the delivery of the lumber to Atkins Bros. The appellee then proved, after the court had overruled an objection to the admissibility of the evidence, that the firm of Atkins Bros., manufacturers of lumber at Attoway, Va., agreed to sell to E. L. De Camp a car load of walnut lumber, they to load the same, and to hold it until a check given to them by De Camp on the appellant bank was paid; the lumber — the same now in controversy — was to continue to remain the property of the vendors until the check was paid; that there was not a sale, but an agreement to sell, which De Camp fully understood; that De Camp, without the authority, knowledge, or consent of the vendors, shipped the car and procured the bill of lading to be made out in his own name; that he did not assure the vendors that the check he gave them was good; that when the check last alluded to was returned unpaid the vendors went to Baltimore, whither the lumber had been shipped, and, reaching there before the car arrived, gave a bond of indemnity to the railroad company, and secured the lumber, which they sold through an agent; that De Camp gave the vendors a check in payment for the lumber on November 7th, but dated it the day following, and that the vendors deposited it in their bank on November 10th for collection; that Atkins Bros. made no effort to ascertain whether the check would be paid, and that they made no arrangement with the railroad authorities that the car should remain on the siding, where it had been loaded, until they could hear from the check. When the check was presented at the Bristol National Bank, De Camp had no funds to

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his credit there, having withdrawn them about the 12th of November. On November 18th, after the return of De Camp's check to Atkins Bros., the latter wrote to the appellant bank a letter in which they said: "Messrs. Price & Heald, of Baltimore, Maryland, state that you have sent them bill of lading for a car of lumber, N. & W. No. 23914 to sell for your account. We would respectfully notify you that this car of lumber belongs to us. We sold it to Mr. E. L. De Camp, in payment of which he gave his check and draft on your bank which you refused to honor claiming that De Camp had no funds." To the admissibility of all of this evidence the plaintiff objected, but the court overruled the objection, and thereupon the first exception was reserved. We need not pause at this time to inquire whether the evidence objected to and above set forth was admissible, because in considering the action of the court upon the prayers contained in the second bill of exception the propriety of the ruling made in the first exception will be necessarily involved. In rebuttal the appellant produced a letter from Atkins Bros., dated November 17th, and addressed to Price & Heald, the agents of the appellant bank, in which the following statement is made: "On November 7th. we shipped from Marion, Va., to Locust Point Station, Baltimore, car of lumber, N. & W. No. 23914. We sold this car to E. L. De Camp, shipped to him in Baltimore. He gave us in settlement his check for part and draft for balance. The bank at Bristol reports no funds, consequently we wish to stop the payment of them by you to E. L. De Camp." Upon the close of the evidence each party presented one prayer. That of the appellant was rejected, whilst that of the appellee was granted. These prayers will be found set forth in the margin.

The theory upon which the court evidently acted in refusing the appellant's and in granting the appellee's prayer was that the title of the bank to the lumber, and its right to maintain this action, depended wholly upon its ownership of the bill of lading, and, as that instrument had stamped upon it the words "'Not negotiable," the bank did not stand in the situation of a bona fide indorsee of a negotiable security, who took it for value, before maturity, without notice of any imperfections in its origin; and, as Atkins Bros. had prior equities, the bank could not recover. The bill of lading evidencing the contract between the shipper and the railway company was issued in Virginia, and its qualities are such as the law of that State, and not the law of this State, impressed upon it. There is no proof in the record as to what the law of Virginia is in this respect, and we must consequently presume that as to bills of lading the common law prevails there. By the common law a bill of lading was not, in an unrestricted sense, a negotiable instrument, like a promissory note, but was, as this court has repeatedly stated, quasi negotiable only. Baltimore & Ohio Railroad Company v. Wilkens, 44 Md. 11, 22 Am. Rep. 26. But even that restricted common-law negotiability may be limited and still further qualified by the insertion of appropriate terms wholly destroying all negotiability, and it seems to be generally agreed that such a result may be accomplished by simply stamping or printing across the face of the instrument the words "Not negotiable," as was done in this instance. 21 Am. & Eng. Encyc. Law (2d Ed.), 545. The non-negotiability of the bill of lading does not prevent it from being assignable. Like any other non-negotiability instrument or chose in action, it may be transferred by assignment; and when thus dealt with the assignee takes a valid title to it, subject, of course, to the equities existing between the original parties to it, of which, if there are

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any, he is held to have had notice. Steele v. Sellman, 79 Md. 1, 28 Atl. 811. But what are the equities with which the assignee of a non-negotiable bill of lading in such a case as this is chargeable? Surely not the equities of third parties whose names do not appear upon and are in no way connected with the bill of lading. A bill of lading, as a mere document, is valueless. It is of consequence only in so far as it is the evidence of title to something in somebody. Its transfer is the transfer of the title to the thing described in it, and whatever equities exist between the parties to it with respect to the title of the property which it purports to represent will follow that property into the hands of the assignee of the bill of lading, unless some other legal or equitable principle intervenes to preclude the assertion of a prior right as against a bona fide assignee for value. In the case at bar the name of Atkins Bros. does not appear upon the bill of lading at all. De Camp was the ostensible owner and the actual shipper of the lumber, and he was also the consignee. Nothing was disclosed on the face of the instrument to indicate that any other person than De Camp had any right to or claim upon the lumber, and there was absolutely no word, mark, or sign to put the bank on inquiry as to De Camp's ownership, or to suggest even a suspicion that some one else had a superior right to the property. When there is a collateral fact, which is known to an assignee of a chose in action, and which, if followed, would result in revealing the existence of the ultimate fact sought to be established, then knowledge of such collateral fact will be held equivalent to notice of the ultimate fact, and will bind the party to be affected as conclusively as though actual knowledge of the ultimate fact had been brought home to him. But the bill of lading contains no entry which could possibly have induced the bank to conjecture that De Camp was not the exclusive owner of the lumber. Any inquiry it could have made would have been either from De Camp or from the railroad agent who issued the bill of lading, and there is nothing in the record to intimate that the latter could have stated verbally anything different from that which the bill of lading discloses; whilst De Camp in fact represented himself to be the owner of the lumber. No inquiry, therefore, on the part of the bank, from either of the parties to the bill of lading, would have disclosed anything beyond that which the bill of lading itself exhibited.

But if it were conceded that in spite of there being nothing on the face of the bill of lading to indicate that Atkins Bros. had sold the lumber to De Camp, and that the latter had not paid for it, and that because of these circumstances the bank, though it did not know them, was none the less chargeable with knowledge of them, merely because the words "Not negotiable" were indorsed upon the bill of lading, still there was evidence before the jury tending to show, if credited by them, such a state of facts as would preclude Atkins Bros. from asserting a title to the lumber as against the appellant bank. There was evidence, as we have stated — particularly that furnished by the letters from which extracts have been quoted — tending to show that Atkins Bros. had sold this lumber to De Camp, had loaded it on a car for him, had shipped it to Baltimore, and had received and accepted from him a check for the purchase price, dated one day after the actual sale. This evidence, if believed by the jury, would enable them to conclude that there had been a sale of the lumber on credit, and a delivery of it to the common carrier, which was a delivery to the vendee, and therefore that the title had passed from Atkins Bros. to De Camp. Hall v. Richardson, 16 Md. 396, 77

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Am. Dec. 303. If the jury believed, from the evidence, that there had been a sale and delivery of the lumber to De Camp, then the latter was authorized to procure the bill of lading in his own name as shipper and owner, and a subsequent failure to pay the vendors the price he agreed to pay did not divest the title thus acquired. Bearing in mind that we are dealing with a bill of lading that is only assignable, and not negotiable, according to the terms contained upon its face, when De Camp came into possession of that muniment of title and assigned it to the bank the latter acquired by the assignment precisely the title which De Camp on that day himself had.

A bill of lading represents the goods described in it. 6 Cyc. 426. Bills of lading, by the merchant, are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee, is a complete legal delivery of the goods, divests the vendor's lien. . . . But, though the vendor's lien is thus divested by reason of the complete delivery of the indicia of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods, in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage in transitu. These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of Lickbarrow v. Maso, 2 T. R. 63, 1 Smith, Lead. Cas. 753; 2 Benj. on Sales, § 1211. In Midland National Bank v. Mo., Kan. & Texas R. R. Co., 62 Mo. App. 531, the following facts appeared: Prior to October 28, 1891, the Currier Commission Company was engaged in the grain and commission business in Kansas City, Mo. It did its banking business with the Midland National Bank, of that place, and had done so for several years. The commission company, not having sufficient funds of its own to carry on business to its satisfaction, arranged with the bank for accommodations, which were represented by notes and overdrafts, and it was a part of the agreement for credit, by which the amount of the indebtedness of the commission company to the bank should be secured, that the company would pledge all original shippers' bills of lading and elevator receipts. During the months of July, August, and September, 1891, one Follansbee, a purchasing agent of the Currier Commission Company, shipped at different times from Burlington, Kan., over the Missouri, Kansas & Texas Railroad, three cars of corn and two of flaxseed. The former were consigned to Kansas City. "shipper's order," with instructions to notify Currier Commission Company, Kansas City; and the latter were consigned to Chicago, "shipper's order, notify Currier Commission Company;" and so the bills of lading were made out. In payment Follansbee drew his drafts on the Currier Commission Company, and attached to each draft the proper bill of lading. When the drafts and bills of lading made their appearance in Kansas City, the Currier Commission Company paid them by its checks on the Midland Bank, and then placed those bills of lading with the bank, to be held as collateral. When the five car loads of corn and seed reached Kansas City the railroad company delivered the same to the Currier Commission Company, or, which was the same thing, at Currier's request, rebilled them to other points, without the production or surrender of the bills of lading. On October 28th the Currier Company failed in business, and at the time owed the plaintiff bank in excess of the collaterals. Thereupon the bank demanded the grain and seed called for by

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the bills of lading, but the railroad company was, of course, unable to produce them because they had already been rebilled to other parties. Suit was then brought by the bank against the railroad company. The bills of lading had stamped on their face the words "Not negotiable." The court said: "When Follansbee, the shipper, indorsed and delivered the bills of lading to the Courier Commission Company, it became the owner thereof, with full power of disposition; and while so the owner it had the absolute right, by the transfer of those bills of lading, to convey its title to the plaintiff bank. And this was done. The delivery of the bills of lading to the bank effected a pledge of the property to the same extent and with the same validity as if it had been actually delivered. The bills of lading were symbols of the grain — represented it — and their transfer by delivery stood as an actual change in the possession of the grain itself. The plaintiff bank held the property as collateral security for the advances made to the Currier Company, and, so far as it was necessary to the holder's self-protection, plaintiff had the legal title, and was vested with all the rights and remedies of a purchaser for value. Porter on Bills of Lading, § 510 et. seq.; Hutch. on Carriers, § 129; Dymock v. R. R., 54 Mo. App. 400. The words 'Not negotiable' stamped on the face of the bills of lading in no wise destroyed their assignability. The sole effect of these words was to exempt such bills of lading from the provisions of our statute in relation thereto. Section 745, Mo. Rev. St. 1889; Dymock v. R. R., supra. They are to be treated, then, as at common law." It is said by the Supreme Court of Indiana, in the case of Moore v. Moore and Others, 112 Ind. 152, 13 N. E. 673, 2 Am. St. Rep. 170, to be familiar law "that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good faith purchaser." The same court in the case above cited stated further: "We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by indorsement so as to give the assignee a complete legal title. The more modern rule upon the subject under consideration seems to be that, where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent indicia of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value, and without notice, that the title of the first assignee was not perfect and absolute. 2 Pomeroy's Eq. § 710; Burton's Bill, 93 Pa. 214."

We have said that the bank acquired by the assignment of the bill of lading precisely the title that De Camp had to the lumber on the day the transfer was made. But it is insisted that De Camp obtained possession of the lumber by fraud, and therefore that he got no title to it at all, and consequently could give none to the bank. If it be conceded that he did secure the lumber by fraud, still if the bank was ignorant of the fraud, and took the bill of lading in good faith and for value, it acquired an unassailable title, even as against the defrauded vendor. That proposition has been distinctly settled in Hall v. Hinks et al., 21 Md. 417. It is there said: "All the authorities agree that, although as between the original parties a sale and delivery of goods obtained by fraud is void (voidable), and may be rescinded at the election of the vendor, and the property reclaimed from the fraudulent vendee, yet if they have passed into the hands of a bona fide purchaser without notice he takes a

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good title, which cannot be impeached by the defrauded vendor. It is not necessary to cite authorities in support of this proposition. We have said there is no conflict upon this qestion, and the principle has been recognized by the Court of Appeals expressly in Powell v. Bradlee, 9 Gill & J. 221, and incidentally in Ratcliffe v. Sangston, 18 Md. 390." The principle which lies at the root of this doctrine is a very familiar one. It is a general and just rule that when a loss has happened which must fall upon one of two innocent persons is must be borne by him who has occasioned the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which has caused or contributed to the misfortune. Somes v. Brewer, 2 Pick. 190, 13 Am. Dec. 406. An illustration of the application of this doctrine is found in Eversole v. Maull, 50 Md. 95, and Dias v. Chickering, 64 Md. 349, 1 Atl. 709, 54 Am. Rep. 770. If the jury should believe that the bank acted in good faith in discounting the draft for De Camp and accepting the bill of lading as collateral security, and if Atkins Bros., by putting it in the power of De Camp to deal with the property as his own, enabled him to mislead the bank, and if in consequence of their confidence in him and the credit of one day which they gave him a loss must fall either upon the bank or upon them, then, wholly aside from all questions respecting the negotiability of the bill of lading, the doctrine imposing the loss upon the persons by whose carelessness De Camp was enabled to represent to the bank that the property was his, that loss thus occasioned by that representation must fall upon them. There was no right of stoppage in transitu if the bank had acquired title to the lumber.

The prayer presented by the appellant was wrong because it ascribed to the bill of lading the characteristics of a negotiable instrument, whereas by its terms it was declared to be non-negotiable. The prayer granted at the instance of the appellee was wrong because it denied a recovery on any ground, inasmuch as the bill of lading was declared to be non-negotiable. The prayer, in effect, withdrew from the consideration of the jury all the facts relative to the acquisition of title to the lumber by the bank because it made no reference to those facts at all. In Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088, this court said: "A prayer instructing the jury that the plaintiff is entitled to recover provided they find certain facts withdraws from the jury the consideration of all facts other than those mentioned, and if, from such excluded facts, the jury would be justified in drawing a conclusion different from that which the prayer requires them to find, it is error to grant such a prayer." The evidence excepted to in the first bill of exception was admissible for the reasons that we have heretofore given in dealing with the prayers. Under the instruction granted, the jury returned a verdict for the defendant, the appellee, and a judgment was entered in its favor thereon, and from that judgment this appeal was taken. For the error committed in granting the appellee's prayer the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and a new trial awarded.

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Decision No. 826.

C. H. DEAN CO. v. STANDIFER.

(Court of Civil Appeals of Texas. Nov. 16, 1904.)

83 S. W. 230.

SALES — BREACH OF WARRANTY — ESTOPPEL TO ASSERT — MEASURE OF DAMAGES — LOSS OF GOODS — EVIDENCE — BURDEN OF PROOF.

1. Where plaintiff sold defendant a refrigerator, knowing, or being charged with notice from the circumstances, that it was purchased for the purpose of keeping meat, and warranted the refrigerator to be in good condition, defendant was entitled to recover the value of meat placed by him in the refrigerator, which spoiled because of the failure of the refrigerator to be as warranted, if meat in good condition, placed in the refrigerator, would have kept if it had been as warranted, and if defendant could not, by ordinary care, know that the condition of the refrigerator was such that meat placed in it would probably spoil.

2. In an action by the seller to recover the price of goods sold, where the only answer was the breach of an express warranty, the burden was on defendant to prove the making and breach of the warranty.

3. The fact that the buyer paid the seller a part of the purchase price, or sold the goods to another for an increased price, did not estop the buyer, in an action by the seller for the price, to set up the breach of warranty in reconvention, where the seller had reserved no lien on the property, and was not in any way injured by the buyer's acts.

4. The measure of damages for breach of warranty in the sale of a refrigerator, in consequence of which meat placed therein was spoiled, is the market value of the meat at the time it was spoiled.

5. Testimony of the purchaser of a refrigerator that he thought that he lost $100 worth of meat because of defects in the refrigerator, and would be safe in putting his loss at that amount, was no competent proof of the damages sustained by a breach of warranty as to the refrigerator.

Appeal from Karnes County Court: A. J. Parker, Judge.

Action by the C. H. Dean Company against M. Standifer. From a judgment for defendant, plaintiff appeals. Reversed.

Keller & Keller, for appellant. M. B. Little, for appellee.

NEILL, J. Appellant sued appellee to recover $58, the balance of the purchase money alleged to be due for a refrigerator sold by the former to the latter. Appellee answered that he was a butcher, and bought the refrigerator upon a special warranty that it would be delivered in good condition, and that it would not leak, for the purpose of keeping his meat in good condition; that there was a breach of warranty, in that the refrigerator was not delivered in good condition, but leaked, and was wholly worthless; that he had paid $28 of the purchase price, and that he lost, by reason of its not being the kind warranted, $100 worth of meat which he had placed for keeping in the refrigerator. The amount of money paid and the value of the meat lost were pleaded in reconvention, and judgment asked therefor. By supplemental petition appellant excepted the plea in reconvention; specially denied the contract of war-

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ranty, averring that, if such contract was made, it was by an agent, who had no authority to make such contract; that appellee was estopped from recovering on the alleged breach of warrant for the reason he had made payments after he knew of the defects, and had afterwards sold the refrigerator for more than he bought it for. The exceptions were overruled, the case was tried before a jury, and the trial resulted in a judgment of $1 in favor of the appellee. As we shall reverse the judgment, we will say no more about the facts than is necessary to a consideration of the questions presented by the assignments of error.

There was testimony tending to prove (1) the warranty; (2) its breach; (3) the payment, after discovery of the defects of a part of the purchase money; and (4) that appellee lost meat by reason of the refrigerator not being such as warranted. But the only evidence of the quantity lost, or its value, was the testimony admitted over appellant's objection, for which, as one reason, we are going to reverse the judgment. It is contended by the appellant that the court erred in not sustaining its exceptions to appellee's plea in reconvention, because the damages sought to be recovered thereby are too remote, speculative, and uncertain to constitute a cause of action; that, if there were a warranty, and a breach thereof, the true measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented or warranted. Ordinarily, the measure of damages for a breach of warranty is the difference between the actual value and the agreed value of the article sold, with interest. Anderson v. Duffield, 8 Tex. 237. But where the parties, at the time of making the contract, had in contemplation some special end or purpose for which the article was warranted to be fit, and if the buyer, in endeavoring to apply the article to the purpose it was warranted as suitable, sustains naturally and proximately some loss incidental to such application, compensation for such loss may be included. Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779; Tatro v. Brown, 118 Mich 615, 77 N. W. 274; Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634; McCaa v. Elam Drug Co., 114 Ala. 74, 21 South. 479, 62 Am. St. Rep. 88. For example, in Beeman v. Banta, supra, where the seller of a refrigerator warranted that it would keep meats until the time for spring market, and the buyer filled it with meat, and the meat was lost through defects in the refrigerator, it was held that the measure of damages was not simply the cost of remedying the defect, but included the value of the meat lost, estimated at what it would have been had it kept until the spring market. If, therefore, when appellant sold appellee the refrigerator, he knew it was purchased by him as a butcher for the purpose of keeping his meat, or was charged with notice of such fact from the very nature of the sale and the circumstances attending it, and warranted the refrigerator to be delivered in good condition, and not to leak, and if, in the condition so warranted, meat in good condition placed in it would have kept, if the refrigerator was properly used, and the refrigerator was not such as warranted, and by reason thereof meat placed in it for keeping was spoiled, and its value lost to appellee, then he would be entitled to recover the amount of such loss; provided, however, he did not know, or by the exercise of ordinary prudence and circumspection could have known that the condition of the refrigerator was such that meat placed in it would probably spoil. In view of the principles stated, we do not think appellant's exceptions

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to the plea in reconvention can be sustained, and the trial court did not err in overruling them, nor in that part of the charge complained of in the eleventh assignment of error.

Appellant requested the court to instruct the jury that the burden is on the defendant to prove his contract of warranty as alleged, and, unless they should find there was a contract, such as alleged, from a preponderance of the evidence, to find for the plaintiff. The sale of the refrigerator was not disputed, and the only answer to the suit for the purchase money was the breach of an express warranty. As such a warranty ordinarily excludes an implied warranty (Case Threshing Mach. Co. v. Hall [Tex. Civ. App.] 73 S. W. 835), it follows that appellant was entitled to recover the part of the purchase money sued for, unless it was shown by a preponderance of evidence that the warranty alleged by appellee was made and breached by the plaintiff. The charge requested should have been given.

The appellant requested the court to instruct the jury that: "If they believed from the evidence defendant purchased the refrigerator from plaintiff, and, after using it, sold the same to another upon the representation it was all right and in good condition, and received a valuable consideration therefor, that he would be estopped from denying plaintiff's demand by setting up a claim for damages." It also requested a charge to the effect that, "if there was a contract of warranty as alleged, and it was breached by plaintiff, and if, after such breach, defendant ratified the contract by paying any part of the purchase price, or in any other manner — by acts or silence, when he should speak out" — then to find for plaintiff the amount sued for. The refusal of either of these charges was correct. The warranty, if there were one, was simply an agreement collateral to the sale, by which the appellant vouched for the condition of the refrigerator. The sale could have been made without it, though there could have been no warranty without the sale. The mere fact that the buyer had not paid the purchase money, or a part thereof, does not, in the absence of stipulations to the contrary, prevent him suing to recover damages for a breach of warranty, for the warranty is merely collateral, and the buyer has its action for its breach, leaving the seller to his appropriate remedy by action or counterclaim for the price. Fairbanks v. Baskett (Mo. App.) 71 S. W. 1113; Fitzpatrick v. Osborne, 50 Minn. 261, 52 N. W. 861, and authorities cited; Cash v. Delong (Ky.), 53 S. W. 1037. The fact that the buyer may have paid the price, or part of it, or given his note for it, or the fact that, when sued for the purchase money, he did not plead the breach of warranty as a defense, as he might have done, does not debar him from recovering for the breach of warranty. Boorman v. Jenkins, 12 Wend. 566, 27 Am. Dec. 158; Elliott v. Puget Sound, etc., Co. (Wash.) 60 Pac. 410. Nor is notice of the defects or an offer to return the property to the seller a condition precedent to the buyer's right to maintain an action for the breach of warranty. Ash v. Beck (Tex. Civ. App.) 68 S. W. 53. The cases, with few exceptions, hold that a breach of warranty may be maintained notwithstanding payment, extension of payment by renewal or otherwise, or part payment, unless an intention to waive the breach is proven. Fairbanks v. Baskett, supra, and authorities are there cited. Moreover, the mere fact that the buyer has sold the goods to another, though he may have made a profit on them, does not preclude his recovery of damages flowing from a breach of the warranty of quality. Eagle Ironworks v. Des Moines, etc., Ry.

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Co. (Iowa) 70 N. W. 193; Andrews v. Schreiber (C. C.) 93 Fed. 367; Western Twine Co. v. Wright (S. D.) 78 N. W. 942, 44 L. R. A. 438. In the case last cited it is held that a purchaser of merchandise which has been warranted and proved worthless may defeat a recovery for any amount, though he sold a part of the merchandise for cash, and the buyer made no claim against him on account of defects. While, as held in Ash v. Beck, supra, these matters may raise a strong presumption that the buyer's action on the warranty is not well founded, they are only evidence on a question of fact, and are not presumptions of law. None of these matters can raise an estoppel against the buyer, unless it be shown it caused a detrimental change in the seller's position. We cannot perceive how the fact that appellee paid appellant a part of the price, or the fact that he sold the refrigerator to another for an increased price, places appellant in a worst position than it was before. It had reserved no lien on the property, and it still had its action against appellee for the purchase money. And the fact of the sale at an increased price might be taken and considered by the jury upon the question as to whether or not there was a breach of the warranty. At least it would be cogent evidence that the refrigerator was not worthless, as was claimed by the appellee.

Over objections of appellant, the court permitted the defendant to testify: "I lost, I think I would be safe in saying, one hundred dollars worth of meat, caused by leakage and water running down and spoiling the meat, although I never weighed but thirty-five pounds of spoiled meat." Emmet Carmichael, a witness for defendant, was also, over objections of appellant, allowed to testify: "I would be safe in saying that we lost one hundred dollars worth of meat by the leakage while we were using it. We never weighed any spoiled meat but once, and that was thirty-five pounds, but I think we lost one hundred dollars worth of meat." The value of the meat lost must be reckoned at its value in the market at the time it was spoiled. Beeman v. Banta, supra. This testimony furnishes no evidence of the quantity of meat lost — unless it be the 35 pounds lost — nor of its market value. The quantity lost should have been proven to a reasonable certainty, and then its market value, so the jury could determine for themselves the damage occasioned by such loss. The testimony objected to hardly furnishes decent evidence for the basis of a guess as to the damages sustained by the alleged breach of warranty. The witnesses only thought so and so, and their "wish" to recover $100 damages may have been "the father to the thought." It takes legitimate evidence of facts, which must be found by a jury, to take money from one man's pocket and put it in another's.

The judgment is reversed and the cause remanded.

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Decision No. 827.

BLADES v. DEWEY et al.

(Supreme Court of North Carolina. Oct. 11, 1904.)

48 S. C. 627.

BANKS — OFFICERS — FIDELITY BONDS — CONSTRUCTION — LIABILITY OF SURETY.

1. The directors of a bank, at a meeting in March, 1891, elected defendant as its cashier "' for one year," and fixed his bond at $20,000. At a subsequent meeting the bond was accepted, reciting that "whereas, the above-bounden D. has been chosen and appointed cashier," etc., "the condition of the obligation was such that, if he should well and truly serve the bank, and properly discharge all his duties as such officer," etc., "' and render a just and true account of all moneys, the bond should be void," etc. At the expiration of the year D. was re-elected cashier "for the ensuing year," and his bond fixed at the same amount, and he was re-elected from year to year thereafter, without any new bond being given, until his defalcation in 1903. Held that, since the recital in the bond referring to terms of the cashier's appointment "for one year" controlled and restricted the condition of the bond, the sureties thereon were not liable for defalcations committed after the expiration of the first term.

Appeal from Superior Court, Craven County; O. H. Allen, Judge.

Action by W. B. Blades, as trustee, etc., against T. W. Dewey and others. From a judgement in favor of plaintiff, defendants appeal. Reversed.

F. A. Daniels and W. C. Monroe, for appellants. Rountree & Carr, D. L. Ward, and O. H. Guion, for appellee.

CONNOR, J. This action is prosecuted by the plaintiff, trustee of the Farmers' & Merchants' Bank, for the recovery of the penalty of a bond executed by the defendants, as sureties of Thos. W. Dewey, late cashier of said bank. A jury trial being waived, the court, by consent, found the facts material and necessary to a decision of the controversy. The Farmers' & Merchants' Bank was duly incorporated by chapter 55, p. 781, Priv. Laws 1891. Sections 3 and 4 of said act, being the only sections referring to the election and terms of the officers of the bank, are in the following words:

"Sec. 3. That the office and place of business of said banking company shall be in the city of Newbern, state of North Carolina, and the officers shall consist of a president, vice-president, cashier and teller, and a board of not less than five nor more than nine directors, who shall be elected annually by the stockholders; the directors so elected to choose the officers aforesaid, and shall require the president, the cashier and the teller each to give bond with approved security for the faithful performance of their respective duties.

"Sec. 4. That it shall be the duty of the board of directors and they are hereby fully empowered, to make rules, regulations and by-laws for the government of said corporation and for the conduct of its business; also to fix the salaries of its officers and to fill vacancies in the

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board of directors. Said board of directors shall be chosen by a majority of the corporators named herein, at the first meeting to be called by them, which said board of directors shall hold office for one year and until their successors are duly elected, a majority of said board to constitute a quorum for the transaction of business."

That under said act the said Farmers' & Merchants' Bank was duly organized on March 3, 1891, and a board of directors elected by the stockholders, and that at a meeting of the said board of directors held on the 3d day of March, 1891, the defendant was elected cashier for one year, and his bond fixed at the sum of $20,000. That on the 29th day of April the bond was, at a meeting of said board, presented and accepted, and thereafter no other bond was required or given during the continuance in office of said cashier. The parts of said bond material to the decision of this appeal are: "Whereas the above bounden Thos. W. Dewey has been chosen and appointed cashier of the Farmers' & Merchants' Bank, by reason whereof he will receive or have control, or be charged with money, property, or things of said bank and others: Now the condition of this obligation is such that if the said Thos. W. Dewey, his executors or administrators, shall well and truly serve the said bank as such officer during his continuance in office, and well and truly perform and discharge all his duties as such officer and shall at the expiration of his said office, or whenever sooner thereto required upon request to him or them made, shall make or give unto said bank a just and true account of all moneys. * * *" That thereafter at a meeting of the board of directors of said bank held on the 29th day of April, 1892, the said Thos. W. Dewey was elected cashier for the ensuing year, and it was ordered that the bonds of the officers elected at said meeting be fixed at the same amount. That regularly each year thereafter the said Thos. W. Dewey was elected by the said board of directors as cashier for the ensuing year until and including the year 1903. There was no defalcation or breach on the part of said Dewey as such cashier until the year 1903. That during said year there was a defalcation by said Dewey to an amount exceeding the penalty of said bond. There was no by-law or resolution fixing the term of office of said cashier. The said bank failed, and the plaintiff was appointed trustee. His honor rendered judgment that defendants were liable on said bond, and they excepted and appealed.

The defendants insist that by section 3 of the charter the terms of the officers, including the cashier, are made annual. This contention is seriously controverted by the plaintiff, he insisting that the words "elected annually" are confined to the board of directors. The question is certainly not free from difficulty. Assuming, however, that, as contended by the plaintiff, the term for which the cashier was to be elected is left open by the charter to be fixed by the directors, it would seem that the fact, as found by the court, that at their first meeting, and probably before any by-laws were adopted, they elected the defendant Dewey "for one year," confined his term to that period, certainly until changed by resolution or by-law. In respect to the liability of the sureties to the bond in suit, no action of the trustees thereafter changing the term, or failing to require a new bond, could enlarge or extend the time for which they could be held answerable. The board seem to have so regarded the matter, because just one year after the first election they re-elected the defendant "for the ensuing year," and ordered "that the bond be fixed at the same amount." This language

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excludes the idea that they regarded the defendant Dewey as continuing in office under the first election, or that the bond given covered the next term. They elected him annually thereafter, ordering that the "bond remain as heretofore." This language might possibly give rise to some doubt, but certainly that used at the time of the second election could not do so. We concur with the plaintiff's counsel that no question of usage or custom can arise in this case. The terms of the contract were fixed at the opening of the bank, and nothing done thereafter by the directors could change or affect them in respect to the question before us. What, then, did the defendants contract to do? It may be well enough to say at the outset that we do not assent to the suggestion that it was not competent for, or within the power of, the directors to fix the terms for a longer time than their own term. We see no good reason why, if not restrained by the charter, they may not elect for a number of years, or to hold at their pleasure. It is frequently said that sureties are the favorites of the law, and their obligation is strictissimi juris. This is true, but we think the principle is correctly stated by Martin, J., in Ulster Sav. Inst. v. Young, 161 N. Y. 23, 55 N. E. 483: "The liability of a surety is measured by his agreement, and is not to be extended by construction. His contract, however, is to be interpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined by the language employed, when read in the light of the circumstances surrounding the transaction. Hence, when the question is as to the interpretation and meaning of the language by which a party has bound himself, there is a difference between the contract of a surety and that of a principal or other party sustaining a different relation. It is when the intention of the parties has been thus ascertained that the principle of strictissimi juris applies, and then it is that the courts gained the rights of the surety, and protect him against a liability which is not strictly within the terms of his contract." Was the term for which defendant Dewey was elected at the time and with reference to which the bond was given annual? In the absence of a provision in the charter, or any by-law or resolution, fixing the term, there is but one possible source for us to go for light by which to answer the question — the terms of the appointment. This the court finds to have been "for one year." We must assume, in the absence of any suggestion to the contrary, that this was ascertained by referring to the minutes or records of the corporation. This is the usual way in which the business of corporations is conducted. We must assume that the term for which he was elected was known to the sureties, and that they contracted with reference to such appointment. It would be doing violence to common experience and observation to do otherwise. The bond recites, "That whereas the above-bounden Thomas W. Dewey has been chosen and appointed cashier of the Farmers' & Merchants' Bank," etc.

Every contract of suretyship has reference to and is based upon some contract made or obligation assumed by the principal obligor, and the liability of the surety is measured by the obligation of the principal. "The bond of all officers remains in force as a continuing obligation only during the period for which he legally holds under his election. His re-election at the end of this period and his entry upon a second term of office, though no actual gap intervene, do not operate to revive or keep alive his bond." 1 Morse on Banks, § 27. This is all clear

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enough, and there would be no difficulty in this case but for the fact that the bond simply recites that Dewey has been "chosen and appointed" without any reference to the time or term for which he has been so chosen, while the condition of the bond is that he shall well and truly serve the said bank as such officer "during his continuance in office." The defendants say that this language is to be understood as referring to his continuance in office by virtue of said appointment. The plaintiff insists that the condition must be given a very much larger meaning and application; that, in the absence of any provision in the charter, by-laws, or resolution fixing the term, or any express recital referring to the term of appointment, the parties must be understood as contracting to make good any default by their principal at any time during his actual continuance in office. It is conceded by the plaintiff that if the recital had, in express terms, referred to or set out an election "for one year," such recital would have controlled and limited the language of the condition. This principle is well settled by a long current of decisions from the time of Lord Chief Justice Hale. In Lord Arlington v. Merrick, 3 Saunders, 403, it was said "that the condition shall refer to the recital." One Jenkins had been appointed deputy postmaster for six months by the plaintiff, who was postmaster general, and entered into bond with the defendant as surety, reciting the appointment "for the term of six months following," with the condition that he would well and truly perform, etc., "for and during all of the time that he shall continue deputy postmaster." The principal obligor continued in office after the expiration of six months, and breached the condition of the bond. The court held that the surety was liable. Hale, C. J., says: "And so here the words 'during all the time' shall be intended but only during said six months recited in the bond." This, Saunders, says, has been considered a leading case on this subject ever since. Liverpool Waterworks v. Atkinson, 6 East, 507; Baker v. Parker, 1 D. & East, 287. In these cases the recital set forth the term of appointment. They aid us, therefore, only as sustaining the principle that the recital will control the condition. There are a class of cases wherein the statute fixes the term, in which it is held that, although the term is not recited, and the condition is general, the language will be construed to refer to the term as fixed by the statute. In Peppin v. Cooper, 2 B. & Ald. (4 Eng. Com. L.) 577, the office of collector of rents was fixed by act of Parliament at one year. Abbott, C. J., said: "It is true that the words at all times hereafter in the condition of the bond would, taken by themselves, extend the liability beyond that period. But these words must be construed with reference to the recital, and the nature of the appointment there mentioned, and the recital is that Warren, together with Peppin, had been appointed collectors under said act of Parliament. Now, the nature and duration of the office must be learned from the act of Parliament itself, for, if the statute makes it an annual office, it is unnecessary to state that fact either in the bond or the pleadings." Hassell v. Long, 2 Maule & Sel. 363. The plaintiff says that this case comes within neither of these classes, and this is true. In Dedham Bank v. Chickering, 3 Pick. 335, Parker, C. J., referring to the contention that the condition is controlled by the recital, says: "We do not doubt the soundness of the principle. * * * In some cases, when the words would extend to an indefinite period, but when by the recital it appeared that the office was annual, it has been held that the obli-

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gation should be understood as referring to an office so limited. We should go even further, and say that, when it appears by the records of a corporation that the office by their regulations is an annual one, the bond should be so restricted; and all this is founded on the intent of the parties." It was held in that case that there was nothing in the record to show that office was annual, and nothing to make the parties suppose that it was limited to one year. The general principle is recognized , and the chief justice says that it will apply when it appears by the records of the corporation. The facts of the case did not come within the rule. The plaintiff relies also upon Amherst Bank v. Root, 2 Metc. 532. The opinion is written by Chief Justice Shaw, and is certainly entitled to the most respectful consideration by reason of his great learning and eminent ability. He says: "It is manifest by the terms of this condition that the obligation is unlimited in time, and undertakes for the faithful conduct of the cashier as long as he continues in office. But it is a well-settled and now familiar rule of law that general words in the obligation may be limited and restricted by the recital, by the subject, or by facts which, when applied to the language, show that it must have been so understood by the parties." After laying down the general proposition, he continues, as if by way of illustration: "As when it is recited that one has been appointed to an office for a limited time, and there is a stipulation for a general performance, the law will look to the recital, and limit the stipulation for a general performance to the time for which it is recited he is chosen." We cannot suppose that the chief justice intended by the illustration to narrow or limit the general principle so that it should only apply to cases coming strictly within the illustration. To so interpret him would be to limit the general principle in which he expressly says that the restriction of the condition may be brought about "by the recital, by the subject, or by facts which, when applied to the language, show it must have been so understood by the parties." The fact that the principal was appointed "for one year," it seems to us, is as potent in controlling the condition as would be the recital of the fact, because it is the fact which the parties had in view when they contracted. The case of Amherst Bank v. Root was decided upon the general statute in force in Massachusetts regulating banks and prescribing the terms of cashiers. The real point decided is that the language of the general statute will control the election by the board "for the ensuing year." The case of Westervelt v. Mohrenstecher, 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477, was decided upon the same ground — the national banking act prescribing the terms for which cashiers are elected. The Massachusetts court expressly recognizes this in Trustees, etc., v. Dean, 130 Mass. 242. In that case the plaintiffs elected Richardson treasurer "for the ensuing term of three years." He gave bond with general recital. At the end of the term he was re-elected, and gave no new bond, the plaintiffs ordering that "the bond of the treasurer be the same as before." In an action brought for a breach committed after the expiration of three years it was held that the sureties were not liable; the court saying: "There is no statute which makes the office a continuing one, and the reasoning which led to the decision in Amherst Bank v. Root is not applicable to this case. * * * When the defendants signed the bond in suit, the subject-matter of the contract was an office of a fixed and limited term. Their stipulations apply

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only to the limited office, and as there is no agreement to continue their liability in case of the re-election of the same officer, they are not responsible for any defalcations happening after their principal, by a re-election, entered upon a new office or term of office." O'Brien v. Murphy, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487; Ulster Sav. Bank v. Ostrander, 165 N. Y. 430, 57 N. E. 627.

While none of these cases are on all fours with ours, we find nothing said in any of them which confines the application of the general principle to cases where the term is fixed by statute, charter, by-law, or resolution, or which excludes its application to a case wherein the term fo appointment at the time it is made is fixed to a definite period and the recital is general. In a note to Morse on Banking (4th Ed.) § 27, the law is thus stated: "Though the bond does not recite the term of the office or agency, if it be of limited duration by statute, charter, by-law, or terms of appointment, the parties are still supposed to contract with reference to the limited term, and the sureties will not be held answerable for the misconduct of the principal beyond that term, upon a new appointment, even though the words of the bond are that they shall be responsible for the principal "at all times or for any time hereafter." Among the cases cited to sustain this proposition are Kitson v. Julian, 82 Eng. Com. L. Rep. 853. In that case the bond recited that Julian had been appointed clerk to the Torquay Gas Company, and had agreed to give bond. No term was named in the recital. The condition was that the said Julian should well and truly, etc., "so long as he should continue to hold said office." The bond was put in suit upon an alleged breach. The defendant sureties by way of plea averred that the appointment was for one year from and after Lady Day, 1850, and no longer; that Julian performed, etc., during said time. Plaintiff, by way of replication,, said that by and with the consent of the defendants and the said company the said Julian remained in the employment of said company after the said time, and that during such last-mentioned period there was a breach. Defendants demurred to the replication. The cause was argued upon the pleadings. Lord Campbell, C. J., said: "The liability continues after the expiration of the year, if that was the intention of the parties. In Lord Arlington v. Merricke the court seemed to have considered that the parties intended otherwise. Many decisions show that when the principal is made liable for a given time only, the liability of the surety is confined to that time. We have here a positive averment that the appointment was for one year, and no more. The condition recites the appointment, the extent of which is shown by the plea, and we must assume that it was known to both parties what that extent was." The judgment was concurred in by all of the judges. In Hassell v. Long, supra, Ellenborough, C. J., said: "All the cases since Lord Arlington v. Merricke and St. Saviour v. Bostick, 2 N. Rep. 175, have narrowed the construction of conditions of this sort to the actual term of the officer." Manufacturers' & Mechanics' Bank v. Odd Fellows' Hall Ass'n, 48 Pa. 446; Thomas v. Summery, 46 N. C. 554; Welch v. Seymour, 28 Conn. 387; 5 Cyc. 773, 774; Munford v. Rice, 6 Munf. 81. We do not think that the case of Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862, conflicts with with this view. As sustaining the construction which we have adopted, it may be noted that in a number of cases the condition of the bond has been so drawn as to include breaches committed during other terms for which

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the officer may be elected. Oswald v. Mayor, 5 House of Lord's Cases, 856; Ulster Sav. Inst. v. Young, 161 N. Y. 23, 55 N. E. 483. We do not deem it necessary to concur in all that is said in Bank v. Briggs' Assignees (Vt.), 37 Atl. 231, 37 L. R. A. 845, 60 Am. St. Rep. 922.

Because of the importance of the principle involved and the very able arguments and briefs by counsel we have endeavored to set out at more length than is usual our views and the result of our examination of the authorities. Holding, as we do, that the condition in the bond is controlled and restricted by the recital and that this refers to the terms of the appointment "for one year," we are of the opinion that the sureties are not liable for defalcations committed after the expiration of the first term, April 29, 1892. Judgment should have been so rendered. To the end that such judgment may be entered below, let it be certified that there is error.

Decision No. 828.

BROWNING v. McNEAR. (S. F. 3,081.)

(Supreme Court of California. Nov. 10, 1904.)

78 Pac. 722.

SALES — ACCEPTANCE OF GOODS — BREACH OF WARRANTY — DAMAGES — SALE BY SAMPLE — AGENCY — UNCOMMUNICATED LIMITATION ON AUTHORITY.

1. A buyer of personalty cannot, after acceptance without protest, and in the absence of fraud or breach of warranty, claim that the goods were damaged when delivered.

2. Where a breach of warranty of the quality of goods sold is discovered after delivery, the buyer may retain the goods, and sue for the breach or set off the damage caused thereby in an action for the price.

3. Where the buyer's agent in the absence of the seller took samples of grain, which he inspected and submitted to the buyer, who, to the seller's knowledge, purchased on the agent's representations that the samples were fair samples, there was no sale by sample, within Civ. Code, § 1766.

4. Under the express provision of Civ. Code, § 1764, a contract of sale does not imply a warranty.

5. The mere fact that payment for grain sold is deferred to the time of shipment, and to be made against the shipping receipts, does not show that title did not pass till shipment.

6. Uncommunicated limitations privately placed on an agent's general authority do not bind a person with whom the agent deals for his principal.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. W. Browning against G. W. McNear. From a judgment for plaintiff for less than his demand, he appeals. Reversed.

Crane & Rutledge and Adams & Adams, for appellant. Chickering & Gregory, for respondent.

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ANGELLOTTI, J. The plaintiff brought this action to recover $6,632.27, alleged to be the balance due him for 21,277 sacks of barley sold and delivered by him to defendant at the agreed price of 81¼ cents per 100 pounds. The defendant, who had received, accepted, and used 20,445 sacks thereof, claimed that the original transaction was no more than an executory agreement for the sale of the 21,277 sacks at the price named, and alleged by way of counterclaim that "said barley was to be delivered to said defendant free on board barge at Eddy's Landing, California, in good order and condition, and equal to a sample therefore shown said defendant by said plaintiff;" that defendant agreed to pay such price for the barley "when so delivered on board barge and in said condition"; that plaintiff delivered only 20,445 sacks; and that the portion so delivered "was, prior to the delivery of said barley upon said barge, seriously damaged by rain and other causes, so that when placed on said barge the same was greatly inferior in quality to said sample and was not merchantable barley"; and that, by reason of said damaged condition of said barley, defendant suffered damages in the sum of $5,000. He therefore asked that judgment be rendered against him for $1,632 only. The trial court found that the agreement between the parties was executory in its nature; that "it was understood by both parties that said grain was purchased and was to be paid for only against shipping receipts to be thereafter furnished by plaintiff"; that at the time of the transaction, October 9, 1899, the barley was in good order and condition, and equal to samples which had been obtained by the purchaser; that both parties "understood * * * that the barley was being purchased by such samples"; that after October 9th, and before the shipping, it was damaged to the extent of $4,182.96 by rain and mud, so that when it was delivered on board the barges it was not in good order and condition, or equal to the samples referred to, and was not merchantable barley; that 832 sacks, weighing 84,864 pounds have never been delivered, but are still in plaintiff's warehouse. The court deducted from plaintiff's claim the said sum of $4,182.96 on account of the damage done by the rain to the barley delivered, and also the sum of $689.52 for the 832 sacks still in plaintiff's warehouse, and gave judgment in his favor for $1,759.79, interest, and costs of suit. Plaintiff appeals from the judgment, and from an order denying his motion for a new trail.

It will be seen from the foregoing that the question here is, except as to the 832 sacks of barley that are now in plaintiff's warehouse, whether or not, the defendant, having accepted and retained and used the property, can, in this action for the agreed price, recover, by way of counterclaim, the amount of damage done to the property by rain between the time of the transaction, October 9, 1899, and the time of the loading of the property upon defendant's barges. If the transaction of October 9, 1899, amounted to an absolute sale of the property, and the title thereto then passed to defendant, concededly plaintiff would in no way be liable for the damage. It appears to be equally clear that if the transaction amounted only to an executory agreement of sale of a specific, identified lot of barley, and the defendant, without protest, accepted, retained, and used the property without attempt to rescind or offer to return, he cannot, in this action for the price, offset the damage caused by the rain, in the absence of a breach of warranty on the part of the vendor. An acceptance of

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property by the vendee, in the absence of fraud or breach of warranty on the part of the vendor, renders him liable for the price agreed on, and precludes him from alleging that the property is not of the character and quality called for by the contract. This must necessarily be so, in view of the fact that by such action he affirms the sale, and, in the absence of fraud, his only possible cause of action against the vendor in this connection must arise from some undertaking on the part of the vendor as to the condition or quality of the property. The authorities appear to be without conflict as to this. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 1092, and cases there cited. It is the law of this State, as it is generally elsewhere, that where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property and bring an action for the breach of the warranty, or may plead the breach in reduction of damages in an action brought by the vendor for the purchase money. Snow v. Holmes, 71 Cal. 142, 149, 11 Pac. 856; Pollhemus v. Heiman, 45 Cal. 573, 579. This rule, which is vigorously asserted by defendant, is not disputed by plaintiff, but its application to this case is dependent upon the question as to whether or not there was a warranty. If there was not a warranty, defendant was not entitled in this action to any offset on account of the damage caused by the rain to the property that he has accepted and retained; and this is true regardless of the question as to whether the transaction of October 9, 1899, amounted to an absolute present sale, or only an executory agreement to sell. It was undoubtedly upon this theory that defendant alleged in his counterclaim that the "barley was to be delivered on board barge * * * in good order and condition, and equal to a sample theretofore shown said defendant by said plaintiff."

Passing for the present the question as to whether or not the transaction of October 9th amounted to an absolute present sale of the barley, we shall consider the question as to warranty. The Superior Court failed to find that there was any express undertaking on the part of plaintiff as to the condition of the property at the time of the transaction of October 9th, or as to what condition it should be in at the time of delivery. The evidence was without conflict to the effect that there was no such express undertaking on the part of plaintiff. In fact, the only evidence as to any express understanding on the subject was that as to what occurred in the Bank of Colusa on October 9th, when the transaction was being there closed, where, according to the evidence of defendant's agent, Mr. Hickok, who negotiated the purchase, Mr. Harrington, an officer of the bank, said: "Mr. Browning, I suppose you sold this barley, so if it gets wet you would not be the loser?" and Browning replied: "Yes; I have sold the barley to Mr. McNear. They have to look out for the weather;" and Hickok said, "You need not be worrying about the weather, because I think the barge will be there in a day or two and get it, and there is no indication of rain to-day." This evidence is more than corroborated by the evidence of Harrington and Browning, and it would be difficult, under such circumstances, to find that there was any express agreement or warranty on the part of plaintiff as to the condition in which the barley should be at the time of delivery. There is no claim that there was any express warranty as to its condition at the time of the transaction.

The question then remains as to whether there was any implied

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warranty. In this connection, the defendant relies upon the finding of the trial court to the effect that at the time of the transaction the barley was equal to samples which had been obtained by the purchaser, and that both parties understood that the barley was being purchased by such samples, as showing a sale by sample, and therefore an implied warranty, under section 1766, Civ. Code, which provides, in accord with the general rule, that "one who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample." If we concede that the finding of the court above referred to is a finding that the plaintiff agreed to sell this barley by sample, within the meaning of this section of the Code, it must be held that the finding is without support in the evidence. No sample of this barley was at any time exhibited or furnished by the plaintiff. The barley lay in plaintiff's yard, and the defendant's agent, Hickok, had examined it carefully, and on two occasions samples were taken for him by another party under his directions; and so far as appears, these samples were taken without the presence of plaintiff, and without his knowledge. It does not even appear that plaintiff ever saw the samples, Hickok stating that he was not positive that he ever showed them to him. All that plaintiff knew at the time of the transaction was that it was customary for grain buyers to sample for themselves all grain that was for sale; that Hickok had in fact selected and taken, for himself, samples of his barley, had sent a set of the same to his principal, the defendant, and retained a set in his office; and that McNear was acting entirely upon the representations of his agent, Hickok, to the effect that the samples taken and forwarded by such agent were in fact fair samples of the bulk of the barley. There was no act of any kind on the part of plaintiff conveying the slightest intimation on his part as to the correctness of the samples. It would be a novel application of the rule of warranty arising from sale by sample to hold that a vendor is to be held responsible for a sample that he has never seen or exhibited, and concerning which he has made no representation, and which was selected and taken by the purchaser himself, or his agent, upon an inspection of the property. On a sale by sample the law implies the warranty that the bulk is equal to the sample, upon the theory that by his acts and representations the vendor assures the vendee that such is the fact. It says that, where one makes or agrees to make a sale by sample, such act on his part is a representation that the bulk is equal to the sample — an affirmation that the specimen exhibited is a fair sample of the bulk of the commodity. Gurney v. A. & G. W. Ry. Co., 58 N. Y. 364. The sale by sample contemplated by the law is one the circumstances of which indicate something in the way of representation by the vendor to the effect that a sample exhibited fairly represents the bulk. To constitute a sale by sample, it must appear that the parties "contracted solely in reference to the sample exhibited; that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it." Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321; Benjamin on Sales, American note (7th Ed.) p. 685; 15th Am. & Eng. Ency. of Law (2d Ed.) 1227.

While the question as to whether the circumstances of a transaction show a sale by sample is, of course, a question of fact for the court or jury, there must be evidence fairly sufficient to support a finding

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of such a sale, or it cannot stand. Taking the evidence in this case in the light most favorable to defendant, it discloses no more than that the plaintiff knew that the defendant through his agent, had personally inspected the barley, and, for the purpose of enabling himself to properly exercise his judgment as to the quality thereof, had himself, through his agent, selected and taken samples, and that he was basing his conclusion as to the quality of the barley and its value upon the result of such inspection and the samples selected by himself. This mere knowledge of plaintiff as to the means used by defendant in determining as to the quality of the barley, unaccompanied by any act of his, could not make the sale one by sample. It was clearly a case where the defendant relied entirely upon his own examination, and took such precautions as he deemed essential to satisfy himself as to the quality of the property, without assistance of any kind from the vendor.

It is further contended that, if there was not an agreement to sell by sample, there was an implied warranty that the goods should be sound and in merchantable condition when delivered upon the barge. The theory appears to be that this is the rule as to all executory sales, as distinguished from the rule applicable to executed sales. In this state the question as to whether there is an implied warranty must depend upon the provisions of our Civil Code. Section 1764 thereof provides that, "except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." See Sutro v. Rhodes, 92 Cal. 123, 28 Pac. 98. Except for the section relative to sale by sample, admittedly no provision of that article of the Code is applicable to this case, unless it be section 1771. That section provides that "one who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." This section makes no distinction between executed sales and agreements to sell, and simply means what it says, viz., that if at the time of the sale, or the agreement to sell, the merchandise is inaccessible to the examination of the buyer, the warranty that it is sound and merchantable will be implied. It can have no application to this case, for the simple reason that this barley was not only not inaccessible to the examination of the buyer, but was, as a matter of fact, inspected and examined by him, through his agent, prior to the making of the agreement. It must therefore be held that there was no express or implied warranty on the part of plaintiff, or any undertaking on his part, as to the condition of the property at the time of delivery, and it follows that defendant was not entitled to set off against the agreed price the damage caused by the rain to such of the barley as was received and accepted and used by him.

Upon the question as to whether the transaction of October 9, 1899, amounted to an absolute sale of the barley, there is some doubt as to whether the evidence supports the finding of the court. We do not deem it necessary to discuss this question, in view of the fact that the judgment and order must be reversed for the reasons already stated. Whether or not the parties, plaintiff and Hickok, representing defendant, then agreed upon a present transfer of the barley is a question of fact, the determination of which may well be left to the Superior Court upon another trial. It is proper to say, however, that the mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only

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as against shipping receipts, does not conclusively establish that the purchase was against shipping receipts only, or that there was no agreement for a present transfer of the property. It is also proper to say that in the determination of the question as to what the agreement actually was, limitations as to the general transaction privately placed by defendant upon the general authority of the agent, and not communicated to plaintiff, cannot, under the circumstances of this case, play any part.

The status of the 832 sacks of barley that have not been taken by defendant from plaintiff's warehouse must depend upon the determination of the question as to whether the transaction of October 9, 1899, was an absolute sale. If the title thereto then passed to defendant, he is liable in this action for the agreed price; otherwise, not.

The judgment and order are reversed, and the cause remanded.

We concur: SHAW, J.; VAN DYKE, J.

Decision No. 829.

ALABAMA STEEL & WIRE CO. v. SYMONS et al.

83 S. W. 78.

(Kansas City Court of Appeals. Missouri. June 20, 1904.)

SALES — ACCEPTANCE OF PROPERTY IN DEFECTIVE CONDITION — APPEAL — THEORY OF TRIAL.

1. Where defendants ordered nails from plaintiff, to be manufactured like samples furnished by defendants, acceptance of a part of the nails with knowledge that they were defective did not preclude defendants from offsetting damages caused by the defects in an action for the price.

2. Material facts not pleaded, but shown by evidence to which no objection was made, will be considered on appeal without reference to the defects in the pleading.

Broaddus, J., dissenting.

Appeal from Circuit Court, Jackson County; W. R. Teasdale, Judge.

Action by the Alabama Steel & Wire Company against Arthur H. Symons and others. From a judgment for plaintiff, defendants appeal. Reversed.

Karnes, New & Krauthoff, for appellants. Lathrop, Morrow, Fox & Moore, for respondent.

ELLISON, J. The plaintiff is a manufacturer of nails, and those in the account sued on were to be manufactured in accordance with a sample furnished by defendants. The sale of the nails was a sale by a manufacturer by sample; and, as appears in the opinion of Judge Broaddus, they were sold for a specific purpose. In such character of sale there is an implied warranty that the goods will correspond to the sample. This is a well-established rule of law, and it distinguishes such sales from an ordinary sale of personal property in præsenti, where the

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rule of caveat emptor would apply, where no express warranty has been taken, and where an implied warranty would not arise. In such sales by sample which fail to conform to the sample, while the buyer is not bound to accept the goods when delivered, and may refuse them, still he may keep and use them, knowing their deficiency, and yet insist on the implied warranty by way of diminution of the contract price. Ferguson v. Huston, 6 Mo. 414 (opinion of Judge Napton); Wade v. Scott, 7 Mo. 509 (opinions by Judges Scott and Napton). Judge Bland so stated the law in Schoenberg v. Loker, 88 Mo. App. 387. In the respect here considered a sale by sample is not different from a sale for a specific purpose (and the sale in this case was both by sample and for a specific purpose), in which instance there is an implied warranty that the chattels shall be fit for such purpose. In such case it is uniformly held that the buyer may keep the chattels, and rely on the warranty in diminution of the contract price. Brown v. Weldon, 27 Mo. App. 267-273, s. c. 99 Mo. 564, 13 S. W. 342; Comings v. Leedy, 114 Mo. 478, 21 S. W. 804; Werner v. O'Brien, 40 Mo. App. 483; Danforth v. Crookshanks, 68 Mo. App. 311; Brewing Co. v. McEnroe, 80 Mo. App. 429; New Birdsall Co. v. Keys, 99 Mo. App. 463, 74 S. W. 12; June & Co. v. Falkinburg, 89 Mo. App. 563. A reference to the text-writers will show that this is well-nigh the universal rule. I refer here to Biddle on Warranties, §§ 291, 303; 2 Mechem on Sales, § 1844; Story on Sales, § 455a; Benjamin on Sales (Ed. 1899) § 901. It is sometimes suggested that the rule only applies when the warranty is express. But by reference to the cases just cited it will be seen that it is held to apply in cases where the warranty is that implied warranty which the law attaches to the contract of sale. And so it has been stated in the text-books and in adjudicated cases in other States. Muller v. Eno, 14 N. Y. 597; Holloway v. Jacoby, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737. There are cases, where no question of warranty is made, and the vendee accepts the chattels as in compliance with the vendor's agreement, in which it would be considered that the parties had agreed that the contract had been properly performed, as in Black River Lumber Co. v. Warner, 93 Mo. 386, 6 S. W. 210. But we have no such case. I do not regard the case of Water Co. v. Lamar, 140 Mo. 145, 39 S. W. 768, as a case like the one before us. The sale in that case was not the character of sale here, and no question of implied warranty was made or suggested. A remark is made by Judge Biggs in Ashford v. Schoop, 81 Mo. App., loc. cit. 545, to the effect that an acceptance of goods would waive an implied warranty. It can make no difference in the rights of the parties whether the warranty is express or implied. I regard the judge's statement as merely a passing remark, not arising in the case. Judge Biggs had written the opinion in Orange Growers' Ass'n v. Gorman, 76 Mo. App. 184, which was adopted by the Supreme Coprt in 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718, which seems to me to be entirely in line with the views I entertain of this case. I have not found any cases in this State involving a question of warranty which, in my view, differ from what I have here written. In this connection, care should be taken not to confound the right of the buyer to rescind a contract (the parties being put back in statu quo), and his right arising on a warranty. If he accepts the goods with knowledge, and yet retains them, he loses the right to rescind, but by no means does he lose his right under the warranty. Benjamin on Sales (Ed. 1899) § 901.

In my view, it follows from the foregoing that the trial court erred in

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giving the instruction set out by Judge Broaddus. I think, furthermore, that it is followed by some other instructions with which it is not easily reconciled.

The pleadings in the case do not show that plaintiff was a manufacturer, nor that the sale was by sample, nor anything in reference to an implied warranty. But notwithstanding this, the evidence, from beginning to end, was introduced and received without objection, as though such matters had been formally pleaded. The plaintiff took upon itself to show not merely that it sold to defendants, at their request, certain goods which were reasonably worth the price charged, as set out in the petition, but it proceeded to show that it was a manufacturer of nails; that it manufactured the nails in question for defendants on their order, and by the sample furnished. Evidence in behalf of defendants was received as to the real value of the nails, and of their failure to correspond with the sample, as though the pleadings justified it. In such state of case, we must do as the parties have done, and overlook any question as to pleading. Hill v. Myer Bros., 140 Mo. 433, 41 S. W. 909; Stewart v. Outhwaite, 141 Mo. 562, 44 S. W. 326; Simon v. Simcox, 75 Mo. App. 143; Pope v. Ramsey, 78 Mo. App. 157.

I think the judgment should be reversed, and the cause remanded.

SMITH, P. J., concurs.

BROADDUS, J. (dissenting). The petition alleges that "plaintiff sold, furnished, and delivered to defendants, at defendants' instance and request, goods, wares, and merchandise during the year 1901 to the aggregate amount and of the aggregate value of $2,321.99; that said defendants are entitled to credits thereon to the aggregate amount of $1,714.70; . . . that said goods, wares, and merchandise were of the kinds, quantities, and qualities as shown by itemized statement of account, and were sold and delivered upon the dates as therein given, and that the prices therefor, as shown by said itemized statement of account, are reasonable and proper prices of and for said goods, wares, and merchandise, and the prices agreed upon by and between plaintiff and defendant; and that the balance unpaid on said account is $607.29." The answer admits the sale and delivery of the nails, but avers that the nails so sold and delivered were defective, in that the heads of the same were not sufficiently broad, the points were poor, and they were not uniform in length, and that a large number of them were bent, and varied in length; some of them being an inch shorter than other nails in the same keg. The answer further avers that the nails delivered were not of the value paid for them, and that defendants owe plaintiff nothing. The answer, however, alleges that defendants paid plaintiff $4,815.11 for nails delivered. The reply, after denying the new matter set up in the answer, states that "in the month of May, 1902, plaintiff sold and delivered to defendants $1,588.28 worth of nails, which defendants paid, less a discount of $35.20, and during said month also sold and delivered to defendants $1,512.13 worth of nails, which they paid, less a discount of $33.61, but that the sale of the last-named nails was made prior to the sale of nails for the balance of the purchase price for which the suit is brought." On May 4, 1901, the defendants made an order on plaintiff for 5,000 kegs of wire nails (the nails in controversy), 3,000 kegs of which were to be shipped to Chicago, and 2,000 kegs to Kansas City, Mo. On the same day the defendants addressed to plaintiff a letter in reference to said nails, which, among other things, contained

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the following: "As our nails are for use in the manufacture of boxes and are all driven by machinery, it is necessary that they have extra broad heads and be as near uniform in length as possible. We enclose a few samples." Plaintiff accepted the order, and made and shipped four car loads of nails. Defendants asked and obtained an extension for 60 days' time to pay for a part of the nails, which had been delivered, and the balance of the order was countermanded. Forty kegs of the nails were returned to plaintiff. Except those returned, all the nails shipped, after being examined by defendants, were received and disposed of by them to their customers. The evidence of the plaintiff tends to show that the nails in question were made to conform substantially in compliance with the specifications. One of the witnesses examined four kegs of those returned. He stated that there were about 30,000 nails to the keg, and that he emptied them from the kegs, and, upon careful examination, after going over 130,000 nails, he found only 193 that were defective, and 175 of a different size. Defendants' evidence was to the effect that the nails were defective — some of them shorter than others, some without points, some bent, and others with small heads. The estimate of one of defendants' witnesses was that one-third of the nails the defendant received were defective. It is admitted that defendants received and used the nails, knowing that they were defective. After some of the nails had been shipped, defendants complained to the plaintiff that they were defective in the particulars mentioned, but did not offer to return them, other than the 40 kegs reshipped to plaintiff, as stated, and for which credit was given. The finding and judgment were for the plaintiff, and defendants appealed.

The only issue made by the pleadings was the value of the nails received by defendants, as the contract price alleged in the petition was not denied. On the issue thus presented the respective parties introduced their evidence.

The principal error complained of by defendants was the giving of instruction No. 1 on behalf of plaintiff, which is as follows: "The court instructs the jury that if you believe from the evidence that the defendants accepted the nails for the purchase price of which this suit is brought, knowing they were inferior in quality, or not the quality of nails contracted for and ordered by defendants, then defendants cannot now object to the quality, and your verlict must be in favor of plaintiff for the amount sued for." The objection to the instruction is that, under the evidence, there was an implied warranty at least that the nails were to be of a certain quality; and, such being the case, defendants had the right to retain the nails, and show the difference between the contract price and their actual value in diminution of such contract price. The question raised has been before the Supreme and appellate courts of this state in many cases. In Brown v. Weldon, 27 Mo. App. 251, and 99 Mo. 564, 13 S. W. 342, the suit was on a note given for the purchase price of a jack and a horse. The court held that "in an action on a note given for the purchase price of a chattel bought for a particular purpose, either upon an express or implied warranty, and with or without fraud, it is not necessary, to enable the purchaser to avail himself of the plea of the failure of consideration, that he return or offer to return the article, or offer to rescind the contract, or that such article be wholly worthless," and that, "if the purchaser retain it, and it is not wholly worthless, the plea of failure of consideration is available to defeat a recovery on the note only to the extent of the difference between the

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represented and real value of the article." The principle in that case was followed in Werner v. O'Brien, 40 Mo. App. 483; Miles v. Withers, 76 Mo. App. 87; June & Co. v. Falkinburg, 89 Mo. App. 563; and Osborne & Co. v. Henry, 70 Mo. App. 19. There is another class of cases referring to sales of manufactured articles. In Schoenberg v. Loker, 88 Mo. App. 387, the court held: "If articles are not made according to sample and are unsuited for the purpose for which made, the defendant, by retaining them and not offering to return them, is not bound thereby to pay the contract price." See, also, St. Louis Brewing Ass'n v. McEnroe, 89 Mo. App. 429. There are also to be found in the Reports of the State a number of decisions which plaintiff claims is the law applicable to the facts of this case. In a case where apples were sold on warranty, the court held: "Where a party knowingly accepts of goods of an inferior quality delivered in pursuance of a contract, he cannot afterwards object to the quality of such goods." Stevens v. McKay, 40 Mo. 224. "One who accepts and receives lumber in part compliance with his contract of purchase waives the objection that its quality does not meet the requirements of the contract." Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210. See, also, Ashford v. Schoop, 81 Mo. App. 539. "It is one of the established principles of the law of sales — a principle founded on the plainest details of justice — that, where an article is furnished pursuant to a contract requiring it to be of a certain quality, the buyer must at least object to its quality within a reasonable time after its receipt; else the law will treat the receipt as a final acceptance, and preclude any later objection on the ground of inferior quality." Water & Light Co. v. City of Lamar, 140 Mo. 145, 39 S. W. 768. In the latter case the court cites the rule laid down in Benjamin on Sales, § 703. which is as follows: "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing, and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods."

Speaking for myself, I am free to say that there is at least an apparent conflict in the authorities of this state upon the question. But however that may be, I do not think, under the facts in the case, there is any doubt about the instruction being right. After receiving the nails, and ascertaining, in their judgment, that they were defective in quality, and therefore did not comply with the terms of the contract of sale, the defendants were not bound to accept them. The authorities are all agreed on this point. And under certain of said authorities they were not bound to return them, nor even offer to rescind the contract, but they might have retained them, and set up defect in quality in diminution of the purchase price. But when they returned a part of the nails, and received credit for them, and used the residue in their business, and thereby exercised ownership over them, their acts in so doing amounted to an acceptance, and to a waiver of the defects in the quality of the nails. They thus not only received the goods, but, in law, they accepted them, which precluded them from making a defense on a suit for the purchase price that they were not as warranted. The excerpt from Mr. Benjamin's work makes a clear distinction between a receipt and an acceptance of goods under a sale.

Instructions Nos. 2 and 3 given at the instance of the plaintiff are

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objected to as improper. They have no relation to the case whatever. But they could not have been applied by the jury to the facts, we do not see how they could have prejudiced the defendant.

I am of the opinion that the plaintiff was entitled to a judgment on the pleadings. It was no defense to merely allege that the nails were defective, and that defendants had paid full value or them. A purchaser may, and often does, pay more for an article than its real value, and he often buys that which he knows to be defective. In order to constitute a defense, the answer should have alleged either an express or implied warranty or fraud. Graff v. Foster, 67 Mo. 512; Stevens v. McKay, supra. And it wholly fails to state that the nails delivered, in quality, did not comply with the terms of the contract.

For the reasons given, the cause should be affirmed. All concur.

On Motion for Rehearing.

(Nov. 28, 1904.)

ELLISON, J. In a motion for rehearing the foregoing majority opinion is criticised by counsel for stating that the sale made by plaintiff was a sale by sample. The plaintiff is a manufacturer, and sold to defendants a quantity of nails to be manufactured. A sample of the nails desired was exhibited to plaintiff by defendants, and accepted by plaintiff as a sample of the nails to be manufactured. The plaintiff's case, as shown in the examination of witnesses and instructions, is put upon the theory that the sale was by sample. The jury were instructed, at plaintiff's request, that, if the goods were equal to the sample, the finding should be for plaintiff. Ordinarily a sale by sample is a sale of goods then in existence in bulk, but not present for examination by the buyer. Whether a sale is by sample depends upon the facts disclosing the intention of the parties. We treated the case as it was made by the parties. But in view of the fact there is to be a retrial of the cause, we will add that, as has been already intimated, whether the sale is to be considered as made by sample, or by a manufacturer, or for a specific purpose known to the seller, the instruction complained of by defendants should not have been given. In each mode of sale there is an implied warranty by the seller. In neither mode does the buyer waive his right to contest the contract price by accepting the goods.

The motion should be overruled.

Decision No. 831.

PEOPLE, to Use of C. H. LITTLE CO. v. GRANT et al.

102 N. W. 226.

(Supreme Court of Michigan. Jan. 30, 1905.)

APPLICATION OF PAYMENT — TIME FOR MAKING.

1. Though a debtor may designate to which of several accounts a payment shall apply, in the absence of such designation the creditor may make the application at any time before suit.

2. Where a credit for payment is entered on a general account, and a statement

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thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.

Error to Circuit Court, Wayne county; Robert E. Frazer, Judge.

Action in the name of the people, for the use and benefit of the C. H. Little Company, against James Grant and others. Plaintiff had judgment, and defendants bring error. Reversed.

See 100 N. W. 1007.

Argued before MOORE, C. J., and CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ.

John E. Moloney, for appellants. Willard E. Warner, for appellee.

MONTGOMERY, J. This is an action of assumpsit, brought in the name of the people of the State of Michigan, for the use and benefit of the C. H. Little Company, a corporation, against James Grant, as principal, and Julius Porath and John A. Mercier, as sureties, upon a statutory bond, under the provisions of Act No. 94, p. 90, of the Public Acts of the State of Michigan for the year 1883, and the amendments thereto, given in connection with a contract made between the city of Detroit and James Grant on the 16th day of August, 1901, for the repaving of an alley in said city of Detroit, known as "Alley No. 45," between Beaubien, St. Antoine, Congress, and Fort streets. Upon this job the plaintiff company furnished materials to the amount of $130.83. During the paving season of 1901 defendant James Grant entered into eight contracts with the city of Detroit, seven for the paving of streets and alleys and one for the building of two sewers. The first contract was entered into on the 19th day of June, 1901, and the last contract on the 15th day of October, 1901. Most of the materials used upon these several jobs were purchased from the plaintiff company. The company kept a regular set of books, and all materials furnished to defendant Grant, irrespective of where deliveries were made, or upon what jobs, were charged in this account, and all payments made by him were credited therein to the general account at the time of payment. Monthly balances were struck, and monthly statements of account were rendered to the defendant Grant, in which payments made during the current month were credited to the general account. The last material was furnished on alley 45 on the 17th day of October, 1901, and all materials furnished on this job were charged upon the books of the plaintiff company in Grant's general account. At that time Grant owed the C. H. Little Company upon general account, including all materials furnished on alley 45, the sum of $1,629.62, and after that time and up to the 1st day of February, 1902, paid to the C. H. Little Company upon general account the sum of $1,800. During the same period the plaintiff company continued to furnish materials to the defendant Grant upon his other contracts, which were charged to the general account. It appears that when the accounts were rendered to Mr. Grant no objection to the accounts rendered were made by him. On the 24th of June, 1903, C. H. Little & Co. notified defendant Grant that they would apportion the payments made from time to time and credited to him on account of certain specific items, leaving the account here in question unpaid, and brought this suit to enforce payment. The circuit

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judge directed a verdict in favor of the plaintiff, and defendant brings error.

The sole question for consideration is whether the creditor, C. H. Little & Co., had the right in June, 1903, to make the application of the payments previously made which was attempted. The rule of the common law as to application of payments is in most points clearly settled. It is, of course, clear that the debtor may, at the time of making payment, make his election as to the application. It is equally clear that the creditor may, in the absence of an application by the debtor, make such an application as he chooses. Under the civil law this application must have been made at the time of the payment, but under the common law it is now settled that this is not necessary; some cases holding that the application must be made within a reasonable time, but the clear weight of authority is to the effect that it may be made at any time before suit. Mayor and Commonalty of Alexandria v. Patten, 4 Cranch, 317, 2 L. Ed. 633; Id., 1 Am. L. Cas. 268, and note.

There remains the question as to the effect of entering the credit of payments in a general account and rendering a statement to the debtor showing such application. It seems that the mere entry of a credit to a particular account is not a conclusive application of the payment in the absence of notice to the debtor. Simon v. Ingham, 2 B. & C. 65. But when such credit is made, and an account rendered to the debtor showing such application, it is too late to make a new election. So it is held in numerous cases that, where a credit is entered to a general account, and an account thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.

The leading case to this point is Clayton's, decided by Sir William Grant as Master of the Rolls, and reported in Merivale, 604. This case was followed and fully approved by Judge Story in Postmaster General v. Furber, 4 Mason, 334, Fed. Cas. No. 11,308, and again by the same learned jurist in United States v. Wardwell, 5 Mason, 82, Fed. Cas. No. 16,640. In the case last cited Judge Story states that the doctrine of Clayton's Case "stands upon irresistible reasoning." The doctrine of these cases was approved in Chapman v. Commonwealth, 25 Grat. 742, in an opinion notable for the learning displayed. See, also, Grasser & Brand Brewing Co., Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389. The counsel for plaintiff contends that the holding of this court in People v. Sheehan, 118 Mich. 539, 77 N. W. 88, makes for a different rule. Counsel has certainly misapprehended the ruling in that case. An examination of the record discloses that the trial judge held that "the payments should be applied to the charges in their order of time." This court said: "Counsel for defendants also alleges error upon the application of payments, but cites no authority which prevents the application of payments by the parties to the contract under the usual rule, or, if they fail to specify how all payments shall be applied, justifies any other rule than that followed by the learned circuit judge." In so far as the holding of this case is in point, it supports the defendants' position in the present case. We think that, after crediting the payment made in the manner stated, and notifying the debtor of such credit, it was too late to attempt another application.

The judgment is reversed and a new trial ordered.

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Decision No. 832.

CASEY-SWASEY CO. v. ANDERSON et al.

83 S. W. 840.

(Court of Civil Appeals of Texas. Nov. 19, 1904.)

PRINCIPAL AND SURETY — EVIDENCE OF DEBT — CHANGE — OPEN ACCOUNTS — NOTES — INCREASE OF OBLIGATION — DISCHARGE OF SURETY — DEED OF TRUST — ACTIONS — THEORY.

1. Defendant and his mother executed a trust deed to secure certain notes for money loaned and any debt to plaintiff on open account for merchandise to be purchased by defendant. Defendant thereafter paid the loan, but, having become indebted to plaintiff on the account in a large sum, executed a note to plaintiff for the balance of the account past due, stipulating to pay interest at a higher rate than that drawn by the account, together with attorney's fees. Held, that such note increased the debt for which defendant's mother was surety, and, she not having assented thereto, her interest in the land covered by the deed was discharged from liability therefor.

2. A deed of trust securing a note and any advances the creditor might make to one of the grantors on open account, etc., did not authorize the debtor to change the character of the debt as against the surety without her consent by executing a note for the balance of the account increasing the liability.

3. Where a suit was brought on a note given for the balance of an account, and not on the account, and no amendment was filed after the answer had been filed by one of the grantors in a deed of trust sought to be foreclosed, who was a mere surety, claiming to have been discharged by reason of the taking of the note, plaintiff was not entitled to foreclose the deed of trust as against such surety on the theory that, as the note was not accepted as payment, a recovery could be had on the account.

Appeal from District Court, Navarro county; L. B. Cobb, Judge.

Action by the Casey-Swasey Company against D. J. Anderson and another. From a judgment in favor of plaintiff for less than the relief demanded, plaintiff appeals. Affirmed.

Richard Mays and Orrick & Terrill, for appellant. W. W. Ballow, for appellees.

TALBOT, J. The appellant sued on a promissory note dated January 22, 1902, payable one day after date, to recover of appellee D. J. Anderson $3,002.75, with interest and attorney's fees, and the foreclosure of a deed of trust against both the said D. J. Anderson and appellee S. L. Anderson. Appellee S. L. Anderson resisted the foreclosure of the deed of trust as to her on the ground, among other things not necessary to name, that since its execution the character of the debt to secure which the deed was given had been changed, and the time of the payment thereof extended, for a consideration, without her consent. The case was tried before the court without a jury, and judgment rendered against appellee D. J. Anderson, for the principal of said note, and interest thereon at the rate of 10 per cent. per annum from its date, together with 10 per cent. of the amount as attorney's fees. The deed of trust was foreclosed as to the said D. J. Anderson, but foreclosure as to S. L.

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Anderson denied. Appellant excepted to the ruling of the court, and has appealed.

The record discloses the following facts: S. L. Anderson was a widow and feme sole. D. J. Anderson is her son, and was engaged in the retail liquor business. He desired to purchase goods from appellant, but was indebted to another party, with whom he had been trading, in the sum of $600. In order to pay this debt and transfer his account to appellant, he borrowed from appellant that amount of money, and he and his mother, S. L. Anderson, executed and delivered to appellant their four promissory notes in the sum of $150 each. To secure the payment of these notes and such other sums as might become due and owing to appellant by the said D. J. Anderson for goods sold and delivered to him during the years 1900 and 1901 on open account, as shown by appellant's books, he executed and delivered to appellant a mortgage, about which there is no controversy, on fifty head of cattle, and subsequently, on the 17th day of March, 1900, he and his mother, S. L. Anderson, executed the deed of trust sought to be foreclosed as additional security for said notes and account on an undivided one-half of 320 acres of land in Navarro county and some lots in the town of Richland, Tex. The provision of the deed of trust relating to the open account is as follows: "And it is further agreed and understood that this instrument is made and executed also for the purpose of securing the Casey-Swasey Company for any advances they may make or credits they may extend to the said D. J. Anderson, upon open account or accounts as he, the said D. J. Anderson, may contract with them, during the years 1900 and 1901, as shown by their books." The deed of trust further provides that, if the four notes mentioned are paid off, it shall not become void, but shall remain in full force to secure the amounts due the Casey-Swasey Company on said account or accounts. It contains the usual stipulations authorizing the sale of the property, and application of the proceeds arising therefrom to the payment of the debts secured in the event of default in the payment of the same. D. J. Anderson paid said four promissory notes, and during the years 1900 and 1901 bought of appellant goods of the value of $10,000 or more, and paid all except $3,002.75, as shown by appellant's books. On January 22, 1902, when said account of $3,002.75 was past due, D. J. Anderson closed the same by executing and delivering to appellant the note sued on. The note stipulated to pay interest at the rate of 10 per cent, per annum from its date, and, in addition thereto, 10 per cent. of the amount of its principal sum and the interest, as attorney's fees, if placed with an attorney for collection, or sued on. This note was made without the knowledge or consent of the appellee S. L. Anderson.

Several assignments of error with accompanying propositions have been presented by appellant, but it is deemed unnecessary to discuss them in detail. The controlling question arising upon the record is: Did the execution and delivery of the note sued on, closing up D. J. Anderson's account with appellant, extending the time of the payment thereof, and providing for an increased rate of interest and the payment of attorney's fees, have the effect to release and discharge the deed of trust sought to be foreclosed as to Mrs. S. L. Anderson's interest in the land therein described? We think this question must be answered in the affirmative. Upon the execution and delivery of the deed of trust in question by Mrs. Anderson her interest in the property therein described

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became surety for D. J. Anderson's debt as provided by said deed of trust, and liable for its payment. The continuance of this responsibility for Anderson's debt, however, was dependent upon a strict adherence on appellant's part to the very terms of the contract made. Any binding agreement between appellant and the said D. J. Anderson, varying in an essential particular the original contract, would discharge Mrs. Anderson's property. The principle governing in the case of a personal surety seems to be applicable to cases of this character. Judge Stayton, in Ryan v. Morton, 65 Tex. 260, in which the rights of such surety were involved, said:

"It is well settled that the liability of a surety cannot be extended beyond the terms of the contract out of which his obligation arises. If the contract be altered without his consent, whether he sustains injury or the contract be to his advantage, it ceases to be his contract, and with that ceases his obligation." Mrs. Anderson's property stood in the relation of surety for the payment of her son's indebtedness to appellant, although she had not become personally responsible for the same. That there was a material change in the contract between appellant and D. J. Anderson there can be no question. The debt for the payment of which Mrs. Anderson pledged her land was originally in the form of an open account. This account bore interest at the rate of 6 per cent. per annum, and there was no agreement to pay any amount as attorney's fees. By the terms of the note sued on the time of payment was extended for four days, including the days of grace, the interest increased to 10 per cent. per annum, and the additional promise made to pay 10 per cent. of the amount of the note and interest as attorney's fees in the event the note was sued on, or placed in the hands of an attorney for collection. The promise to pay an increased rate of interest, etc., was sufficient consideration to support the agreement to extend the payment and make the new contract binding. Mrs. Anderson never assented to this contract. It is materially different from the one existing at the time the deed of trust was given. It enlarges the debt for which her property became surety, and imposes an obligation not assumed by the terms of the original undertaking. She did not pledge her property as security for the performance of this contract by her son, and it cannot be held bound therefor. Westbrook et al. v. Belton National Bank et al., 77 S. W. 942, 8 Tex. Ct. Rep. 913; Ryan v. Morton, 65 Tex. 260; Gardner, Adm'r v. Watson, 76 Tex. 25, 13 S. W. 39; Lane v. Scott, 57 Tex. 367.

The contention of counsel for appellant in argument that the execution by D. J. Anderson of the note sued on is expressly authorized by the terms of the deed of trust is not supported, in our opinion, by the language of that instrument. The language relied upon, as we understand it, is as follows: "This instrument is made and executed also for the purpose of securing the Casey-Swasey Company for any advances they may make or credits they may extend the said D. J. Anderson upon open account or accounts, as he, the said D. J. Anderson, may contract with them, during the years 1900 and 1901, as shown by their books." The words, "as he, the said D. J. Anderson, may contract with them," refer unquestionably to "open account or accounts" as shown by appellant's books, and is an express limitation of the security to that character of debt. The language is not ambiguous and open to construction. It is an unequivocal restriction of the pledge of Mrs. Anderson's property to the payment of advances made and credits extended to D. J.

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Anderson upon open account or accounts during the years 1900 and 1901, as shall be shown by its books; and no warrant, we think, can be found therein to justify the claim that D. J. Anderson was authorized without the consent of Mrs. Anderson, to make any character of contract with regard to such advances and credits, without incurring a forfeiture or release of the security given by her. Nor do we think the execution and delivery of the note in question, when considered with reference to well-known commercial usages, and in the light of the facts and circumstances surrounding its execution, and the purposes for which it was made, was impliedly authorized by the terms of the deed of trust. As said, the language of the instrument is unambiguous. Nothing is left to intendment. The intention of the parties is made clear, and we know of no commercial usage or custom that would give a meaning to the language other than its ordinary signification imports.

Appellant's third assignment of error is as follows: "The plaintiff's itemized account, as shown by its books, against D. J. Anderson, for the sum of $3,002.75, being in evidence, the court erred in not holding that the property of Mrs. Anderson was bound for its payment, and subjecting it to the payment of said amount." The contention, as we understand it, under this assignment, is, that inasmuch as the account against D. J. Anderson, as shown by appellant's books, was proven to be correct, and admitted in evidence, and the trial court found that the note sued on had not been accepted as a payment of said account, judgment should have been rendered on the account and the deed of trust foreclosed as to Mrs. Anderson, notwithstanding the novation of the contract. The rule seems to be well established that when a debtor executes his note for an existing debt the right of action upon the original consideration is suspended until the note becomes due, and, if it is not paid at that time, the creditor may elect to sue either upon the original account or indebtedness or upon the note, provided the note was not accepted in payment of the pre-existing debt. Otto v. Halff & Bro., 89 Tex. 390, 34 S. W. 910, 59 Am. St. Rep. 56, and authorities there cited. The application of this rule cannot be made in the present case, for the reason that the pleadings will not warrant it. Appellant elected to sue on the note, and asked a foreclosure of the deed of trust upon the theory that the payment of the note was secured thereby. It is distinctly a suit on the note, and not on the account. Upon the coming in of Mrs. Anderson's answer there was no amendment seeking to recover on the account, as was done in the case of Otto v. Haff & Bro., supra, and no other proper judgment, in our opinion, than the one entered by the trial court, could have been rendered.

The judgment of the court below is therefore in all things affirmed.

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Decision No. 833.

RUSSELL v. ST. MART et al.

73 N. E. 31.

(Court of Appeals of New York. Jan. 31, 1905.)

CHATTEL MORTGAGE — VALIDITY — RECORD — VOID FORECLOSURE.

1. Under Laws 1833, p. 402, c. 279, § 1, a chattel mortgage given by a firm to secure the price of mortgaged property, where the partners reside in different places, must be filed not only in the town or county where the property is situated and one of the partners resides, but in the city and county in which the other partner resides.

2. Where a chattel mortgagee, acting under the erroneous assumption that the mortgage was due, took possession of the property and sold it under an attempted foreclosure, and bid it in himself, he acquired no title to the property as against existing creditors of the mortgagor lawfully claiming the same; the mortgage being void for failure to duly record the same as required by Laws 1833, p. 402, c. 279, § 1.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Frank S. Russell against Alphonse St. Mart and others. From an order (82 N. Y. Supp. 71, 83 App. Div. 543) of the Appellate Division reversing a judgment for defendants entered on report of a referee, they appeal. Reversed.

Alexander Neish, for appellants. James Wright, for respondent.

BARTLETT, J. The plaintiff seeks in this action to recover damages of the defendants for the alleged conversion of a printing plant used in publishing a weekly paper at the village of Hancock, in the county of Delaware. The material facts out of which this litigation arises are as follows: The firm of Burtch & Burgess, in contemplation of publishing a newspaper at Hancock, applied to the defendants on or about the 26th day of November, 1900, to guarantee the payment of their note for $100, representing to them that they had purchased and paid for a printing plant, and were about to remove the same to Hancock; that when this was done they would give to defendants a first chattel mortgage thereon as security. The defendants thereupon guarantied the said note. On the 3d day of December, 1900, at Port Byron, N. Y., the plaintiff sold this printing plant to Burtch & Burgess at the agreed price of $600. The sum of $100 was paid at that time, and a chattel mortgage given upon the property to secure the balance of $500, payable on the 3d day of December, 1901. Burtch & Burgess removed this property to Hancock, and on the 21st of December, 1900, executed and delivered to the defendants a chattel mortgage thereon, due on the 26th day of February, 1901, to secure them as such guarantors. The note guarantied by the defendants was not paid when due, on the 26th of February, 1901, and was taken up by them. It appears that, at the time of the execution and delivery of the plaintiff's chattel mortgage, Burgess resided at the city of Auburn, in the county of Cayuga, and Burtch at Hancock. This mortgage was filed only in the town of Hancock. The

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business of publishing the newspaper turned out to be unsuccessful, and on the 1st of March, 1901, the plaintiff, by his agent, went to the town of Hancock, pursuant to the suggestion of Burtch, and took possession of the property in order to foreclose his chattel mortgage; the latter delivering to him the keys of the rooms in which it was located. On the 7th of March, 1901, the plaintiff sold this property under an attempted foreclosure of his chattel mortgage, and the same was bid in by the plaintiff. The property remained in the same place until the 29th of March, 1901, when plaintiff sought to remove the same, but on that day the defendants took the possession of it under their past-due mortgage. Thereupon the plaintiff began his action for conversion, as the alleged owner of the property. The issues were referred, and resulted in a judgment dismissing the complaint. The Appellate Division reversed, with a divided court upon questions of law only; the facts having been examined, and no error found therein. The reversal is based on a single question of law — whether the action of the defendants on the 29th day of March, 1901, in taking possession of the property in question under their past-due mortgage, was lawful.

As between Burtch & Burgess and the defendants, the latter, having paid the note they had guarantied, and their mortgage being due, were proceeding strictly within their legal rights. The question then arises, what was the legal position of the plaintiff on the 1st day of March, 1901, when he took possession of the property, and a week later undertook to make title under a foreclosure of his mortgage? The referee expressly found, on sufficient evidence, that the plaintiff did not take possession under the danger or unsafe clause in the mortgage, but acted on the erroneous assumption of his agent that the mortgage was due, and could be foreclosed. The fact was that the mortgage was not due until the following December, 1901. There is, however, an underlying fact that rendered this seizure of the property by the plaintiff unauthorized in law. The failure to file his mortgage in Auburn, county of Cayuga, where Burgess, one of the mortgagors, resided, rendered it absolutely void as to these defendants. Laws 1833, p. 402, c. 279, § 1. The nonfiling of a chattel mortgage, under the provisions of this statute, renders it absolutely void "as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith." The learned referee rested his decision upon the ground that the defendants were creditors of the mortgagors.

It is urged on behalf of the plaintiff, although vigorously controverted by defendants, that the defendants are not mortgagees in good faith, under the statute, as their mortgage was given to secure a precedent debt; that is, they guarantied the note on the 26th of November, 1900, and the mortgage to secure the same bears date the 21st of December, 1900. We assume, without deciding it, that the defendants are not mortgagees in good faith. This court held that the failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this although the mortgage was given in good faith to secure an actual indebtedness. Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11. It follows that the plaintiff, armed with a chattel mortgage not properly filed, not due, and not exercising his right

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under the safety clause, in taking possession of the property, was a mere trespasser.

It is argued on behalf of the plaintiff that, at the time the defendants took possession of the property under their chattel mortgage, they were simple contract creditors, and in no position to attack the plaintiff's mortgage or possession. This court has held that a simple contract creditor is as much within the protection of the statute as a creditor whose debt has been merged in a judgment. Karst v. Gane, 136 N. Y. 316, 323, 32 N. E. 1073. The defendants were, as matter of fact, not in the position of simple contract creditors on the 29th day of March, 1901, when they seized this property, as events subsequent to the execution and delivery of the mortgage had changed their position. Their mortgage having fallen due on the 26th of February, 1901, and they having paid the note which matured at that time, they became creditors, holding an instrument which, as the contract of the parties, entitled them to take immediate possession of the property. The right of the defendants to do this was as absolute as that of a simple contract creditor who had proceeded to final judgment and execution. It follows that the taking possession of the property by the defendants on the 29th of March, 1901, was fully authorized in law, and the complaint of the plaintiff was properly dismissed.

We have examined the exceptions presented by the respondent in his brief, and find no reversible error.

The order appealed from should be reversed, and the judgment entered upon the report of the referee in favor of the defendants affirmed, with costs in all courts.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur.

Order reversed, etc.

Decision No. 834.

ROWELL v. SMITH.

102 N. W. 1.

(Supreme Court of Wisconsin. Jan. 10, 1905.)

RES JUDICATA — PRIVIES — ELECTION OF REMEDIES — ESTOPPEL IN PAIS — WAIVER OF REMEDY — LACHES — RELIEF IN EQUITY — CONTRACT — MUTUAL MISTAKE — COLLATERAL PROMISE — VERBAL AGREEMENT — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — DEBT OF ANOTHER.

1. A judgment is conclusive between the parties thereto and their privies in a second action on the same claim or cause of action, as to all questions that were, or might have been, litigated in the first action, and is likewise conclusive in a second action upon a different claim or cause of action, as to every proposition within the issues at first, which was presented for adjudication and decided. In this rule the mere personal effect is confined to the parties, while the term "privity" suggests mutual succession or relation to the same property or property right. Hart v. Moulton et al., 80 N. W. 599, 104 Wis. 354, 76 Am. St. Rep. 881.

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2. Where a person not a party to an action will be liable to another who is a party if the latter's claim or defense shall fail, and such person has notice of the action and opportunity to participate therein in defense or maintenance of his position, he will be bound by the result the same as if he were a party to such action.

3. A cause of action to enforce a supposed valid agreement to answer for the debt, default or miscarriage of another is different from one based on the circumstance resulting in the supposed valid agreement to compel specific performance of a verbal agreement to make a valid guaranty or to reform one defectively written so as to make the same accord with the intention of the parties.

4. The doctrine of election of remedies applies only where there are two or more appropriate ways to vindicate the right of a controversy, but the relations between the parties necessary to the pursuit of one successfully, are such that concurrent existence of those necessary to the pursuit of the other or others is impossible.

5. Unsuccessful use of a remedy supposed to be, but in effect not, appropriate to vindicate the right of a particular matter, either because the facts turn out to be different than plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the first action proceeds to judgment, does not preclude plaintiff from thereafter invoking the proper remedy.

6. Neither the doctrine of election or res adjudicata applies to the situation suggested in the preceding paragraph, though if the second remedy invoked is in equity and the defendant would be seriously prejudiced by plaintiff's mistake if he were permitted to proceed the second time, the court might apply principles of estoppel in pais if deemed necessary to prevent injustice.

7. Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one with knowledge, or reasonable means of knowledge, of the facts, the other no longer exists.

8. Where more than one remedy to deal with a single subject of action exists and they are not inconsistent all may be used concurrently, but a satisfaction in one is a satisfaction in all.

9. Where only one remedy exists to deal with a single subject-matter, but through mistake one not appropriate is in voked, the proper remedy is not thereby waived.

10. Mere delay for any length of time, short of a period sufficient to extinguish the right under the statute of limitations, does not bar an action in equity to vindicate such right.

11. Mutual mistake, either of fact in making a contract or of law or fact in reducing the same to writing, is remediable, in the absence of a waiver of the right in that regard or estoppel to the assertion of it.

12. A verbal agreement to make a collateral promise can no more be dealt with in equity to save the collateral promisee from the consequences of noncompliance with the statute of frauds, than a written agreement in that regard, which is fatally defective for noncompliance with such statute.

13. A court of equity will not take jurisdiction to compel specific performance of a verbal agreement to make a valid contract of guaranty where it would not reform such a contract, through mutual mistake defectively reduced to writing.

14. A mere collateral promise to answer for the debt, default, or miscarriage of another, invalid because not reduced to writing, or becaused defectively so reduced, is not susceptible of part performance as between the principal contracting parties so as to afford the collateral promisee a right of action in equity to compel the making of a valid guaranty in writing, or to reform the one defectively made.

15. The doctrine that where a contract required to be made in a particular way to be valid under the statute of frauds is not so made, a court of equity will deem the statute "uplifted" and enforce the obligations growing out of the circumstances of the situation so as to prevent the consequences that would otherwise flow from

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such statute, where if that were not done, it would be used as an instrument of fraud instead of one to prevent fraud does not apply, the effect would be to essentially nullify the statute.

16. In applying the maxim "There is no wrong without a remedy" courts of law and equity as well must regard wrong, so called, which is not remediable because of the statute on the subject, as not wrong at all in a judicial sense.

17. The doctrine as to part performance taking a transaction out of the statute of frauds so that the relations between the parties may be dealt with judicially to prevent injustice, is grounded on the idea that the opposite party by the statute and such part performance has obtained title to something of value for which, independently of the statute, he should render an equivalent for.

18. The doctrine mentioned in the last paragraph cannot apply as between the parties to a mere collateral promise which is within the statute of frauds, because as to such neither part nor full performance by the collateral promisee enriches the collateral promisor.

(Syllabus by Judge.)

Appeal from Circuit Court, Portage county; Chas. M. Webb, Judge.

Action by G. D. Rowell against Franklin T. Smith, administrator. Judgment for defendant, and plaintiff appeals. Affirmed.

Action for equitable relief. Plaintiff sold one Goodrick 470 shares of the capital stock of the Valley Iron Works Manufacturing Company, and A. L. Smith, since deceased, 170 shares of such stock under an agreement that the purchase price to the former amounting to $5,000, should be paid in accordance with five $1,000 notes due in two, three, four, five, and six years, the first three thereof to be guarantied by said Smith. Pursuant to the verbal agreement in that regard plaintiff delivered the stock. Goodrick signed the five notes and Smith placed on the back of the first three to fall due the words:

"I hereby guarantee the payment of the within note. A. L. SMITH."

— Omitting by mistake, as is alleged, the words "for value received" from the body of the guaranty; the notes were delivered in the form indicated to the plaintiff and the Goodrick stock was placed in Smith's possession to secure him against loss on account of the guaranty. Smith and Goodrick were jointly interested in purchasing the stock to the end that they might control the policy of the corporation. Before the maturity of the two-year note plaintiff transferred it to a bona fide holder for value, and thereafter before such maturity Smith recognized his agreement to guarantee the payment thereof by duly waiving demand for payment of the same and protest for non-payment, and placing thereon, in due form, a guaranty for such payment, expressing a sufficient consideration to satisfy the statute of frauds. Plaintiff at the time of the commencement of this action was the owner of the notes and Goodrick was insolvent.

The foregoing circumstances were pleaded by the plaintiff in the form of four separate causes of action against the personal representatives of Smith, followed by a prayer for relief, as follows:

(1) Specific performance of the agreement to guarantee the second and third notes. (2) For reformation of such notes. (3) Judgment upon the note validly guarantied. (4) Judgment for $2,000, on account of the purchase price for the stock represented by the second and third notes. (5) Such other relief as to the court might seem just.

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The defendant demurred to each of the pretended causes of action upon four grounds: Want of equity, insufficiency of facts, defect of parties plaintiff, and misjoinder of causes of action.

The demurrer was overruled. Defendant then answered to this effect: The alleged guaranty was without consideration and void under the statute of frauds. Before the commencement of this action and on the 6th day of September, 1898, suit was commenced on the notes in question which was thereafter, without trial, discontinued. The Commercial National Bank of Appleton, indorsee from plaintiff on the four-year note, commenced an action against the decedent and Goodrick in the Circuit Court setting forth in the complaint the circumstances alleged in the complaint herein characterizing the making of the guaranty. The action was tried, resulting in a judgment dismissing the same as to Smith, and on appeal to the Supreme Court the judgment was affirmed. Lawrence University, a corporation, indorsee of the plaintiff, April 12, 1899, commenced an action against Smith and Goodrick in the Circuit Court on two of the notes mentioned in the complaint, being the one payable in two years, and the one payable in three years. The decedent appeared and answered, and thereafter, before the cause was reached for trial, it was discontinued.

Upon the issues joined the cause was tried, resulting in findings of fact as to the circumstances under which the alleged guaranty was made in harmony with the complaint. Among other things the court found specifically, thus:

"When the transaction between plaintiff, Goodrick, and Smith in regard to the stock was closed up, Smith and the plaintiff were represented by their respective attorneys. The guaranty, as signed, was submitted to such attorneys and approved by them. They and all of the parties interested then believed the guaranty to be sufficient to satisfy the statute of frauds. Plaintiff agreed to sell the 470 shares of stock to Goodrick upon the express condition that three of the $1,000 notes should be satisfactorily guarantied. The stock was transferred to Goodrick upon the faith of Smith's promise to guaranty the payment of such three notes. It was agreed in writing between Smith and Goodrick that the stock should be assigned in trust to secure Smith against liability on account of his guaranty. He demanded that as a condition of becoming guarantor on the notes. In the year 1896, without any new consideration, Smith signed upon the back of the two-year note a guaranty good in form and duly waived demand for payment of such note, and protest for non-payment."

There were findings in harmony with the allegations of the answer as to the commencement of and termination of three actions in regard to the notes prior to the commencement of this action, and findings to the effect that before the commencement of this action plaintiff requested decedent to place a valid guaranty upon the back of the notes, which he refused to do; that decedent died after the commencement of the action, and that the same was duly revived against his personal representative.

As conclusions of law the court held that plaintiff was entitled to recover against decedent's personal representative upon the note that was reguarantied, but not upon the others. Judgment was rendered accordingly from which plaintiff appealed.

J. C. Kerwin, for appellant. Frank W. Harriman (Hunter & Goff, of counsel), for respondent.

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MARSHALL, J. (after stating the facts). The logical treatment of this appeal seems to require the contention of respondent's counsel that the decision in the action to enforce the four-year note is a bar to any relief in this action upon principles of res adjudicata to be first considered. The scope of such principles has been too often pointed out to require more than a statement thereof at this time. A judgment whether pleaded in bar, or given in evidence in estoppel, as to every question within the issues in the cause wherein it was rendered, whether actually presented and solved or not, as between the parties to the litigation and their privies, till reversed or set aside in due course of law, — is conclusive as to the truth of the matter involved in that and any action subsequently tried to enforce the same cause of action whether in the same or in any other court, and it is likewise conclusive in any subsequent judicial controversy upon a different cause of action between the same parties, or their privies, as to any question within the issues actually presented and decided. Wentworth v. Racine County, 99 Wis. 26, 74 N. W. 551; Grunert v. Spalding et al., 104 Wis. 193–213, 80 N. W. 589; Hart et al. v. Moulton, 104 Wis. 349–353, 80 N. W. 599, 76 Am. St. Rep. 881. A cause of action for equitable relief from the consequences of accepting a void guaranty is essentially different from an action upon the guaranty. The former action proceeded upon the theory that there was a valid contract between the parties, while this action was grounded upon the theory that at best there was only an enforceable agreement to make such a contract. Hence, in any event, only the results of questions actually presented and adjudicated before need be considered now on this branch of the case. Such results are verities for the purposes of this litigation. The parties are not the same now as before, but the respondent is the personal representative of Smith, and as such a privy as regards the former suit, while the plaintiff now was, in the main, the party interested then and is bound the same as if he were a party to the record. The action was prosecuted in his interest. He had notice thereof, an opportunity to participate therein, and embraced it. As between him and his assignee of the note, in whose name the suit was brought, the result here was conclusive, the same as between such assignee and the defendant. In such circumstances, for all purposes of the doctrine of res adjudicata, he was a party to the suit. Saveland v. Green, 36 Wis. 612; Daskam v. Ullman et al., 74 Wis. 474–477, 43 N. W. 321; Carroll v. Fethers, 82 Wis. 67–72, 51 N. W. 1128; Grafton v. Hinkley et al., 111 Wis. 46–54, 86 N. W. 589. The important question common to both actions and decided on the former occasion, is whether the guaranty was based on a consideration independently from that afforded the maker of the note, and moving from the guarantee to the guarantor so as to take the transaction out of the statute of frauds. That was decided before in favor of the decedent. The case turned on the solution of that question on the appeal to this court. It follows that, regardless of the evidence now in the record, and even the findings of the trial court, if contrary thereto, this case must be viewed as if Smith's promise was merely collateral to that of Goodrick and so within the statute of frauds.

Except as above indicated, the doctrine of res adjudicata does not bar the way to favorable consideration of appellant's appeal. The mere fact that in the former action it was claimed there was a guaranty good at law, and on the second occasion that must be deemed to have been

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abandoned and the action grounded on a transaction not culminating in a legal contract as intended, is not sufficient to render the former judgment a bar to the successful prosecution of this action upon principles of res adjudicata.

We are not unmindful of the decisions that a judgment in an action to recover on a contract of a particular character is a bar to one subsequently commenced involving the same transaction, either at law or in equity, upon the theory that the contract was not as at first alleged, but of a materially different character. There is a logical basis for such decisions, but it does not lie in the doctrine of election between inconsistent remedies or res adjudicata, but rather in the doctrine of estoppel. Some of such cases, plainly, it would seem, confuse the two former doctrines and overlook the latter. True, the distinction between estoppel and res adjudicata is sometimes so shadowy that one, without careful analysis, would blend into the other. Nevertheless there is a distinction. We will not stop in our labor here to point it out, but assume that its existence is well understood.

Washburn v. Great Western Insurance Co., 114 Mass. 175, is one of the most significant of the cases above referred to. From our investigations we may well venture to say it is the pioneer case. There plaintiff brought an action to recover on a policy of insurance containing a warranty. He pleaded compliance therewith. Upon being defeated for a breach thereof he filed a bill in equity for a reformation of the policy by striking out the warranty, alleging that the same was contrary to the verbal agreement and was inserted in the writing by mistake. The court held that the judgment in the first action was a bar to the prosecution of the second, the decision being put squarely on the doctrine of election. Reference was made thereto in this way, quoting the language of Chancellor Kent:

"The suit at law and the action here are inconsistent with each other, since the one affirms and the other seeks to disaffirm, the contract in question. Any decisive act of the party, with knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies."

We fail to see wherein the remedies the court was dealing with were conflicting and inconsistent within that rule. Both proceeded upon the ground that there was a contract. If it was as at first alleged, an action at law was the only remedy to enforce it. If it was as alleged on the second occasion, an action in equity for a reformation thereof was the only remedy. The doctrine is well established that there can be no choice between two inconsistent remedies unless there are in fact two remedies to choose from, and they are really inconsistent, in that one is suitable to deal with relations between the parties of one character and the other with relations of a different and inconsistent character. The rule, it will be seen, was correctly illustrated by the court, but improperly applied. Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867. It might well have said that the plaintiff was estopped from successfully invoking equity to enforce a contract of one character after, with knowledge of the facts, having put the defendant to the expense of defending in an action at law against a claim that it was of a different character. It is significant that it did not occur that the decision could be grounded upon the doctrine of res adjudicata.

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In Steinbach v. Relief Fire Insurance Co., 77 N. Y. 498, 33 Am. Rep. 655, the circumstances were the same as in Washburn v. Great Western Insurance Co., supra, and the result the same. It was based, however, upon the doctrine of res adjudicata and it would appear that of election as well, Washburn v. Insurance Co. being pointed out as authority, without indicating that the inconsistency of grounding one case on the doctrine of res adjudicata and the other on the doctrine of election was appreciated. In support of the Massachusetts decision there was at least noted a prime essential of the situation permitting the exercise of election between inconsistent remedies, viz.: "The state of facts necessary to support one remedy did not coincide with the facts necessary to support the other." Barth v. Loeffelholtz et al., 108 Wis. 562–568, 84 N. W. 846. It may be well assumed that such feature led to the decision being grounded as it was, though manifestly such a situation may and does often exist where other essentials to the application of the doctrine of election are absent. In the New York case, though the two are alike, the court considered that the same evidence would sustain either claim, which seems to be clearly contrary to the fact, and so justified the result upon the doctrine of res adjudicata, at the same time using terms indicating that the doctrine of election applied as well.

Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624, is another case of the character referred to. Both cases we have discussed are cited therein as authority for the conclusion reached. The doctrine of election and of former adjudication were both referred to, and, as in the other instance, without appreciating the distinction between the two. That is quite clear, in that it was not seen that the Massachusetts case went distinctly upon the ground of election while the New York case, though it went upon the doctrine of res adjudicata, referred to the Massachusetts case for authority. In a later case the Minnesota court recognized that Thomas v. Joslin, supra, turned on the doctrine of election. Spurr et al. v. Home Insurance Co., 40 Minn. 424, 42 N. W. 206. But a distinction between the two cases was suggested, in that in the former situation the first case proceeded to final judgment, while in the latter it did not. The circumstance was rightly deemed important as regards the doctrine of res adjudicata or estoppel, but not that of election, since any affirmative act with knowledge of the facts to enforce one remedy, such as the commencement of an action, as effectually waives all other remedies as the prosecution of an action to judgment. Smeesters v. Schroeders (Wis.), 101 N. W. 363. In a still later case, Rossman v. Tilleny, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247, as we read it, a situation similar to that in Thomas v. Joslin, supra, was presented. Defendant was put to the expense of a successful defense to a claim against him for a stipulated compensation for professional services. Plaintiff persisted until judgment was rendered against him. He then commenced a new action upon the theory of implied contract and Thomas v. Joslin, supra, was invoked in vain, the court remarking as to the latter situation that the evidence required in the two actions was different, inferentially saying that in the former situation it was not, which seems plainly to be contrary to the fact and to the prevailing idea in the case, which was there pointed to as authority, viz: Steinbach v. Relief Fire Insurance Co., supra. However, in this later case we find suggested for the first time what seems to be the only legitimate basis for the decision in Thomas v. Joslin, supra, in this language: "It was properly held"

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there, said the court, " . . . that plaintiff was estopped, having elected to stand trial in the first action on the incomplete contract."

We have discussed at some length Washburn v. Great Western Insurance Co., supra, and the cases based thereon, since it seemed that if they were rightly grounded on the doctrine of election or that of res adjudicata they might be decisive on this appeal. We do not think that they were, neither do we think that as vindications of the doctrine of estoppel in pais they should influence the decision here. Doubtless, if a person with knowledge of the facts invokes a judicial remedy upon one theory, as regards a particular subject-matter — for example, that it produced a contract of one character — and compels his adversary, at considerable expense, to successfully defend against such theory, it would be inequitable, at least, to permit such person to again use a judicial remedy, though consistent with the other, to recover on a different cause of action than at first alleged — one not affected by the doctrine of res adjudicata or the election of remedies, but proceeding upon the theory that the transaction in question produced a contract differing somewhat from that first alleged. The defendant might, in some circumstances, invoke the equitable principle of estoppel in pais against the vexatious litigation, but we cannot discover that there was any such situation here. The action commenced by the bank upon the four-year note was instituted and prosecuted upon the theory that the facts now relied upon as a ground for relief, entitled the holder of the note to legal relief upon a contract of guaranty. There has been no change of position by the plaintiff, as regards the facts. It having been decided in the legal action that they were not sufficient to make a guaranty good at law, he invoked equity to grant such relief as it can afford, in view of the evident purpose of the parties to make such a guaranty.

What has been said sufficiently answers the contention of counsel for respondent that the commencement of the action on the four-year note was an election of remedies. There is much inaccurate language in authorities on this subject. A mere election of remedies, where there are several, does not waive others. Barth v. Loeffelholtz, supra. It is only where, as before indicated, there are several remedies which are inconsistent that the choice of one waives the rest. Such inconsistency is to be looked for in the relation between the parties which the different remedies suggests. If one sues for damages for breach of or to otherwise recover on contract corresponding relations are necessarily alleged or implied to exist, while, if growing out of the same transaction, that one sues to recover property parted with to the defendant on contract a termination of contractual relations by rescission is suggested. In one case a subsisting contract is assumed or alleged, in the other absence thereof is necessary. Failure to note the true test of whether the doctrine of election applies or not has led to so many instances of improper references thereto that great care must be exercised in the selection of judicial guides in a given situation or one will be liable to go astray. Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one the others to all intents and purposes no longer exist. Where more than one remedy exists to deal with a single subject of action, but they are not inconsistent, nothing short of full satisfaction of the plaintiff's claim waives any of such remedies. All may be pursued concurrently, even to judgment, but satisfaction in one reaching the whole claim is a satis-

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faction in all. Where only one remedy exists, but the plaintiff asserts one which he does not in fact possess, the proper remedy is not waived. In a late work the author rightly remarks that the "test seems easy of application, yet the fact has not prevented confusion and a degree of contradictions in reported cases." It will not do to take it for granted that when election of remedies is spoken of in a judicial opinion, the principle that the selection of one remedy waives the use of all others was involved. Encyc. of Pl. & Pr. vol. 7, 363.

The purpose of the action on the four-year note was to vindicate the rights of appellant as to the subject-matter in question by recovering on contract. The transaction claimed at first is identical with that claimed now. The fact that in one case it was claimed that it created a contract good at law and in the other one good in equity, or that the failure to create, as was intended, a contract good at law or in equity, created obligations of equivalent dignity in equity, does not satisfy the rule that a choice of one remedy waives the others. It is by no means uncommon to bring an action upon a written contract, and upon its subsequently appearing that the writing was not made as intended by both parties, to invoke equity jurisdiction to reform and enforce it as perfected. Wisconsin Marine & Fire Ins. Co. Bank v. Mann et al., 100 Wis. 596, 76 N. W. 777, is significant instance thereof.

If there were no other answer to the suggestion that the commencement of the first action waived all other remedies against Smith or his personal representative, a conclusive one would be found in the fact that if any effective remedy at all existed for appellant it was to be found in equity, while the one chosen was at law. As before indicated, it is a cardinal principle of the doctrine of election that it is to be applied only where there is opportunity to choose between two or more remedies which are appropriate.

The doctrine of laches is invoked by respondent in support of the judgment. Delay in a case like this evidencing acquiescence or that no mistake was in fact made is one thing, while delay to insist upon one's rights as to a mistake known to exist is quite another. The former is not claimed in this case. Delay, under some circumstances is as efficient to extinguish the right as the statute of limitations, but in itself it is ineffective as a defense. It is not a bar in equity when it would not be at law, in the absence of circumstances rendering the late assertion of the right so prejudicial to the adverse party, that it would be inequitable to permit it to be done successfully. Kropp v. Kropp et al., 97 Wis. 137, 72 N. W. 381. There was no unreasonable delay here. This action was commenced promptly after the termination of the one at law, which irrevocably established as a fact that the remedy first asserted was inappropriate, even if the facts were as alleged.

The point is made that if there was a mistake in reducing the verbal agreement to guarantee the notes to writing, it was one of law and hence irremediable. A mistake of law as well as of fact may, in some circumstances, be remedied. The general statement often indulged in that equity may relieve one from the consequences of a mutual mistake of fact, but not from a mistake of law is very misleading. Error as to the sufficiency of language to put in legal form a transaction upon which the minds of two parties have met, may be as effectually dealt with as one purely of fact. Upon due consideration in Wisconsin Marine & Fire Insurance Co. Bank v. Mann, supra, the rule was stated thus:

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"A mistake in the contract itself, springing from ignorance of the law, is one thing, and mistake in the legal meaning attributable to the words used to express a contract is quite another. . . . Where there is a mutual mistake, either of fact in making a contract, or of law or fact in the reduction of the contract to writing, the person injured thereby may have it reformed in equity in accordance with the truth, in the absence of facts or circumstances constituting a waiver of the remedy or an estoppel to the assertion of it."

To the same effect are The Green Bay & Mississippi Canal Co. v. Hewitt, Jr., et al., 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106; Whitmore et al. v. Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838; Beardsley v. Knight et al., 10 Vt. 185, 33 Am. Dec. 193; Pomeroy's Equity Jurisprudence (2d Ed.), §§ 843–845.

We now come to the question of whether a mistake in reducing to legal form a mere collateral promise to answer for the debt, default, or miscarriage of another is relievable by the equitable remedy for reformation or specific performance. The finding that the corporate stock was sold and transferred to Goodrick upon the faith of Smith's agreement to guarantee payment of three-fifths of the purchase price thereof is urged upon our attention. As an original matter, we should say that comes far short of finding that the performance by appellant of the main contract was beneficial to Smith, so as to render the transaction between them independent of that between the former and Goodrick, satisfying the rule declared in Commercial National Bank of Appleton v. Smith et al., 107 Wis. 574, 83 N. W. 766, or to suggest that there was fraud in fact or in law in the failure of Smith to execute a valid guaranty. The distinction between a purely collateral undertaking, which is within the statute of frauds, and an original promise which may also be secondarily collateral to another, but is, nevertheless, without the statute, is well stated in Stearns' Law of Suretyship, § 39, in these words:

"A distinction must be made, however, between a beneficial consideration, which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute. The promisor may receive a money consideration for his promise, or he may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing, but if the performance of the main contract, to which his suretyship is collateral is a benefit to him, a verbal promise in guaranty is sufficient."

Illustrations of the application of that principle are found in the following cases: Dyer v. Gibson, 16 Wis. 557; Houghton v. Ely et al., 26 Wis. 181, 7 Am. Rep. 52; Hutson v. Field, 6 Wis. 407; Borchsensius v. Canutson, 100 Ill. 82; Fears v. Story, 131 Mass. 47; Bluthenthal & Rickart v. Moore, 106 Ga. 424, 32 S. E. 344; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. But, as we have heretofore indicated, if there were any doubt as an original proposition as to whether appellants' promise was collateral and within the statute of frauds, that doubt could not be resolved in favor of appellant, whatever construction might be put upon the finding of the trial court, since the former adjudication of the matter is conclusive in favor of the respondent. We should not have discussed the matter at all, other than to show that it was covered by such adjudications, were it not for the fact that it is made quite prominent in appellant's argument.

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So, as before stated, the case comes down to this one proposition: Can a defectively written purely collateral promise to answer for the debt, default, or miscarriage of another, by interference of a court of equity, — there being no question as to what the facts are and but that the minds of the parties met on all the essentials of a verbal promise to make a valid guaranty, but that through mutual mistake, without any element of fraud, they failed to embody it in the writing, — be reformed so as to make the same satisfy the statute of frauds? Or can, in such a case, a court of equity interfere and compel specific performance of the verbal agreement to make a valid guaranty?

It will not do to hold that the mere delivery of the consideration as between the original parties to the contract, though sufficient to support a guaranty, if one be properly made, is a part performance of a verbal contract to make a valid guaranty taking the latter out of the statute of frauds, under the familiar principle that where relations between parties to a verbal agreement required to be reduced to writing to satisfy the statute of frauds and so give it validity, has so far ceased to be executory as to one party thereto that it would operate as a fraud upon him to permit the other to successfully put up the statute of frauds as an excuse for nonperformance, while respecting the statute — a court of equity will lay its hands upon that other and enforce obligations deemed to have been created by the circumstances not within the statute, but resting upon him in good conscience with a corresponding equitable remedy to give them vitality; — that equity thereby may leave the statute of frauds intact, yet satisfy the ends of justice by avoiding the injurious consequences that would, or might, otherwise flow from the mistake. It would take much time and require a very broad field to be explored to define the precise boundaries to which such boundaries are deemed to be cognizable by a court of equity, so that, while respecting the statute of frauds, it can prevent its being used to accomplish the very purpose it was designed to avoid. That it cannot be carried so far as to entirely nullify the statute would seem not to be open to question. Courts of equity have been accustomed to take great liberties, and probably seldom too great, in this matter, but they have never gone so far but that in each instance it was at least assumed that the real policy of the statute was left intact.

The growth of equity in the line under discussion, while very rapid at first, has not perceptibly advanced in recent years. Many judicial warnings may be found in the books against any further development of the idea that the statute of frauds may be "uplifted," so to speak, while the consequences of noncompliance with it may be avoided, pointing to instances where it was thought it had already been extended to the danger line, if not beyond, and suggesting that to further extend it would, in effect, avoid it altogether.

While it is true that equitable principles never necessarily remain stationary, that they may advance, from time to time, as the exigencies of new situations seem to demand, to the end that justice may not fail of vindication, probably it is true that the needs of such a situation, affecting the statute of frauds or limitations, should be of an extraordinary nature to justify a court in creating an essentially new precedent. In that regard such statute is quite as securely intrenched as that of limitations. Regarding the latter, it has been held that if one is merely betrayed into ignorance of his rights as to another by wrongful conduct of

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the latter until the time shall have expired for him to invoke judicial remedies to vindicate the same, such other is not thereby estopped from pleading the limitation period in respect to the matter; that standing upon his statutory rights he may safely confess his misconduct and defy his adversary in any judicial forum. Pietsch et al. v. Milbrath et al. (Wis.), 101 N. W. 388; Bank of Hartford County v. Waterman, 26 Conn. 324. That fraud may go so far, however, as to any cause of action as to call for equitable protection against the consequences of the statute of limitations or frauds, is recognized in some jurisdictions. Holloway v. Appelget, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827; Fry on Specific Performance of Contracts, § 552. But that is not here.

The conflict of authorities as to how far equity power may interfere to protect one from the consequences of noncompliance with the statute of frauds is well indicated in 2 Pomeroy's Equity Jurisprudence, §§ 864–867, and note on Glass v. Hulburt, 102 Mass. 24, 3 Am. Rep. 418; Petesch v. Hambach et al., 48 Wis. 443, 4 N. W. 565. It is commonly said that "the statute is intended to prevent frauds and not to promote them," and therefore courts will not give effect to efforts to turn the intended beneficent instrument into one with which to perpetuate injustice. Lex nemini facit injuriam. So far as that may legitimately go, the principle is one of inestimable value in judicial dealings with the affairs of men. True, the statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong, but in testing that principle by the proper limitations of the words "justice" and "wrong" the function of the Legislature must be respected as to what is right. That which, operating in its proper sphere of action, the Legislature has proclaimed to be wrong must not be declared to be wrong with a corresponding remedial right in a judicial sense. It having unqualifiedly stated that delay for a specified period of time after a cause of action shall have accrued to enforce it, shall be deemed to have extinguished it, the courts cannot legitimately ingraft exceptions upon the enactment. If the conseqeunces in any given case are avoidable it must be one where that can be done and the statute left really inviolate. Courts must regard wrongs not remediable because of the statutes as not wrongs at all, at least of any greater dignity than those breaches of moral obligations which must always be left to be redressed in other ways than by judicial tribunals, they not being within the maxim: "There is no wrong without a remedy."

Counsel for appellant refers to authorities where there was part performance after the execution of the defective agreement, or where on the faith of it at the time of the execution thereof one party thereto parted with value to the other and subsequently a court of equity exercised its authority to prevent the consequences that would otherwise flow from the failure to put the agreement in suitable form. In all such cases there are special circumstances referred to held sufficient to take the case out of the statute. To make those authorities, which, of course, announce a very familiar principle, fit this case in any view that can be taken of it, we must be able to find special circumstances warranting the application thereof. There are none which we can discover. The verbal agreement, if we are to fall back on that, and the writing are so closely connected with each other and blended into one transaction as to be inseparable. Whatever was done on the faith of one was grounded on the other. Whatever was done by appellant occurred as truly after

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the defective writing was made as after the agreement to make the writing. One was as infirm as the other, both at law and in equity. No consideration moved directly or indirectly to Smith, nor was any fraud, in fact or in law, perpetrated by him or could result from his acts, such as is commonly held sufficient to create an equitable obligation not affected by the statutes. So we have a clear case where by the policy of the statute it is conclusively presumed that the promisor did not intend to bind himself, and that the promisee has no reason to complain of his refusal to be bound, there being no evidence to the contrary created in the manner provided by law.

If we could treat the verbal agreement to make a valid guaranty as separate from the writing, as before incidentally suggested, we would yet face the fact that the former is void because there was no circumstance rendering it a fraud in Smith not to perform it, so as to take it out of the statute. An agreement to make a collateral promise is as much within the statute as the promise agreed upon would be, if imperfectly reduced to writing. Wills v. Shinn, 42 N. J. Law, 138; Dee v. Downs, 57 Iowa, 589, 11 N. W. 2; Carville v. Crane, 5 Hill, 483, 40 Am. Dec. 364; Bushell v. Beavan, 1 Bing. (N. C.) 103; Whitechurch v. Bevis, 2 Bro. C. C. 565; Wood v. Midgley, 5 De G., M. & G. 41; De Golyar's Law of Guaranties, etc., p. 59. This language is used on the subject in the work last cited:

"It has not been made the subject of discussion whether or not a promise to give a guaranty (as distinguished from a promise to procure one) is a special promise which falls within the statute. It is, however, obvious, that a promise to give a guaranty at a future time entirely falls within the mischief which the enactment was intended to guard against, and, indeed, that if the statute could be evaded by making such a promise it would be useless." The author quotes from the opinion of Pollock, C. B., in Mallett v. Bateman, L. R. 1 C. P. 163, as follows:

"If we were to hold that a contract of guaranty must be in writing but that a contract to give a guaranty need not, we should, I think, be committing the same mistake as our predecessors did with reference to the statute of uses. . . . Whether the decision of the courts of equity as to uses and trusts were beneficial or not I do not stop to inquire, but undoubtedly the whole doctrine arose out of a desire to frustrate the intention of the statute of uses. I trust that we shall not commit a similar mistake in construing the statute now under consideration."

In Fry on Specific Performance of Contracts, at section 552, the use of equity jurisdiction to compel performance of a verbal agreement to make a guaranty in writing is spoken of thus:

"Such a procedure affords a most easy means of evading the intention of the statute, and introducing the mischief it was designed to remedy . . . After a parol contract, a refusal to sign a written one is no fraud of which the court can take cognizance."

It should be remarked in passing that the author was then endeavoring to define the limits of the doctrine — having, of course, no application to this case, — that when the want of a writing is due to fraudulent prevention thereof by the preson seeking to take advantage of the circumstances, he is estopped from obtaining such advantage. The general conclusion of the author is that the mere refusal to carry out a verbal agreement to execute a contract in writing good under the statute of frauds creates no remedial right in favor of the party to whom the

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agreement was made. That being so, it certainly could create no such right in favor of a collateral promisee, who parts with nothing at the time of the promise nor is expected to thereafter to the collateral promisor. Nowhere is it suggested by the author, or by any one who has written on the subject, so far as we are able to discover, that failure to reduce a verbal agreement to writing, not characterized by fraudulent inducement or mistake, or by other special circumstances accompanied by such change of position on the part of the promisee beneficial to the promisor by part performance within the rule on that subject that a failure to fully perform would work a fraud on him and be a fraud in the promisor.

In considering this subject we must not lose sight of the fact that equity never interferes to give one immunity, as to any transaction, from the consequences of the statute of frauds, unless those consequences would be not only a fraud upon one but a fraud in the other party to the transaction. Fry on Specific Performance of Contracts, § 557. So the whole doctrine as to part performance taking a transaction that would otherwise be within the statute of frauds out of it is based on the idea that the party seeking to shield himself behind the statute obtained something of value, and his adversary parted with it to him after the completion of the agreement and on the faith of it. That could never occur ordinarily as to mere personalty so as to call into activity equity jurisdiction to avoid the otherwise consequences of the statute of frauds, since the part performance of itself would take the transaction out of the statute by creating a legal liability. Section 2308, Rev. St. 1898; Pomeroy on Contracts, § 100. It is the fact that the one seeking to hide, so to speak, behind the statute of frauds, at law obtains title by force of such statute to something of value without rendering a just equivalent therefor, or being amenable to any legal remedy, springs the obligation on the one side and the corresponding equitable remedy on the other. The principle has nowhere been more accurately and understandingly defined than by Lord Westbury in McCormick v. Grogan, 4 H. L. 97, in these words:

"The court of equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes on him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds."

So here we find entirely absent the prime essential of part performance upon which the appellant's case is assumed to be grounded. Of course, part performance by Smith in that he made a good guaranty on one of the notes when requested to some time after the making of the defective paper, does not count. A mere acknowledgment by one entitled to the protection of the statute of the existence of a void obligation by partly performing it does not render further performance a fraud upon the promise in any sense. Mere part performance as between the parties to the principal contract could not be held to take the collateral contract of suretyship out of the statute without nullifying it, because that necessarily occurs in every case where the original promisee acts at all. McGaughey Brothers v. Latham, 63 Ga. 67. Said an eminent

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writer respecting the equitable doctrine of part performance of contracts of the kind under consideration, "There is no occasion or opportunity either for the equitable relief of specific execution, or the doctrine of part performance." Pomeroy on Contracts, § 100.

We have not found it necessary in reaching a conclusion to consider whether an agreement of the sort here could, under any circumstances, be deemed in equity to have been taken out of the statute. Doubtless, in the main, at least, the doctrine in that regard is confined to contracts relating to lands (Pomeroy on Contracts, § 101), and those which a court of equity would entertain a suit for specific performance of if they were in statutable form. Section 2305, Rev. St. 1898, refers only to such contracts and was doubtless supposed at the time of its enactment to cover those which courts of equity had been accustomed to deal with, saving parties, where necessary to prevent injustice, from the consequences of the statute of frauds. That does not prevent the same equitable principle from being applied to other situations, as the cases indicate that it has, but it suggests caution in the development thereof in going beyond the boundaries of precedent. The maxim "Lex deficere non debet in justia exhibenda" (the law ought not to fail in showing justice), which is the guiding principle of equity and in harmony with which the doctrine was evolved, that when a situation is met with where the application of the statute would give one a right to the fraudulent despoliation of another, it may be deemed "uplifted" that an obligation springing from the relations of the parties and assumed to be outside of the statute may be enforced and injustice be thereby prevented, cannot be carried so far as to really nullify the statute without entering upon the broad field of judicial usurpation. The boundary would be crossed by equitable interference to give vitality to a mere collateral promise of suretyship in which there was no consideration moving to the guarantor supporting the equitable remedy of reformation, or special circumstances supporting other equitable relief.

We have not discussed specifically the subject brought to our attention, of whether by the equitable remedy for reformation, a contract of guaranty, so called, not a contract at all, because, though in writing, not containing the statutory essentials, can have those essentials placed therein by a judicial decree. If it could, the statute would seem to have little force. Certainly any circumstance that would justify such an exercise of judicial authority would justify the use of the remedy for specific performance. Petesch v. Hambach et al., 48 Wis. 443, 4 N. W. 565. As we have found, the facts here will not support the former remedy, it seems plainer still, they will not support the latter.

It follows that in any view that can be taken of this case the judgment appealed from cannot be disturbed.

Judgment affirmed.

KERWIN, J., took no part.

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Decision No. 835.

MORRISON v. AUSTIN STATE BANK.

(Supreme Court of Illinois, Dec. 22, 1904. On Rehearing, Feb. 8, 1905.)

72 N. E. 1109.

PARTNERSHIP — FRAUD — MUNICIPAL CORPORATIONS — WARRANTS — NEGOTIABILITY — STATUTES — CONSTRUCTION — APPEAL — QUESTIONS FOR REVIEW — STIPULATIONS.

1. Where the right of appellant to prosecute an appeal is not assigned as error, and no motion is made to dismiss the appeal on that ground, the mere fact that the parties stipulated that the objection should be submitted to the consideration of the Appellate Court does not render the question reviewable.

2. Whether appellant has an interest in the subject-matter is a question that might have appeared by the proof in the record, if it did not sufficiently appear from the decree's recital, stipulated by the parties to be true, and on which appellee cannot be heard to urge error, where the parties stipulated that the proof was waived, and that no exception, benefit, or advantage should be taken by either party to the same.

3. A transaction whereby partnership property is received from one partner for a past-due debt from him to the recipient is, in the absence of ratification by the other partners, a fraud on the partnership, which renders the transaction void.

4. In the absence of express legislation, municipal warrants, though negotiable in form, are not negotiable in fact, and hence are not within the protection of the rule which guards commercial paper in the hands of innocent purchasers.

5. Under Local Improvement Act (Laws 1897, pp. 127, 133) §§ 73, 90, providing that the contractor or other holder of warrants issued for work done thereunder has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected, such warrants, when stating on their face that they are payable out of special assessments, are nonnegotiable.

Appeal from Appellate Court, First District.

Suit by John J. Morrison and others against George I. O'Brien. The Austin State Bank intervened. From a decree of the appellate court (113 Ill. App. 65), affirming a decree for the intervener, John J. Morrison appeals. Reversed.

This is an appeal from a judgment of the Appellate Court for the First District, affirming a decree rendered by the Superior Court of Cook county on an intervening petition filed by the appellee in an equitable action brought by the appellant, John J. Morrison, and James D. Morrison and William Sullivan, against one George I. O'Brien. The original bill was brought by the appellant, John J. Morrison, and James D. Morrison and William Sullivan, against George I. O'Brien, setting up that said four parties had constituted a partnership under the firm name of John J. Morrison & Co. & O'Brien, and that said O'Brien had collected and converted to his own use certain assets of the partnership, viz., certain warrants issued to the partnership by the town of Cicero, and praying for an accounting and the appointment of a receiver. A receiver was appointed, and served notice upon the town of Cicero that said warrants belonged to said receiver and should be paid to none other.

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Thereupon the appellee herein, which had in the meantime acquired possession of said warrants in the manner hereinafter described, filed its said petition for an order commanding said receiver to withdraw said notice. A hearing was had on said petition, and a decree rendered in favor of the appellee. The question as to the ownership of these warrants was the only one to be determined, so that the decree rendered on said petition practically decided the entire cause. After the rendition of said decree an order was made by the Superior Court finding that the appellant and James D. Morrison and William Sullivan were interested in said decree, so as to be entitled to appeal therefrom, either jointly or severally, and authorizing such joint or several appeal. Thereafter the appellant herein duly perfected his separate appeal to the appellate court, from which he has also duly perfected his separate appeal to this court. Neither of the other parties has appealed. The appellant and appellee thereafter stipulated that the record in the cause on appeal to the appellate court and the Supreme Court should consist of the decree, the order authorizing the appeal by the appellant, and the stipulation, and that the facts shown by the recitals in the decree were true. It was agreed by the stipulation that the case should be submitted to the upper courts on the objection of the appellee to the appellant's right of appeal, and upon the objection of appellant to the correctness of the decree on the facts therein recited.

The admitted facts presented by the decree are that George I. O'Brien, a partner of the firm of John J. Morrison & Co. & O'Brien, did on the 27th day of February, 1901, on behalf of and as a partner in said firm, receive from the town of Cicero, a municipal corporation, certain vouchers or warrants, amounting to the sum of $2,208.10, and being in the form following:

This warrant is payable only from the special assessment named when collected.

Cook County, Illinois,
No..... Town of Cicero.
Clerk's Office, Austin, Feb. 21, 1901.

Treasurer Town of Cicero:

Pay to John J. Morrison Co. & O'Brien the sum of.....dollars for bal. on cement walks.....out of the appropriation for the special No.... fund only. And charge same to the appropriation for said fund. ($.....)

I hereby certify that the above bill was ordered paid by the board of trustees of the town of Cicero.

Countersigned,
Signed, JOHN I. JONES,
J. E. TRISTRAM, President Town of Cicero.
Town Clerk.

It is also admitted that these vouchers were executed and issued by said town of Cicero for work done and material furnished by said firm of John J. Morrison & Co. & O'Brien under written contracts made by said firm and its assignors with the town of Cicero for the laying of cement sidewalks; that after receiving said vouchers or warrants aforesaid the said George I. O'Brien indorsed them and delivered them to his father, Thomas O'Brien; that such indorsement and delivery were without any express authority from his copartners, and that his copartners and the receiver thereafter appointed of such copartnership assets, repu-

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diated the action of said George I. O'Brien in making such indorsement and delivery when the same became known to them; that the sole consideration for the said indorsement and delivery was a past-due indebtedness of George I. O'Brien to his said father, Thomas O'Brien, and that the said Thomas O'Brien was acquainted with the affairs of the said copartnership of said John J. Morrison & Co. & O'Brien, and was chargeable with knowledge that the said warrants were the property of said John J. Morrison & Co. & O'Brien; that Thomas O'Brien indorsed the said warrants and delivered them to the Austin State Bank, the appellee herein, and received in payment therefor the sum of $2,053.90, which he kept and applied to his own use, and that neither the said firm nor its receiver has ever received any part thereof, or derived any benefit from said payment; that the Austin State Bank received the warrants in the usual and ordinary course of business, for the valuable consideration aforesaid; that it had no notice, information, or knowledge, except as derived from the face of said warrants, of any claim of any nature of any other person to said warrants, or that the said firm of John J. Morrison & Co. & O'Brien was in the hands of a receiver, or that Edwin J. Zimmer had been appointed such receiver, or that litigation was then pending; that on the 11th day of October, 1901, the receiver, Zimmer, served notice on the treasurer of the town of Cicero, claiming the moneys represented by the warrants above described; and that on December 20, 1901, the Austin State Bank, appellee herein, presented the warrants to the said treasurer for payment and payment was refused.

Appellant has assigned a number of errors, but the principal is that the court erred in holding that the vouchers and warrants in question, and the moneys represented thereby, were not the property of the partnership, and should be delivered to the receiver.

James A. Brady, for appellant. Castle, Williams & Smith (Ben M. Smith, of counsel), for appellee.

RICKS, C. J. (after staing the facts). Appellee by its brief questions the right of John J. Morrison, the appellant, to prosecute this appeal, and that question will first receive our consideration. The record was made up by a stipulation of the parties, in which it was agreed that the record should consist of the decree of the Superior Court, the order of court granting the appeal, and the stipulation. It is also agreed "that the record, pleadings, and proof in such case is hereby waived, and no exception, benefit, or advantage shall be taken by either party hereto to the same." It is also agreed that the objection of appellee that appellant has not the right of appeal, and the objection of the appellant to the correctness of the decree on the facts, are submitted to the consideration of the appellate court, and in case of an appeal to this court the same questions shall be presented. We think appellee's contention should be denied for two reasons. Appellee did not assign cross-error in the appellate court or in this court, nor did it make a motion in this court to dismiss the appeal upon the ground stated. Parties may agree upon the questions they will present to the court upon the record, and they will be confined to them; but the court does not consider error upon the mere agreement of the parties. Notwithstanding the agreement, the errors relied on must be assigned. The appellate court took jurisdiction of the cause and disposed of it upon its merits.

The decree is not predicated upon the ground that John J. Morrison

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the appellant, had no interest in the subject-matter, but that the better right to the property in question was in the appellee; so that there is nothing appearing in the facts of the decree which tends to show that Morrison was not interested, but, on the contrary, the facts and recitals in the decree tend to show that he was interested in the subject-matter. Appellee recites and relies upon Gogan v. Burdick, 182 Ill. 126, 55 N. E. 126, from which it quotes: "The settled rule is that a party in whose favor a decree granting relief is rendered must sustain it by specific facts which justify it, either recited in the decree as proved on the hearing and found by the court, or by preserving the evidence establishing such facts." It may be first noted that the rule there cited is applicable only to the person in whose favor the decree is granted; but, if it be held applicable to both of the parties, then it is further seen that the fact may appear by recitals in the decree or the proof at the hearing. In this case it is expressly stipulated that upon any matter of proof no exception, benefit, or advantage shall be taken by either party. Under the authority cited, the question here presented was one that might have appeared by the proof in the record if it did not sufficiently appear from the recitals in the decree; and, as appellee agreed that it is to have no advantage because of the absence from the record of the proof, it cannot now be heard to urge error upon a matter that might have rested in proof.

The questions upon the merits of this case that are presented for our consideration, as we conceive them, are as to the rights and powers of a partner in reference to the partnership property and the character of the instruments here in question. The latter question involves the determination of whether those instruments are negotiable within the meaning of the law merchant, so that the purchaser thereof may take the same unaffected by the rights of the maker or intermediate holders. The legal characteristics of partnership property, and the interests, powers, and rights of the partners relative to the same, are peculiar, and cannot be well assimilated to any other class of property when viewed in its relation to its ownership. While it has many characteristics of estates in common and in joint tenancy, yet the interest of partners in the firm property is neither that of joint tenants nor that of tenants in common, but is sui generis. In Taft v. Schwamb, 80 Ill. 289, it is said (page 300): "Each partner is possessed per my et per tout — that is, by the half or moiety and by all — or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part, of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not. But their several degrees of interest must be regulated according to the stipulated proportions and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects until a balance of accounts be struck between him and his copartners, and it be ascertained precisely what is the actual amount of his interest." If he sell his interest in the partnership without the consent of his partner that the purchaser shall become a partner and succeed him in the partnership, the purchaser does not by his purchase become a partner, but simply becomes the owner of the proportion his vendor held in the

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partnership after the closing up of the partnership and the payment of the partnership debts. If a partner die, his heirs do not succeed to his rights as a partner, nor to the partnership property, and particularly so where it is personal property; but the surviving partners hold all the property until the closing up and settlement of the partnership, when the heirs succeed merely to the proportionate share of the remaining assets. These attributes of such property arise in a large degree from the existence of the situation of two or more persons having interests in the business, being clothed with power to conduct it. They owe fidelity to each other, and the firm, as such, owes good faith to the public, and it is in the adjustment of the respective rights and duties between the partners and the public that qualities peculiar to this property are given it. Where a business is being conducted by a number of persons who are owners of that business, it is necessary that each of the persons so owning shall be invested with power to do all things in the regular, necessary, and usual course of business, and when they do so it is necessary and proper that those who deal with them shall be protected. These considerations have led the courts to require of persons who deal with partnerships to take notice of the partnership, the identity of its members, the character of the partnership, its business, and the general course of that business, as the public owes to the partnership the same fidelity, when dealing with its individual members, that the partnership owes to the public in such cases.

Ordinarily partnerships are conducted for profit. The property of the partnership is usually sold for money, and the money reinvested, and through these means the business is kept up. The return of sales received by each partner is for the partnership — the result and representative of the partnership goods — and is to be accounted for to the partnership or turned into it by the person who makes the sale. These matters are, and must be, known to all persons who deal with them. The partner who makes disposition of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and the person who deals with him, knowing that such is to be the result, is a party to that fraud, and can receive no benefit from it. When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants or vouchers in question for the payment of money that belonged to the partnership, of which appellant was one, in payment of a past-due debt to himself from his son, and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and, being a party to that fraud, he did not and could not take anything by it. As between him and the partnership it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in good faith, or an assignement of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the

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partnership, and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past-due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership, and knows that he is thereby working a fraud upon the partnership. Such a transaction is not merely voidable. It is void. Fraud vitiates and so poisons a transaction that it has no vitality. Property contracted for or obtained through fraud is like Dead Sea fruit, that can neither be gathered nor enjoyed when possessed. The transaction may be ratified by the partnership, and may be validated, as one may elect to waive a tort and proceed in assumpsit as for goods sold; but until, with a full knowledge of all the facts, the partnership has ratified the transaction, it is void. When Thomas O'Brien received the orders from his son, he knew the partnership was to receive nothing from them, and the transaction was fraudulent and void. If, however, the instruments so obtained by him are negotiable, in the sense that promissory notes and bills of exchange are under the law merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

We have looked to the act authorizing the issuance of these warrants or vouchers, and there is no provision found in it giving them the required characteristics of negotiability. We have looked to the statute in relation to negotiable instruments, and find that by sections 3 and 4, c. 98, Hurd's Rev. St. 1899, certain instruments are mentioned and are given the quality of assignability by indorsement, so that they may be passed by assignment in writing in the same manner as bills of exchange are, "so as absolutely to transfer and vest the property thereof in each and every assignee successively." By section 5 it is provided that the assignee may sue in his own name and maintain the same kind of action that the original obligee or payee could have done; and section 7, which was section 1 of an act approved June 4, 1895, in relation to promissory notes, etc. (Laws 1895, p. 262), states just what instruments, among all the instruments referred to in the act, shall be clothed with the attributes of negotiability according to the custom of merchants, and by it those qualities are only extended to promissory notes payable in money, and it contains the further provision that the holder or owner of any other evidence of indebtedness mentioned in the act may sue the assignor when he has shown due diligence to collect from the maker. So it will be seen that neither by the act authorizing the issuance of the vouchers in question nor by our statute in regard to negotiable instruments are the instruments in question given the qualities necessary to protect appellee as an innocent purchaser, unless such instruments can be held to be promissory notes within the meaning of our act.

It seems to have been generally held that municipal corporations have no power, in the absence of an express grant, to issue unimpeachable evidence of indebtedness; and so it was held in Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251: "It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable obligations, which may be multiplied to an indefinite extent." And in

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Mayor v. Ray, 19 Wall. 468, 22 L. Ed. 164, it is said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and the incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." The above cases are quoted and the subject ably discussed in the case of State ex rel. v. Cook (Neb.), 61 N. W. 693.

In Miner v. Vedder, 66 Mich. 101, 33 N. W. 47, a suit was brought against the treasurer of a village upon a warrant by the assignee thereof. The treasurer answered, among other things, that he had received notice from one Boies that the orders originally belonged to him, and that the relator was not entitled to them. The court found that the relator was not the lawful holder and was not entitled to recover. Upon appeal, in discussing that phase of the case, the court said (page 103, 66 Mich., and page 48 33 N. W.): "It was claimed upon the trial and is argued here, that relator purchased the orders in good faith, for a valuable consideration, without notice of the mistake or lien claimed, and that therefore, being a bona fide holder of said orders, neither such mistake nor lien could be allowed or enforced as against him. It is sufficient to say, in answer to this argument, that these warrants or orders issued by the village of Hudson are not negotiable instruments, and while in the hands of the relator are subject to all the equities existing between the payee and the village, or between the payee and any other person, without reference to the good faith of the relator in his purchase."

This court, in People ex rel. v. Johnson, 100 Ill. 537, 39 Am. Rep. 63, speaking of a county order, said (page 546, 100 Ill., 39 Am. Rep. 63): "We regard the rule well settled, by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation." In that case the case of Garvin v. Wiswell, 83 Ill. 215, in which a bond issued by a county to meet an appropriation to pay bounties for volunteers was held to be a negotiable instrument, is reviewed and distinguished, and attention is directed to the fact that the special act authorizing the issuance of bonds gave them the character of negotiable instruments. The court, in discussing it, said (page 547, 100 Ill., 39 Am. Rep. 63): "The effect of this act was

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equivalent to a previous authority to issue the instrument, and gave to it, as was originally intended, all the attributes of commercial paper. That the Legislature has ample power to authorize counties or other municipalities to issue negotiable securities is not to be questioned, yet without such special legislative authority they have no power to do so, and there is no pretense that the order in this case was issued for any such purpose or was authorized by any special act of the Legislature."

The case of First Nat. Bank v. Gates, 66 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383, is very similar in principle to the case at bar. There Gates gave to Blanchard a sum of money with which to purchase for him county warrants. Blanchard was cashier of the bank, and Vawter was its president. Blanchard purchased the warrants and placed them in the bank of Gates. Vawter took the warrants and pledged them as security for a loan from the appellant, the First National Bank. Gates demanded the warrants, and their delivery was refused, and he sued for conversion. The court says: "The bank, however, claims that, having taken this warrant in the usual course of business, for a sufficient consideration, without knowledge of Vawter's wrong, it is entitled to be protected by the law merchant. The question is, therefore, is a county warrant, which is negotiable in form, but non-negotiable in the sense that the county issuing it may defend against it, nevertheless negotiable as between successive holders, so that a thief may vest title to it in a bona fide holder of it? That one so acquiring ordinary commercial paper would be protected is not questioned. An innocent purchaser in good faith of commercial paper gets a good title, even though he purchases from a thief [citing authorities]. This is so because of the law merchant. . . . But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal warrants, though negotiable in form, are non-negotiable in fact; hence they are not within the protection of the rule which guards commercial paper." To the same effect is Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

We think the above cases state a sound rule, and one which sound public policy and the greater weight of authority alike demand shall be adhered to.

There is another insuperable reason why the warrants here in question cannot be deemed to be commercial paper. They were given for work done under the local improvement act of 1897, and payable out of special assessments, and so state upon their face. By sections 73 and 90 of that act (Laws 1897, pp. 127, 133), the contractor or other person holding such warrants has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected. "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future, are not negotiable bills or notes, since they do not carry the general personal credit of the maker, and since they are contingent upon the sufficiency of the fund upon which they are drawn." 4 Am. & Eng. Encyc. of Law (2d Ed.), 87, and authorities there cited. It is needless to extend this opinion, or to further cite authorities upon this last proposition, as they are very numerous and entirely uniform.

The judgment of the appellate court and the decree of the Superior Court are reversed, and the cause remanded to the Superior Court, with

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directions to that court to dismiss the intervening petition of appellee, and to make such order with reference to the ownership of said warrants as shall conform to this opinion, and as justice and equity may require.

Reversed and remanded, with directions.

On Rehearing.

PER CURIAM. Rehearing denied.

HAND, J. (dissenting). I think the warrants in question were so far negotiable as to vest title in the Austin State Bank against all persons except the town of Cicero. To hold otherwise would be to impair the commercial value of such warrants, and increase the cost to the property owner of all local improvements in municipalities in this State.

Decision No. 836.

LA FAYETTE & BRO. v. MERCHANTS' BANK OF FT. SMITH.

84 S. W. 700.

(Supreme Court of Arkansas. Jan. 14, 1905.)

DRAFTS — FORGERY — PAYMENT BY DRAWEE — RECOVERY FROM INDORSER — NOTIFYING INDORSER OF FORGER — DELAY — NEGLIGENCE.

1. Where a draft bore on its back a bill of sale of cattle from the payee to the drawee in consideration of the amount of the draft, it was notice that the drawee was to pay from his own funds if the bill of sale and signature were genuine; and the drawer having forged the name of the payee and seller, and caused the draft to be discounted by a bank, which indorsed it and obtained payment from the drawee, the latter was entitled to recover from the bank.

2. Where the drawee of a forged draft paid it to a bank which had discounted and indorsed it, the fact that the drawee did not notify the bank of the forgery for six months did not preclude recovery by the drawee from the bank; the drawee in the meantime having had no cause for suspicion, and the bank not having been prejudiced.

3. In determining on appeal the correctness of the direction of a verdict for defendant, that view of the facts sustained by the evidence which is most favorable to plaintiff must be taken.

Appeal from Circuit Court, Sebastian county, Ft. Smith District; Styles T. Rowe, Judge.

Action by La Fayette & Bro. against the Merchants' Bank of Ft. Smith. From a judgment for defendant, plaintiffs appeal. Reversed.

La Fayette & Bro., merchants and dealers in live stock at Checotah, I. T., in June, 1898, entered into an agreement with one Boudinot Whitlock, by which, under certain conditions, they were to advance money to Whitlock for the purchase of cattle. These conditions were that Whitlock, when he purchased cattle, should give the vendor of the cattle a draft on La Fayette & Bro. for the price thereof, on the back of which draft there should be indorsed a bill of sale conveying the cattle to La Fayette & Bro. When this draft was presented with a proper bill

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of sale indorsed on the back, and signed by the seller of the cattle, then La Fayette & Bro. were to pay the draft, and hold the cattle as security for the money advanced by them. The evidence is not very clear as to what profit La Fayette & Bro. were to receive, but it is said that the expectation was that they would afterwards purchase the cattle from Whitlock, if they could agree on the terms, and that the bill of sale was intended only as security. In pursuance of this agreement a printed form of a check, with the bill of sale printed on the back, was prepared, and these forms were delivered to Whitlock, to be used when he purchased cattle. Whitlock afterwards drew 12 of these drafts, with bills of sale printed on the back, which, on being presented to La Fayette & Bro., were paid by them; but it turned out that the names of the payees indorsed on six of these drafts, and signed to the bill of sale thereon, were forgeries. The fact was that the payees' names thereon had been forged by Boudinot Whitlock, and the drafts then discounted or sold to third parties. Four of these drafts, with the forged indorsements thereon, were taken by Whitlock to the Merchants' Bank of Ft. Smith, Ark., which paid him the face value thereof in due course of business, without notice that the indorsement of the payees' names on the drafts and to the bills of sale were forgeries. All of the drafts were in the same form, but made payable to different persons, and the following is a copy of one of them at the time it was presented to the Merchants' Bank.

$156.00. Checotah, I. T., July 25th, 1898. La Fayette & Bro. General Merchants and Live Stock. Pay to the order of S. A. Smith one hundred and fifty-six dollars. Boudinot Whitlock.

"No. 11."

Upon the back of the draft was the following:

"Know all men by these presents, that for and in consideration of the sum of one hundred and fifty-six dollars to me in hand paid, the receipt whereof is hereby duly acknowledged, I, S. A. Smith, of Lena, I. T., do hereby bargain, sell, and deliver unto La Fayette & Bro., of Checotah, I. T., all the following described property, namely [here follows description of ten head of cattle]. I covenant that I am the absolute owner of the property aforesaid and have the lawful right to dispose of the same; also that I will warrant and defend the title hereby conveyed against whomsoever claiming or to claiming the same. In witness whereof I have hereunto set my hand this 25th day of July, 1898. S. A. Smith."

In addition to the signature of S. A. Smith to the bill of sale, his name was also indorsed on the back of the draft. And after the bank had paid for the draft, it made the following indorsements thereon:

"Pay First Nat. Bank or order. Merchants' Bank. C. S. Smart, Cashier. R. L. Martin, Cas."

The Merchants' Bank then forwarded the drafts to the First National Bank of Muscogee, I. T.; and it, in turn, presented the drafts to La Fayette & Bro., who, not knowing or having any notice that the signature of the payees signed to the bills of sale and indorsed on the drafts were not genuine, paid the amount of the drafts. Some four or five months afterwards, when they went to gather up the cattle, described in the bills of sale, they found that the signature of the payees was forged. S. A. Smith, the purported payee, made affidavit that he had never sold Boudinot Whitlock any such cattle, and had never seen or heard of such a draft, and that his signature indorsed thereon and attached to the bill of sale was a forgery. The payees to the other drafts made affidavits to

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the same effect. Soon after the discovery of the forgery, La Fayette & Bro. notified the Merchants' Bank, and demanded a return of the money. The bank at first denied that the signatures of the payees were forged, but after the affidavits were obtained the forgeries were admitted, but the bank declined to return the money, and La Fayette & Bro. brought this action to recover the same. The Circuit Court, after hearing the evidence, held that the defendant was not liable, and directed a verdict for the defendant, and the plaintiffs appealed.

Hill & Brizzolara, for appellants. Ira D. Oglesby, for appellee.

RIDDICK, J. (after stating the facts). This is an action to recover money paid under mistake of fact. And the facts, briefly stated, are that one Boudinot Whitlock had an agreement with the plaintiffs, La Fayette & Bro., by which La Fayette & Bro. agreed to pay drafts drawn by Whitlock on them for the purchase price of cattle, provided that a bill of sale, signed by the vendor, conveying the cattle to La Fayette & Bro., should be indorsed on the back of the draft as security for the payment of the draft. To enable Whitlock to have these drafts with bill of sale in proper form, blank drafts, with bills of sale printed on the back, with spaces for description of cattle purchased, and for signature of the owner, were prepared and given to Whitlock. The intention was that he should buy these cattle in the Indian Territory, where he lived, and where the firm of La Fayette & Bro. was in business. He afterwards drew drafts in favor of certain parties living in the territory, without their knowledge, and then, without their knowledge or consent, indorsed their names on the back of the drafts, and signed their names to the bills of sale on the back of the drafts, and then delivered the drafts to the Merchants' Bank of Ft. Smith, who paid him full value therefor. The bank indorsed the draft and sent it to a bank at Muscogee, I. T., which presented it to La Fayette & Bro. for payment, and they paid it. Neither the Merchants' Bank nor La Fayette & Bro. had any notice of the forgery, and both supposed that it was a legitimate transaction on the part of Whitlock. On the discovery of the fraud, La Fayette & Bro. demanded that the bank repay the money, and upon its refusal to do so they brought this action to recover it.

It is a general rule that money paid under a mistake of fact may be recovered. The right of recovery proceeds upon the theory that the plaintiff has paid the money which he was under no obligation to pay, and which the party to whom it was paid has no right to receive or to retain; and the law therefore raises an implied promise on his part to refund it, and an action will lie to recover it. The reasons which permit a recovery are equitable in their nature, and the rule does not apply in any case where it would be unjust or inequitable to compel the return of the money. For instance, if one in ignorance of the date of the maturity of a note pays it, and afterwards discovers that it is barred by the statute of limitations, he cannot recover the money paid; and there was a moral obligation on him to pay his debt, whether barred or not. 15 Am. & Eng. Encyc. of Law (2d Ed.), pp. 1103 to 1106, and cases cited. But no such reason exists in this case. When this draft was presented to the plaintiffs for payment, it had the indorsement of the defendant bank upon it, as well as the indorsement of the name of the payee, and his signature to the bill of sale on the back of the draft. The plaintiffs had the right to suppose that the bank had taken proper precautions to ascertain that these signatures were genuine. The presentation of the draft

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for payment under such circumstances was, in effect, a representation on the part of the bank either that it had paid or that it would pay to the payee or to his order the amount named in the draft, and that his signature both to the bill of sale, and indorsed on the draft, was genuine. Under these circumstances the plaintiffs paid over the money to the collecting bank, acting as the agent of the defendant in making the collection; and it seems to us that the equities are in favor of the plaintiffs, and that a recovery should be allowed unless there is some rule of law that forbids it.

Now, there is an exception to the rule permitting a recovery of money paid under a mistake of fact in the case of a drawee paying a draft or check upon which the name of the drawer had been forged. The reason of the rule is said to be that the drawee should know the signature of the drawer, and that he is guilty of carelessness in paying a check where the drawer's name has been forged, and that, as between him and an innocent holder, no recovery should be allowed. Defendant contends that the exception applies also where the name of the drawer is genuine, and where the drawer has himself forged the signature of the payee. There is authority to support that position. The Supreme Court of the United States so declared the law in an opinion delivered by Chief Justice Taney. The court said that "the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring to the contrary in a suit brought against him by the holder." Hortsman v. Henshaw, 11 How. 177, 13 L. Ed. 653; Bigelow on Bills & Notes, 568. But though there are cases that seem to hold to the contrary, (Merchants' Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Northampton Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283), still we may admit that the rule declared by Chief Justice Taney is correct in cases where there is nothing on the draft to give notice that the drawee does not pay out of funds of the drawer in his hands. But that is not the case here. The bill of sale on the back of the draft was notice to every one taking it that the drawee was paying or would pay not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale, and a transfer of the property described therein. The form of the draft was notice to the bank that the drawee would not pay unless the bill of sale and the signature thereto were genuine, and it should have taken the usual precautions to ascertain that they were genuine before parting with its money. It obtained this money not by presenting the draft alone, but by presenting it in connection with this forged bill of sale. The drawee was ignorant of the forgery, and the case, as we think, comes within the general rule that one who has paid money under a mistake of fact may recover it. Northampton Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283; Merchants' Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Insurance Co. v. Bank, 60 N. H. 442; Carpenter v. Bank, 123 Mass. 66.

It is true that the drawee did not notify the bank of the mistake and the forgery until five or six months after the money was paid, but the reason of that was that they were themselves ignorant thereof. Having no reason to suspect that a forgery had been committed, they were not guilty of negligence in failing to discover it sooner, and so soon as they discovered it they notified the bank. Nor is it shown that the bank was injured in any way by the delay. So we think that it furnishes, under the circumstances, no defense to the action.

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The Circuit Court directed a verdict for the defendant. In testing the correctness of that ruling, we must take that view of the facts sustained by the evidence that is the most favorable to plaintiffs; and, when we do that, it seems very clear that the court erred in directing a verdict. The judgment is therefore reversed, and the cause remanded for a new trial.

HILL, C. J., not participating.

Decision No. 837.

KELLEY v. BUFFALO SAV. BANK.

72 N. E. 995.

(Court of Appeals of New York. Dec. 30, 1904.)

SAVINGS BANKS — PAYMENT OF DRAFT — NEGLIGENCE — DEATH OF DEPOSITOR.

1. Where, after the death of a depositor in a savings bank, of which fact the bank was ignorant, his bankbook was produced, and a draft presented, purporting to bear his signature, which was paid by the bank, it is not liable for any error, if it used ordinary care in making payment.

2. Where a savings bank failed to make a physical comparison of a purported signature to a draft with the signature of the depositor on file in the bank, and in point of fact the signature was a forgery, the bank is liable for such payment, for failure to exercise due care and ordinary caution.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Mary Kelley, administratrix of the estate of Ellen Neville, against the Buffalo Savings Bank. From the judgment of the Appellate Division (84 N. Y. Supp. 642) affirming a judgment for defendant, plaintiff appeals. Reversed.

The action is brought by the administratrix of Ellen Neville, deceased, to recover from defendant bank the amount of certain deposits, which, with interest up to the time of the commencement of the action, were said to have amounted to upwards of $2,100. The material facts, as found by the trial court, and unanimously affirmed by the Appellate Division, are substantially as follows: On the 30th day of January, 1871, the plaintiff's intestate, Ellen Neville, then about eighteen or nineteen years of age, opened an account with the defendant bank. A bankbook was issued to her in her name, and she signed her name to the signature book kept by the defendant for purposes of identification. At the time when this account was opened there were in force certain rules adopted by the defendant, which were posted in a conspicuous place in its banking room, and also printed in each pass book issued by it. One of these rules provided that "the secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books or duplicates thereof, shall be good and valid payments to the depositors respectively." Another rule provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." During the lifetime of Ellen Neville she made sixteen deposits to the credit of this ac-

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count, presented her book to the defendant fifteen times for the purpose of having interest credited thereon, and drew two checks upon said account, one dated September 22, 1873, for $335.98, and the other dated July 7, 1877, for $23.31. These were presented with her pass book and she received the money thereon. She died on or about the 1st day of December, 1878, at the age of about twenty-five or twenty-six years, and at the time of her death there remained to her credit on said account the sum of $884.43. This is the amount, with compound interest, which the plaintiff seeks to recover in this action. Ellen Neville left, her surviving, her sister, the plaintiff, another sister, named Kate, and her mother. At the time when this account was opened they all lived together in the city of Buffalo. Each of Ellen's sisters had a bank account of her own. Nearly twenty-three years after Ellen's death, and on the 22d of May, 1901, the plaintiff applied for and received letters of administration. About ten years ago the mother and sister Kate became inmates of St. Francis' Asylum for the Aged and Infirm of Buffalo, where they remained until the time of their deaths, which occurred about two or three years, respectively, before the trial. When they entered this asylum they paid to it the sum of $1,000. When Ellen died, on December 1, 1878, her bankbook was in the house where the whole family then lived, and was taken possession of by her mother or her sister Kate or the plaintiff. Subsequent to Ellen's death the bankbook was presented to the defendant by the mother or the sister Kate or the plaintiff for the purpose of having interest credited thereon on ten different occasions between the 1st of January, 1879, to and including July 1, 1883, and on the 4th day of March, 1882, the pass book was presented by some person unknown to the defendant (such person so presenting said book being the mother, the sister Kate, or the plaintiff), and a deposit of $70 was duly made and entered therein. Subsequent to Ellen's death the moneys to the credit of this account were paid out by the defendant on five separate drafts or written orders drawn in the name of Ellen Neville, as follows: December 28, 1878, $41.43; June 2, 1880, $50; July 30, 1881, $70.45; August 14, 1883, $56.62; September 1, 1883, $937. No part of these moneys was paid to the legal representative or representatives of Ellen Neville, but the payments referred to were made to her mother or to one of her sisters, and the signatures on these five drafts or orders, purporting to be the signatures of Ellen Neville, were not her signatures, but were made by her mother or one of her said sisters. The findings relating to the conduct of the bank officials in the payment of these drafts are as follows: "That by a critical examination and comparison of the said signatures on each of the aforesaid drafts or orders with the true signature of said Ellen Neville, entered and signed as aforesaid in the book of signatures it would have been apparent to a competent bank officer that neither the signatures to said drafts or orders was the genuine signature of said Ellen Neville. That, at the respective times at which such drafts or orders were presented to the defendant for payment, the defendant made no critical examination or physical comparison of the signatures thereon with that of the said Ellen Neville entered and signed in the book of signatures of depositors kept by the defendant aforesaid. That said drafts or orders were paid by defendant on presentation of the same with the pass book, and the defendant made no effort, by a critical examination or physical comparison, to ascertain the genuineness of the signatures of any of said drafts or orders, or to ascertain the identity of the

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person presenting the same. That there does not exist such a disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon said five checks, or any or either of them, as to create doubt or misgiving concerning the genuineness of said five signatures, or any or either of them, in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bankbook, and therefore the defendant exercised due care and caution, and was not guilty of negligence, in paying the five checks in question, nor in paying any or either of them." These findings of fact were followed by the legal conclusion that the complaint should be dismissed, and the judgment entered thereon has been unanimously affirmed by the Appellate Division.

Harry D. Williams, for appellant. Adolph Rebadow, for respondent.

WERNER, J. (after stating the facts). Upon the foregoing facts the trial court dismissed the complaint. At the Appellate Division the judgment entered upon that decision was unanimously affirmed. This court must therefore assume that every fact found is based upon sufficient evidence (Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; People ex rel. Manhattan Ry. Co. v. Barker, 152 N. Y. 417, 46 N. E. 875), and the judgment must be sustained unless the conclusion of law upon which it is predicated is erroneous, or other fatal errors affect the rulings made upon the trial.

The immediate question presented by this appeal is whether, upon the record before us, the plaintiff is entitled to recover; and, as the decision of this question necessarily involves an inquiry into the duties and responsibilities of savings banks toward their depositors, the case is one of more than ordinary professional interest and practical importance. Savings banks are prominent factors in our modern business life. Many of them count their deposits by the millions, and number their depositors by the thousands. Many, if not most, of these depositors are persons in the humbler walks of life, living in widely scattered sections of their respective communities, visiting the banks infrequently, having no personal acquaintance with bank officials or employees, and no convenient or satisfactory means of immediate identification when their identity is questioned. These conditions are in striking contrast with those which prevail in the intercourse between the officers and employees of discount banks and their patrons. The majority of the latter are persons actively engaged in business, making daily or at least frequent visits to their respective banks. Their signatures are familiar to the officers and employees of the banks, and if, now and then, there is need of identification, it can usually be furnished without much difficulty. These considerations clearly indicate the difference beteween the two classes of banks, as well as the necessity for the law which permits savings banks to adopt reasonable rules, adapted to the nature of their business, which rules, when properly adopted and promulgated, are binding upon them, their depositors, and those who succeed to their interests. Outside of these special rules, however, there are many questions affecting the interests of savings banks and their depositors which must be determined by broad and comprehensive legal rules of general application. One of these questions arises out of the relations between savings

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banks and the legal representatives of deceased depositors. What degree of care must a savings bank exercise in paying money out of a depositor's account after his death, upon the production of his bankbook, and the presentation of a draft purporting to bear his signature, when the bank has had no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact? That is the question which underlies all other questions in this case.

In view of what has been said concerning the relations of savings banks and their depositors towards each other, it becomes obvious that any general rule that would require savings banks to act in such circumstances at their peril, without regard to the degree of care exercised, would ultimately cast as great a burden upon depositors and their legal representatives as upon the banks, and would disastrously affect the beneficent work which such institutions are designed to accomplish. If it were the duty of savings banks to establish at all hazards the identity of every person presenting a depositor's bankbook and draft, it would be quite as impossible for them to continue business as it would be for some persons to avail themselves of the best-known and most generally approved method of investing and accumulating the fruits of frugal and patient economy. The same would be true of any other rule so onerous in its operation that such institution could not do business without great inconvenience both to them and their depositors. A single illustration will suffice to demonstrate this. Take the case of a large savings bank, with so many accounts that it is impossible for the paying teller to know each depositor. It would be utterly impracticable to do business if each application for a withdrawal of money had to be delayed until a searching inquiry could be made as to the regularity of the transaction. But even if such a course were possible, so far as the bank were concerned, what would be the effect upon the poor and unknown depositor, whose place of residence may be remote from the banking house, and who may have no acquaintance with any one who would be of the slightest assistance in identifying him? He would have no way of getting money that rightfully belonged to him, or, at least, might find his efforts in that direction so burdensome as to amount to the same thing. This is not an extreme illustration, but one that is fairly typical of the relations between great savings banks located in large centers of population with many depositors, whose accounts are small, and whose deposits are made at rare intervals. Upon reflection it becomes obvious, therefore, that the only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. This is the rule that has been laid down by this court in a variety of similar cases. Schoenwald v. Metr. Savings Bank, 57 N. Y. 418; Appleby v. Erie Co. Savings Bank, 62 N. Y. 12; Kummel v. Germania Savings Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786.

In the case of Allen v. Williamsburgh Savings Bank, 69 N. Y. 314, the wife of a depositor had wrongfully secured possession of his passbook, forged his signature to a draft, and obtained payment from the bank. But there the bank had adopted a special by-law requiring it to use its best efforts to prevent fraud, and this was construed to bind the bank to a higher degree of care than that enjoined by the general rule.

It is to be observed that all of the cases above cited present instances

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of payments to the wrong persons during the lifetime of the depositors, and it is true that, in construing certain rules so generally adopted by savings banks as to have acquired almost the binding force of statutes, it has been held by this court that there is a difference between the relations of a savings bank and a living depositor, on the one hand, and the relations of such a bank and the legal representatives of a deceased depositor, on the other hand. The rules referred to are among the by-laws adopted and promulgated by the defendant bank, and are as follows: "The secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books, or duplicates thereof, shall be good and valid payments to the depositors respectively." "On the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." In the recent case of Mahon v. South Brooklyn Savings Inst., 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603, we had occasion to discuss the effect of these two rules; and, as bearing upon the defense that the bank had exercised due diligence in paying out money upon the account of a deceased depositor, we said: "The rule of diligence invoked by the defendant applies only to the case of a living depositor. When, through a depositor's carelessness, his bankbook gets into the hands of a third person, who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the pass book, and thus protect itself against a second demand for payment by the careless depositor. But the by-law which is designed to protect the bank in such a case must be read in connection with the other by-law, which provides that, after the depositor's death, payment must be made 'to his or her legal representatives.' This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." That case is now relied upon by the appellant. As applied to the facts there established, the language just quoted was precise and correct, because the bank had knowledge of the depositor's death, and assumed to pay out the money credited to her account to one who claimed it by virtue of an alleged gift causa mortis, which the trial court found had never been made; and the unanimous affirmance of that finding of fact by the Appellate Division left this court no alternative but to apply the rule there laid down. In that case the finding of fact clearly established the absence of ordinary care, and the decision reached by this court was the only logical sequence of the finding. The language of the opinion is general and comprehensive, but of that it is enough to say that judicial discussion is to be limited to what is actually decided. People ex rel. Metr. St. Ry. Co. v. State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884.

In the case at bar the situation is different. While there is no direct finding to the effect that the officers of the respondent bank had no knowledge of Ellen Neville's death, that is the direct and inevitable implication of the other finding; and thus the question that remains to be discussed is whether the findings as to what the officers of the bank actually did, support the legal conclusion that they were not guilty of negligence in making payments to the persons who presented the decedent's pass book and drafts purporting to have been signed by her. The substance of the findings upon that subject is a critical examination and comparison of the signatures on the several drafts referred to with

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the true signature of the decedent would have disclosed the fact that the signatures on the drafts were not genuine; that the officers of the bank made no critical examination or physical comparison of the signatures on the drafts with the genuine signature of the decedent, entered and signed in the bank's signature book; and that the officers of the bank made no effort, by a critical examination or physical comparison, to ascertain the genuineness of the signatures on the drafts, or to ascertain the identity of the person presenting the same. The use of the disjunctive "or" in these findings separates that portion of them which relates to a critical examination of the signatures from that which relates to a physical comparison thereof, and, fairly construed, they import that no physical comparison of the signatures was made by the officers of the bank. These two findings are not necessarily inconsistent with each other, but they are so divergent as to entitle the appellant to the benefit of the one most favorable to her. Redfield v. Redfield, 110 N. Y. 671, 18 N. E. 373. Whether the failure to make a physical comparison of the signatures in the case at bar was consistent with the exercise of ordinary care on the part of the defendant bank may depend upon peculiar facts which are not found in the record before us. The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon five checks as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him, with the bankbook, and that therefore the bank exercised due care and caution, and was not guilty of negligence, is really a conclusion of law, and not a finding of fact. It is possible that there may be special cases in which it may not be necessary for bank officers to make a physical comparison between one signature on file with a bank and another upon a draft or check presented to it for payment, but, if so, there must be some unusual and pertinent excuse, that it is not discoverable in the findings now before us, tending to show that the failure to make such a comparison is not at variance with the requirements of ordinary care. We think the finding most favorable to the appellant, to wit, that the defendant made no physical comparison of the signatures upon the five drafts with the signature of Ellen Neville in the defendant's signature book, does not support the conclusion of law to the effect that the complaint should be dismissed, and for that reason the judgment herein should be reversed.

This view of the case renders it unnecessary to pass upon the exceptions to rulings that may not be repeated upon another trial, nor upon the extent of the appellant's rights in case she should recover a judgment, and it should appear that, as one of the surviving sisters of Ellen Neville, she has already received a part of the fund which she now seeks to get in her representative capacity.

The judgment herein should be reversed, and a new trial granted, with costs to abide the event.

VANN, J. I concur for reversal, but upon a more radical ground. While the defendant could have adopted a rule that would cover a payment made in good faith to a person in possession of the pass book of a deceased depositor, it had not done so when the payments in question were made. As its rules then stood, such a payment bound the deposi-

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tor while he was alive, but did not bind his estate after he was dead, for they expressly provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." This rule is absolute, and a part of the contract. It is the law of the case made by the parties. The language is that of the bank, and hence, if ambiguous, is to be construed in favor of the depositor, who is not responsible for the ambiguity. If we add to it, in effect, the proviso, "But payment to one presenting the pass book of a deceased depositor shall not be good unless the bank has notice of the death," we make a new contract. I repeat, as applicable to the case in hand, what we recently said in another case: "This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." Mahon v. South Brooklyn Savings Institution, 175 N. Y. 69, 72, 67 N. E. 118, 96 Am. St. Rep. 603.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ. (and VANN, J., in result, in memorandum), concur with WERNER, J.

Judgment reversed, etc.

Decision No. 838.

MASSACHUSETTS NAT. BANK v. SNOW.

72 N. E. 961.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1905.)

NOTES — INDORSER — LIABILITY — STATUTES — CONSTRUCTION.

1. Under the direct provisions of Rev. Laws, c. 73, § 26, subd. 5, a negotiable instrument is payable to bearer when the only indorsement is in blank.

2. Under the direct provisions of Rev. Laws, c. 73, § 207, a bearer is the person in possession of a note which is payable to bearer.

3. Where a note payable to bearer is presented for discount, the presumption is that the bearer is the owner of the note.

4. Under Rev. Laws, c. 73, §§ 69–76, defining holders in due course of negotiable instruments, one who in good faith takes a note payable to bearer, and discounts it without knowledge of any infirmity, thereby becomes a holder in due course.

5. To constitute notice of any infirmity in a note or defect in the title, the person to whom it is negotiated must have had knowledge of such facts that his action in taking the instrument amounted to bad faith, under the direct provisions of Rev. Laws, c. 73, § 73.

6. Proof that a note on which an indorser was sued was not only complete in form and in execution, but also that it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by the defendant, renders inapplicable Rev. Laws, c. 73, § 33, providing that every contract on a negotiable instrument is revocable until delivery of the instrument for the purpose of giving effect thereto.

7. Under Rev. Laws, c. 73, § 33, providing that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him,

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so as to make them liable to him, is conclusively presumed, a note which is complete and payable to bearer, taken from a thief, is valid in the hands of a holder in due course.

8. Where a negotiable note has taken effect, and was subsequently negotiated by the bearer to a holder in due course, the fact that the bearer was also the maker was immaterial, as between the holder and an indorser in blank prior to the negotiation by the maker.

9. Under the direct provisions of Rev. Laws, c. 73, § 141, a holder in due course of a negotiable instrument may enforce payment thereof according to its original tenor when it has been materially altered.

Exceptions from Superior Court, Suffolk county; Robt. O. Harris, Judge.

Action by the Massachusetts National Bank against one Snow Verdict for defendant, and plaintiff brings exceptions. Exceptions sutained.

Carver & Blodgett, for plaintiff. Whipple, Sears & Ogden, Sherman L. Whipple, and Edwin M. Brooks, for defendant.

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed, "H. G. & H. W. Stevens," payable to the order of the defendant, indorsed by him in blank, and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by St. 1898, p. 492, c. 533, sometimes called the "Negotiable Instruments Act," which is now embodied in Rev. Laws, c. 73, §§ 18–212, inclusive. In referring to different provisions of this statute, it may be convenient to cite the sections of the Revised Laws, rather than the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. & H. W. Stevens, has deceased; and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff's bank, and that they were altered by the insertion of the words "seven per cent." after the words "with interest." The defense is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness; that, after he had indorsed them in blank, and put them in his desk for collection or discount, he was called out of his office, leaving the maker, Stevens, there; and that Stevens then took them without right, and three days later carried them to the plaintiff bank, and caused them to be discounted for his own benefit.

The plaintiff made many requests for rulings, which were refused, subject to its exception, among which were the following:

"First. That, on all the evidence, judgment should be for the plaintiff for the full amount declared upon in its declaration, with interest at seven per cent. from December 9, 1899."

"Fourth. If the plaintiff shows it took the notes declared upon in its

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declaration as a holder in due course, judgment should be entered for the plaintiff for the full amount of said notes, with interest at the rate stated in the same from December 9, 1899."

"Fifth. That, when an instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them payable to him, is conclusively presumed."

"Eighth. That the notes declared upon by the plaintiff in its declaration are complete and regular, and were taken before they were due and for value."

"Ninth. That a holder of a note is deemed prima facie to be a holder in due course, and that to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

"Fifteenth. That there is no evidence in the case to warrant a jury in finding that plaintiff was possessed of facts which put it upon its guard as to the title of the person delivering the notes declared upon, or which ought to have led the plaintiff to inquire concerning the same."

"Nineteenth. That when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

"Twenty-third. That even if the jury should find that the words 'seven per cent.' were added to the face of said notes after they were indorsed by the plaintiff, and without his authorization or revocation, yet, on all the evidence in the case, the verdict must be for the plaintiff for the full amount of said notes, with interest at six per cent, from December 9, 1899."

The plaintiff also excepted to the following instructions given at the request of the defendant:

"Fourth. That if the jury find that the notes were taken from the defendant wrongfully, and that the same were never delivered by the defendant to Stevens, the plaintiff gained no title to the notes by the negotiation of the same by Stevens, and the plaintiff cannot recover."

"Fifth. The burden is upon the plaintiff to show that the notes were delivered by the defendant to Stevens, or some other person authorized to negotiate them at the plaintiff bank."

"Seventh. Or, in the alternative, if the jury find that the notes in question were altered by the addition of the words 'seven per cent.' thereto after the same were indorsed by the defendant, such an alteration is a material and wrongful one, destroying the validity of the notes, and upon the notes, or any one of them, thus altered, the plaintiff cannot recover."

The notes, being indorsed in blank, were payable to bearer, within the meaning of the statute. Rev. Laws, c. 73, § 26 (5). When the notes were taken to the plaintiff for discount, Stevens was the bearer. Rev. Laws, c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. Pettee v. Prout, 3 Gray, 502, 63 Am. Dec. 778. Upon the undisputed evidence, and upon the defendant's admission that the plaintiff took them in good faith, and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. Rev. Laws, c. 73, §§ 69–76; Boston

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Steel & Iron Company v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments, or defect in the title of Stevens, under the rule prescribed by the statute. Rev. Laws, c. 73, § 73. This rule, namely, that, to constitute such notice, the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is the same as prevailed in this commonwealth before the enactment of the statute. Smith v. Livingston, 111 Mass. 342; Lee v. Whitney, 149 Mass. 447, 21 N. E. 948; International Trust Co. v. Wilson, 161 Mass. 80–90, 36 N. E. 589.

The defendant's contention that, after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the Negotiable Instruments Act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. Wheeler v. Guild, 20 Pick. 545, 550, 553, 32 Am. Dec. 231; Worcester, etc., Bank v. Dorchester, etc., Bank, 10 Cush. 488, 57 Am. Dec. 120; Wyer v. Same, 11 Cush. 51, 53, 59 Am. Dec. 137; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; London Joint Stock Bank v. Simmons (1892), App. Cas. 201, and cases cited; Smith v. Bank, 1 Q. B. D. 31; Goodman v. Simonds, 20 How. 343–365, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. Ed. 645; Kinyon v. Wohlford, 17 Minn. 239 (Gil. 215), 10 Am. Rep. 165; Clarke v. Johnson, 54 Ill. 296; Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Kuhns v. Gettysburg National Bank, 68 Pa. 445. The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." Rev. Laws, c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course, this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See Greeser v. Sugerman (Sup.), 76 N. Y. Supp. 922. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note was not only complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until the delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and was subsequently negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to

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become payable to bearer. Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise. We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141, it is provided that "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof, according to its original tenor." This language is directly applicable to the present case. See Scholfield v. Earl of Londesborough (1894), 2 Q. B. 660, (1895) 1 Q. B. 536, (1896) A. C. 514; Schwartz v. Wilmer) 90 Md. 136–143, 44 Atl. 1059.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine at this stage of the case whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only six per cent. See Mutual Loan Ass'n v. Lesser (Sup.), 78 N. Y. Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

Decision No. 839.

PHINNEY v. STATE ex rel. STRATTON, Atty. Gen.

78 Pac. 927.

(Supreme Court of Washington. Dec. 19, 1904.)

GIFT CAUSA MORTIS — SUFFICIENCY — DELIVERY OF CHECK.

1. Where a man suffering from a disease which made him believe that death was impending, having no wife or children or next of kin or creditors, had a check drawn on a bank in which he had a deposit in favor of one who had for some time been his friend, nurse in sickness, and companion, and handed the check to the payee, with the statement: "If I don't get over this, I want [the payee] to get my money. I don't want it to go" to the county — and died within a few days thereafter, the delivery of the check was a valid gift causa mortis, and enforceable, though the check did not reach the bank until after the donor's death, and did not include all of the donor's deposit.

Appeal from Superior Court, Skagit county; George A. Joiner, Judge.

Petition by Frank Phinney, as administrator of the estate of John W. Collins, deceased, to have his acts approved and be discharged, on filing his final account. The State, on the relation of W. D. Stratton, Attorney-General, intervened, claiming the amount shown in the final account as an escheat to the State for the benefit of the common schools. From a judgment for the intervener, Phinney appeals. Reversed.

Million & Houser, for appellant. J. C. Waugh, for respondent.

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DUNBAR, J. The following is the appellant's presentation of the facts in this case, which an examination of the record has proven to be substantially correct: The decedent, John W. Collins, and appellant, Frank Phinney, had been friends for some time prior to Collins' death. Some two weeks before his death, Collins was taken sick at Anacortes, and was attended by appellant as nurse and companion. On the 12th day of February, 1902, Collins and appellant left Anacortes for Harrison Hot Springs, B. C., with the intention of benefiting Collins' health. They arrived at the Springs on the following day, where they remained until Collins' death. During all of this time appellant was acting as companion and nurse to Collins. Shortly after their arrival at the Springs, Collins was placed under the care of Dr. Elliot, who treated him up to the time of his death. On or about the 22d day of February, decedent had a very severe hemorrhage of the stomach, from the effects of which he seems to have gradually failed until his death, which occurred on the 27th of February. Shortly after the hemorrhage, Collins requested appellant to go to the office and get a pen and ink, stating that he desired to write a check. About the time appellant returned with pen and ink, Dr. Elliot had also returned to his patient, and, appellant declining to write out the check, and insisting that the deceased ought not to disturb himself at that time, the doctor was requested to write it, and, at Collins' dictation, a check was drawn up in favor of Frank Phinney on the Bank of Laconner, for the sum of $4,000. The check was then handed to appellant, with a statement by Collins that, "If I don't get over this, I want Frank to get my money. I don't want it to go to Skagit county." The statement also shows that the gift was to be revoked in case Collins got well. Collins then directed appellant to forward a letter to the bank at Laconner, containing the check, and at the same time wrote a letter to the bank himself, inclosing his pass book, and directing the bank to balance his book and return it to him. He then directed appellant to address both letters and mail them, which was done the following morning, February 27th. The letter containing the pass book was received by the bank at Laconner on the 28th day of February, and the pass book was balanced on that day and returned to Collins. The letter containing the check was miscarried to Lacombe, B. C., and, by reason of that fact, did not reach the bank at Laconner until March 3d, some five or six days after Collins' death. The bank, having been apprised of Collins' death, refused to honor the check when it arrived. Collins died intestate, and left no wife, heirs, or next of kin, and no creditors. Appellant was duly appointed administrator of the estate, notice to creditors was duly given, and an inventory filed as required by law, in which all the personal property of decedent was included. The $4,000 covered by the check was not included in the inventory or treated in any of the proceedings as an asset of the estate, but was at all times claimed by said Phinney as his own personal property by virtue of the gift from Collins. On the 10th day of July, 1903, appellant filed his final account, and asked that his acts be approved and that he be discharged. At the time for hearing the final account and application to be discharged, the case was continued, and the State intervened, claiming the $4,000 as an escheat to the State of Washington for the benefit of the common schools. The motion to strike said intervention, for the reason that it was irrelevant, incomplete, and immaterial, was overruled. A demurrer was interposed that the facts stated in the peti-

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tion of intervention did not constitute a cause of action, and for the further reason that the petitioner had no legal capacity to sue. The demurrer was overruled, to which ruling appellant excepted, and his exception was allowed. Thereupon said cause proceeded to trial, and at the conclusion thereof the court found that at the time of deceased's death there was standing to his credit in the Skagit County Bank of Laconner the sum of $4,420.50, including the $4,000 claimed by appellant, and, after the payment of all just debts and expenses of administration, there remained a balance of $3,145.32, and that said amount did not belong to appellant, but that the same belonged to and should be turned over to the State of Washington for the use and benefit of the common school fund, to which appellant excepted, and he now brings the case to this court, and asks that the same be reversed, and remanded back to the lower court with instructions to proceed in accordance with the law of the case.

The errors assigned are that the court erred in denying appellant's motion to strike the petition in intervention, in overruling the demurrer to the petition in intervention, in holding the amount of said check to belong to said estate, and in awarding the balance of $3,145.32 to the State of Washington as escheated property. The view we take of the third assignment renders unnecessary a discussion of the first two. It was the opinion of the court, upon which its judgment was based, that the acts shown in the statement of facts did not constitute a gift mortis causa, and that the drawing of the check in favor of appellant did not constitute an assignment of the fund in the bank to the extent of the amount of the check. So that we will discuss the case squarely upon the equitable question of whether or not, under the circumstances surrounding the giving of this check, the appellant is entitled to the amount specified in the check.

Under the provisions of the civil law there were three distinct kinds of gifts, all brought within the general definition of donatio mortis causa: First, where a person not in periculo mortis, but moved by the general consideration of man's mortality, makes a gift; second, where a person, being moved by fear of present peril, gives so that the subject of the gift is immediately made the property of the donee; and, third, where the person, being in peril of death, gives something that shall become the property of the donee only upon the death of the giver. But all modern courts have held that the first two are mere donations, and that such gifts do not properly fall within the definition of "donatio mortis causa," or within the rules of law governing such a gift. The gifts known to the law as "inter vivos" and "mortis causa" have many essential elements in common, and the rules of law applicable to rights under them are frequently applied interchangeably, as will be seen by the decisions hereafter quoted. The principal difference is that a gift inter vivos must be without any conditions attached to it, while a gift mortis causa must be made upon the apprehension of death, which must occur without the revoking of the gift, and it must be made with the understanding that the gift is void in case of the giver's recovery. It is now conceded by all modern authority that every species of personal property capable of delivery, either constructive or actual, may be the subject of a gift mortis causa. There is some connection in respondent's brief that the facts are not exactly as claimed by the appellant. But an examination of the record convinces us that the statement of appellant is substan-

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tially correct; that the deceased, Collins, was of sound and disposing mind; that no influence whatever was brought to bear upon him; that the appellant rather discouraged than encouraged the transaction, having regard for the physical welfare of his friend; that the check was made at the instance and request of the deceased; that it was made for the purpose of assigning his interest in the amount expressed in the check to his friend; that it was expressly so stated at the time that that was the intention in making the check, and that the gift was to be void in case of the recovery of the deceased.

Many of the old English cases hold that the giving of a check upon a bank does not constitute an assignment of the amount deposited in the bank for which the check is given, and such, no doubt, is the law in ordinary business transactions, and is the law of this State, as held by this court in Bank v. Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873. A large amount of the business of the country is done through the mediation of banks, and it has not been thought best by the courts to allow the banks to be made responsible in contests between the depositor and his creditors. Therefore the acceptance of a check was held to be the test of the responsibility of the bank. But it must be borne in mind that there is no contest in this case between the donor or his estate and the donee or the appellant in this case, and that there is no contest between the appellant and any creditors of the estate. So that, viewed from any equitable standpoint, it is the duty of the court to ascertain what was the intention of the donor in respect to this alleged assignment of interest, and, when that intention is ascertained, give it force and effect. This distinction many of the courts have failed to notice, and the rule that a check on a bank does not constitute an assignment of the fund is frequently stated as a general proposition, when an investigation of the case shows that the principle was announced with reference to a contest which was waged between creditors of the estate or other assignees of the estate and the donee. The modern authorities almost universally hold that the greatest latitude ought to be given to carry out the expressed intent of the donor, and that in cases like the one at bar, where there are no conflicting interests by creditors or other assignees or donees of the deceased, the giving of the check is an assignment of the interest. Many of the courts, it seems to us without any sufficient reason, have undertaken to make a distinction between cases where the check given was for the whole of the fund and where it was only for a portion of the fund. In the case at bar we think it may be justly concluded that it was the intention of the donor to give to his friend the whole of the estate. He evidently did not know the exact amount that he had in the bank, and, while there were a few hundred dollars over and above the $4,000, he felt that he was going to die soon, and according to his expressions as shown by the testimony, it was evidently his intention that all of his fortune should go to the appellant. But in any event there seems to be no reason why the giving of the check for a portion of the deposit should not be an assignment pro tanto of the deposit. And, recurring again a moment to the essential qualifications of the gift, it is true that, in cases of gifts mortis causa, there must be a delivery of the thing given, and this is the rock upon which courts have so often split. And it is also true that it must be as nearly an actual delivery to the donee as the circumstances of the case and the nature and actual position of the donee and the thing given will permit. But in the very nature

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of business transactions of this kind, this delivery must frequently be constructive. The nature and circumstances surrounding this case necessitated a constructive delivery. The subject of the gift was not available. The decedent did all that was in his power to do to deliver the money in the bank at Laconner to the appellant. So that, in justice and common sense, it seems to us that the delivery was complete, and that the will of the deceased ought not to be thwarted by any technical construction or definition of delivery.

In Guinan's Appeal (Conn.), 39 Atl. 482, it was held that a delivery of bankbooks with intent to vest in the donee the title to the money therein represented is a sufficient delivery to constitute a valid gift of the money. In this case, the deceased, Kate Healy, took the three bankbooks in question from under her pillow and gave them to her sister, Winifred Miller, and also gave to her the keys to her trunks, which she took from a small satchel. In giving these articles to Mrs. Miller, Kate Healy said: "Those bankbooks I give to you and the keys to my trunks. These are yours, and everything I got belongs to you. If anything happens to me, I want you to have everything." It was found that at the time this gift was made, the said Kate Healy was in the expectation of immediate death, and under those circumstances the rule was announced as above. It has universally been held that the delivery of a key to a trunk, the contents of which had been given to a donee, in cases of gifts causa mortis, is a delivery and an assignment of the contents of the trunk. It might properly be considered, as urged by the appellant in this case, that the giving of the check in this case was equivalent to the giving of a key to a trunk. It was the thing that forced an entrance to the fund which the deceased had on deposit.

It was held in Polley v. Hicks (Ohio), 50 N. E. 809, 41 L. R. A. 858, that a delivery to a donee of a deposit book issued by a savings bank, containing entries of deposits to the credit of the donee, with the intention to give the donee the deposits represented by the book, and accompanied with appropriate words of gift, is a sufficient delivery to constitute a valid gift of such deposits, without assignment or transfer in writing; and the court quoted approvingly from Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319, where the Supreme Court of Massachusetts, in answering the objection that no valid gift of a chose in action could be made without assignment, said that: "'As a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of, and give effect to, such assignments, there seems to be no good foundation for the objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts inter vivos. The latter, indeed, when made perfect by delivery of the things given, are executed contracts'" — citing 2 Kent's Com. 438. "'By delivery and acceptance the gift passess, — the gift becomes perfect and is irrevocable. There is therefore no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think a gift of a chose in action, provided no claims of creditors interfere to affect is validity, ought to stand on the same footing as sales.' And this is the rule which prevails in the federal courts, and in all of the States in which the question has arisen: and it has been before the court of last resort in many of them" — citing

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Thornton on Gifts, § 271; also citing Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39, where it was held that a delivery to a donee of a savings bankbook, containing entries of deposits to the credit of the donor, with the intention to give the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits; and that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. There certainly could be no more virtue in the delivery of a savings bankbook to the donee than there is in the delivery of a check to the donee, and there is not as much reason for an assignment of a check as there is of an assignment of the books, because the issuing of the check, the ordering of the payment, authorizes the effect and result which is authorized by an assignment. A delivery of the key of a chest, with words of gift of the chest and its contents, is a good delivery to pass the property to the donee. Marsh v. Fuller, 18 N. H. 360.

In Waite v. Grubbe (Or.), 73 Pac. 206, where the father made a gift of money to the daughter, which money was buried in different places upon the farm and was not susceptible of an actual manual delivery, and where the father said: "If I should get well, and want some of it, would you let me have it?" and she replied, "Yes, papa, if you get well you can have all of it," a case which in principle resembles very much the case at bar, it was held that the gift was sufficient to convey the property; and the court quotes approvingly Blake v. Jones, Bailey Eq. 141, 21 Am. Dec. 530, as follows: "That seems to be regarded as a sufficient delivery which would authorize the donee to take possession without committing a trespass." The court in that case continues: "It is not necessary that there be a manual delivery, or an actual tradition from hand to hand. The delivery may be constructive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit." And if the delivery in this case could not be made under the circumstances that it was attempted to be made, it could not be made at all, and the will of the deceased would be thwarted — also citing Thornton on Gifts, § 148, that where the intent to bestow is obvious and clear, and the language and deportment of the donor indicate a belief upon his part that he has done all that is necessary to accomplish his purpose, they come to the aid of the act of delivery, if slight and ambiguous, but not to dispense with it as an essential element of a valid gift.

In Thomas' Adm'r v. Lewis (Va.), 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, an elaborately argued case, where the father made gifts causa mortis to his two daughters, which gifts were not more explicit than in the case at bar, the court laid down the rule as follows: "The factum of the gift in this case being clearly and conclusively proved, as we think it indisputably has been, it only remains to state the law and apply it to the facts proved. They show all the essential attributes of constituent elements of a donatio mortis causa, as defined by the law and established by the course of adjudication. The gift was made in periculo mortis, under the apprehension of death as imminent; and it was of personal property such as, under the law, may be the subject of a gift mortis causa. Possession or delivery was made at the time of the gift, and the donor died of that illness in a few hours after the making of the gift. Thus the gift, inchoate, conditional, and de-

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feasible when made, became absolute at the donor's death. Delivery is essential. It may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient" — citing many cases.

In Camp's Appeal (Conn.), 4 Am. Rep. 39, which was a case where bankbooks had been given to the appellant, and he had attempted to carry the intention of the giver into effect by delivering the books to the donee without any order for the payment of the money or other writing indicative of such gift, and the appellant had been refused, the court held that the donee was entitled to the money, and said: "Whatever may be said or thought of the propriety of the law, it is well settled by the modern authorities that choses in action not negotiable, and negotiable paper not indorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. In this respect a title by gift is not distinguishable from a title by purchase for a valuable consideration, and, when the claims of creditors do not interfere to affect its validity, such a title will be recognized and protected in the same manner and to the same extent as a title by sale" — citing many cases to sustain the text.

In Kimball v. Leland, 110 Mass. 325, where A., a depositor in a savings bank, delivered to B. her bankbook and an order for the payment of the whole deposit, for the purpose of transferring the money to B., it was held, that, although B. did not present the bankbook and order to the bank until after A.'s death, the transfer to her was complete as against the next of kin of A., the court saying: "There being no creditors whose rights could be affected by it, the transfer was equally effectual, whether it was a gift without consideration, or made for a legal consideration." We cite this case as showing the distinction that it maintained in cases of this kind, where the interests of creditors are involved, and where they are not. "The gift of a savings bank book is in effect a gift of the deposit." Prov. Institution for Savings v. Taft, 14 R. I. 502.

In Crook v. First Natl. Bank of Baraboo (Wis.), 53 N. W. 1131, 35 Am. St. Rep. 17, it was held that where a depositor addressed the following note to a bank: "Please let my nephew have the amount of the within bill," describing the bill, coupled with its delivery so indorsed to such nephew, with the intention of giving him the fund in bank, such action operates as a valid gift of such fund, and justifies the bank in paying it to such donee on presentation of the writing. This, it seems, was in effect nothing more than a check for so much money, where no indorsement or assignment could make it any stronger. In the course of the discussion of this case the court cited Basket v. Hassell, 107 U. S. 614, 2 Sup. Ct. 602, 27 L. Ed. 500, and said: "The law favors free and comprehensive power of disposition by an owner of his property, and the rigor of the earlier cases has been materially relaxed, both as to the subjects of such gifts, and as to what will serve as a delivery to make them effectual. This is well illustrated by the cases above cited, in which it is held that the thing given must be delivered, or it must be placed in the power of the donee by delivery to him of the means of obtaining possession" — citing many cases where it was held that a deposit in a savings bank may be the subject of a valid donation mortis causa, as well as of a gift inter vivos. It is also said in this case: "It is well settled that in order to constitute a valid assignment of a debt or

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other chose in action in equity, no particular form of words is necessary. Any words which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration are sufficient. Nor is any written instrument required. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument."

In Ellis v. Secor (Mich.), 18 Am. Rep. 178, in sustaining a gift of this kind, it was said: "The confusion, if any, which is found in some of the textbooks, is partly due to an attempt to draw unreal distinctions between these and other strictly analogous transactions. They are neither more nor less than a branch of voluntary gifts and settlements, and, in the case of choses in action, fall generally under the doctrine of trusts and equitable assignments. The cases are abundant where such transactions have been maintained, where the technical phrase 'donatio causa mortis' is not referred to. If there could be any doubt on the subject, it would seem to be, not whether the securities must be delivered, but whether the memorandum of transfer must be delivered. The paper in question here, if actually delivered, would have been a sufficient assignment on its face to pass title, if so intended." And as showing that the English courts have not uniformly followed this rule, in Jones v. Lock, L. R., 1 Ch. App. 25, Lord Cranworth was called upon to determine whether a gift had been completed, where a father put a check for £900 for a moment into the hands of his son of nine months old, saying, "I give this to baby for himself," and then took it away, and it was found among his assets after his death. He held that in the case before the court there had been no completed gift, but only because, on all the facts before him, he thought the father had no such intention; and he expressly recognized the doctrine that it would have been a valid declaration of trust if so intended. And he declares that all the authorities turn upon that question — whether what has been said was a declaration of trust or an imperfect gift; citing, also, Penfield v. Mould, L. R., 4 Eq. 562, where the court said: "The same learned vice chancellor reviewed the doctrine very clearly, and declared that any undoubted expression of intention to pass the property will make the grantor a trustee, although some formalities may be wanting. He declares the case of Meek v. Kettlewell, 1 Hare, 464, which held a voluntary assignment of a chose in action an imperfect gift, to have been overthrown. He says: 'That decision has been in effect overruled, and it is now held that any instrument may be a sufficient declaration of trust, no form being necessary; the only material question being 'Did the grantor, or did he not, mean at once to pass the property?'"

"Deceased, while ill and in expectation of death, handed to defendant a savings bankbook, saying that, after the payment of the doctor's bills and funeral expenses, the balance of the money was to be equally divided between defendant and his brother and sister. Defendant accepted the bankbook, and deceased died the next day. Held, that there was a valid gift, causa mortis." Loucks v. Johnson (Sup.), 24 N. Y. Supp. 267.

"A good gift causa mortis is shown where it is proved that money on deposit in bank was given to plaintiff, and that the bankbook to enable her to get the money was actually delivered to her by the donor, who at the time was in expectation of impending death, and who did die a day or two afterwards." Walsh v. Bowery Savings Bank (Com. Pl.), 7 N. Y. Supp. 669.

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In May v. Johnes, (Iowa), 54 N. W. 231, it was held that when the delivery of a check is coupled with an intent to transfer a present interest in the money represented thereby, and no revocation is attempted, the intention of the donor will be given effect, and the transaction be held to transfer a present interest and a right to the payment of the check after death, as well as before, and that, too, whether it is a mere gift or given for a consideration.

"Where a check was drawn for the full amount of decedent's deposit, under circumstances which showed it was intended as an assignment of the fund, it passed title of the fund to T." In re Taylor's Estate (Pa.), 25 Atl. 1061, 18 L. R. A. 855.

To the same effect are Debinson v. Emmons (Mass.), 33 N. E. 706; Schollmier v. Schoendelen (Iowa), 43 N. W. 282, 16 Am. St. Rep. 455; Ridden v. Thrall (N. Y.), 21 Am. St. Rep. 758; Gardiner v. National City Bank, 39 Ohio St. 600; Coates v. First National Bank, 91 N. Y. 20; Smith v. Sands (Neb.), 23 N. W. 356; and a great army of other cases too numerous to mention.

As showing the view taken by eminent authors on this subject, we quote from 2 Story's Eq. Jur. (13th Ed.), 363, where, after discussing the legal propositions involved, the author says, at section 1044: "But in cases of this sort the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." So that, regardless of equitable definitions, or whether it may be properly termed an assignment or not, if a trust is created which in equity constitutes an equitable lien upon the fund, the law vindicates the right of a person to make such disposition of his estate as to him might seem equitable and just. The same author, in volume 1, § 607, after discussing some of the cases, says: "But it may admit of doubt whether the doctrine of these last cases can now, upon principle, be supported; for the ground upon which courts of equity now support donations mortis causa is not that a complete property in the thing must pass by delivery, but that it must so pass by the delivery of the instrument as to give a title to the donee to the assistance of a court of equity to make the donation complete."

Mr. Daniel, in his first volume on Negotiable Instruments, reviewing this question in section 20, says: "The doctrine of equitable assignment is the creature of courts of equity, and the phrase 'equitable assignment' is used because, by the technicalities of pleadings at law, no legal assignment can be effectuated. No assent of the debtor is necessary to an assignment of the debt. Notice to him is all that is essential to affect him with liability to respect the assignment, and so far does equity regard the justice of this principle that it is applied even where an integral debt is broken up into fragments. Now, then, if A. have $1,000 in the hands of B., and draw a bill directing B. to pay $1,000 to C. or order, on demand, there can be no fair inference from the transaction but this: that A. intended to assign the debt due to him by B. to C., and for the bill to stand in B.'s hands as evidence of the acquittance. It is the intention to assign that makes the assignment. And after

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presentment of the bill to B., which is notice, what sound principle of law could be violated, and what equitable right impaired, by holding that an assignment is effected so as to bind the debt in equity, and bind B. to respect it? . . . " The same author, in the second volume (section 1643), says: " We have seen already that a check operates as an assignment of the fund on which it is drawn pro tanto, from the very time it is drawn and delivered, as between the drawer and the payee or holder." And Morse on Banks and Banking states in section 496 as follows: " The plain common sense of the holder's rights would seem to be that as to the drawer, and those claiming under him otherwise than as bona fide holders for value, the check is to be sustained as a transfer of the fund against which it is drawn, to the amount for which it is written. The same reasons of good faith and security in business transactions which induce the law to sustain a bona fide sale of property, or assignment of bills or notes, against a subsequent assignee in insolvency of the assignor, apply to the case of a check."

Believing that not only the overwhelming weight of authority, but the overwhelming weight of reason, is in favor of sustaining a gift mortis causa, at least in a case like the one at bar, where there is no controversy with creditors or subsequent donees or assignees of the donor, the judgment will be reversed, and the court instructed to render judgment for the amount in the bank, over and above the expenses of the administration, in favor of appellant.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

Decision No. 840.

AUGSBURY v. SHURTLIFF.

72 N. E. 927.

(Court of Appeals of New York. Dec. 30, 1904.)

SAVINGS BANKS — INDIVIDUAL DEPOSIT — MERGER — ORDER FOR PAYMENT TO SURVIVOR — DELIVERY — REVOCATION — EVIDENCE.

1. A husband and wife, having separate accounts in a savings bank, addressed the bank in writing, requesting that their accounts be merged so as to run to either or the survivor of them. Held to constitute an order for the change of the accounts so as to make each the joint owner of the entirety, so that on the death of one the survivor would become the owner of the whole, but which was revocable by either party at any time before the order had been presented to the bank and complied with.

2. Where a husband and wife wrote an order to a savings bank in which each had a deposit to merge the same, so that on the death of either the survivor would become the owner of the whole, the husband, with whom the instrument was left after execution, was the agent of the wife, and, where he failed to deliver such order to the bank before the death of the wife, it was revoked thereby.

3. Where husband and wife, having individual accounts at a savings bank, execute an order on the bank to merge the same, in an action on the death of the wife to recover possession of the bankbook it is reversible error to nonsuit the plaintiff without submitting the question as to whether such order was delivered by the husband to the bank during the life of the wife.

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Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by David D. Augsbury, administrator, against Lore F. Shurtliff. From a judgment of the Appellate Division (86 N. Y. Supp. 1128), affirming a judgment for defendant, plaintiff appeals. Reversed.

E. C. Emerson, for appellant. John N. Carlisle, for respondent.

HAIGHT, J. This action was brought to recover a savings bank pass book issued to Sarah Ann Roof in her lifetime by the Jefferson County Savings Bank. The defendant was the administrator with the will annexed of John C. Roof, and claims the right to hold the pass book as the property of his testator.

John C. Roof and Sarah Ann Roof were husband and wife. They had both been married before, but neither had any children. They both had made deposits in the Jefferson County Savings Bank, and a pass book had been issued to each of them. Sarah Ann Roof had a balance upon her book of $911.26, and John C. Roof had a balance upon his book of $900.88. They were about eighty years of age, and had each made and executed a will, in which each gave the use of his or her property to the other during life, and upon the death of the survivor each had bequeathed his or her property to collateral relatives. After the execution of these wills, and on the 8th day of January, 1896, they signed a paper, of which the following is a copy: "Theresa, N. Y., Jan. 8, 1896. To Jefferson County Savings Bank — Gentlemen: "We, the undersigned, owners of bankbooks No. 23,661 and No. 25,472 issued by your bank, desire to have the accounts therein merged into an account running to John C. Roof or Sarah Ann Roof or the survivor of them; our object being that, in case of the death of either, the other may draw the whole amount. John C. Roof. Sarah Ann Roof. Witnesses: Mary E. Countryman. Lizzie Countryman." Two days after the making of the foregoing instrument Sarah Ann Roof had a stroke of paralysis, and was confined to her bed until her death, which occurred ten days later. Some days after the making of the paper John C. Roof took the paper to the savings bank, together with the bankbook of his wife, and the teller pasted the paper in the bankbook containing signatures, and wrote upon the pass book, after the name of Sarah Ann Roof, the words "and John C. Roof," so that the account read "Jefferson County Savings Bank in account with Sarah Ann Roof and John C. Roof." He also made the same change upon the ledger account. It is claimed on behalf of the plaintiff that the paper was taken to the bank and the changes made in the books after the death of Mrs. Roof, and that prior to her death and after her paralytic stroke she spoke to her husband in monosyllables at repeated intervals, indicating that she wanted her own, and that he replied to her that he knew what she wanted, and that he would get the paper and destroy it, and that the conversation had reference to the above-described paper.

The first question which we deem it important to consider is the meaning and effect intended to be given by the parties to the paper. As we have seen, it is addressed "to the Jefferson County Savings Bank." The respective owners of the bankbooks which were described in the paper expressed their desire to have their accounts merged so as to run to John C. Roof or Sarah Ann Roof, or the survivor of them. They then concluded by stating their object to be "that in the case of the death of

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either, the other may draw the whole amount." There are no words here indicating any present gift from one to the other of any portion of the funds on deposit in the bank. On the contrary, it is apparent that each in his or her lifetime intended to retain the fund, so that either could draw upon their deposits as their necessities might require; but it is apparent that they intended that, upon the death of either, the other should be permitted to draw the whole amount. The purpose for which the survivor might draw the whole amount is not specified. In the absence of evidence upon this subject, the inference might be permissible that it was their intention to give the survivor the right to draw the whole amount so as to make it his or her own property. Assuming this to be so, the effect of the paper was therefore a written order addressed to the bank requesting it to change their respective deposits so as to make each the joint owner of the entirety, analogous to a joint tenancy or tenant by the entirety in real estate, so that upon the death of one the survivor became the owner of the whole. Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361. As we have seen, the paper was an order merely, and was executory until it was presented to the bank and the deposits were changed in accordance therewith. It is conceded that it was subsequently taken to the bank by John C. Roof and the changes made so far as the deposit of Mrs. Roof was concerned; but was this change made during her lifetime? Upon this subject considerable evidence was taken, and, if the fact is material, it doubtless became a question for the jury to determine.

This brings us to a consideration of the question as to whether the order is deemed to be revoked by the death of Mrs. Roof before it was delivered to the bank and the change in the deposits made. The order was executory until its delivery to the bank and the changes in the deposits were made. It, consequently, could be revoked by either party at any time before the order had been complied with. It is contended that Mrs. Roof did revoke by her statements in monosyllables, but these declarations were too vague and uncertain to warrant a finding of fact to that effect. If it was revoked, it was by reason of her death before it was delivered to the bank. The paper, as we have seen, was a mere executory order, which did not constitute an executed gift, or make either of the parties thereto a creditor of the other. Mrs. Roof only intended to give to her husband the same right to draw upon their joint account that she had until her death, and then, if he survived her, the right to draw the whole; but before her order had been executed she died, and her estate at once became vested in her heirs at law, or, upon proof of her will, in her collateral relatives specified, subject to the life use of her husband. If her husband had become her creditor, he could prove his claim as against her estate; but he was not a creditor. If the execution of the paper was a gift in præsenti, then, of course, the money on deposit became his; but it was not such a gift, nor so intended, for she retained the right to draw every dollar of the fund and use it for her own purposes. It was not a gift inter vivos, for the reason that, as we have shown, the order was executory and not executed. It was not a gift causa mortis, for the reason that the parties, at the time of executing the paper, were not suffering from any disease or apprehensive of death from any impending perils. The paper, as we have seen, was left in the possession of John C. Roof. He is deemed, therefore, to have become the agent of his wife to take the paper to the bank; but, if he failed to do

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this within her lifetime, his agency, by the happening of that event, is deemed to have been revoked. Schouler on Personal Property (volume 2, § 86) correctly states the rule as we understand it: "An agency is revoked by the principal's death; therefore the agent of one who intends a gift inter vivos must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime, otherwise the gift fails as though the donor himself had failed to make a seasonable delivery. Neither can a gift inter vivos be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease, for a gift of personalty made after this fashion must stand, if at all, as a gift causa mortis, or else on the footing of a testamentary disposition, with all the formalities of a will. Delivery, then, in all cases of ordinary gift, must have been made during the donor's lifetime. But if the gift has been once completed, so as to fully transfer the beneficial interest from donor to donee, in accordance with their mutual intent, and so as to make any third party holding the custody the trustee for carrying out the original purposes of the donation, or the donee's agent, the subsequent death of the donor, sooner or later, will leave the gift unimpaired." Story on Agency, § 488; Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 289, 34 N. E. 784, 36 Am. St. Rep. 696.

We conclude that the question as to whether the order was delivered to the savings bank during the lifetime of Mrs. Roof is material, and under the evidence the question as to whether it was so delivered was for the jury, and that the exception taken by the appellant to the nonsuit raises an error of law which requires a reversal of the judgment

The judgment should be reversed and a new trial granted, with costs to abide the event.

VANN, J. (concurring). This action was brought by the personal representative of Sarah Ann Roof against the personal representative of John C. Roof, her husband, to recover possession of a savings bank pass book as evidence and a muniment of title to the deposit represented thereby, which, according to the rules of the bank, could be drawn only upon the production thereof. The defendant by his answer claimed that, as such personal representative, he was entitled to possession of the pass book and to the amount of the deposit. Upon the trial before a jury a nonsuit was granted, and, the judgment entered thereon having been affirmed by the Appellate Division, the plaintiff came here.

John C. Roof and Sarah Ann Roof, his wife, were aged people, without children, and each had a small amount of property. On the 2d of September, 1890, when she was seventy-five years of age, Mrs. Roof made her will, whereby she gave to her husband the use of all her property during his life. On the 18th of July, 1895, when he was seventy-seven years old, Mr. Roof made his will, whereby he gave to his wife the use all of his property during her life. On the 8th of January, 1896, each had a pass book from the Jefferson County Savings Bank, representing deposits made by them respectively at various times. The balance on that day due her, according to her pass book, was the sum of $911.26, and the balance due him, according to his pass book, was the sum of $900.88. On the day last named Mr. and Mrs. Roof executed an instrument, of which the following is a copy: "Theresa, N. Y., Jan'y 8, 1896. To Jefferson Co. Savings Bank — Gentlemen: We, the undersigned, owners of bankbooks No. 23,661 and No. 25,472, issued by your

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bank, desire to have the accounts therein merged into an account running to John C. Roof or Sarah Ann Roof, or to the survivor of them, our object being that in case of the death of either the other may draw the whole amount. John C. Roof. Sarah Ann Roof. Witnesses: Mary E. Countryman. Lizzie Countryman." Mrs. Roof had a stroke of paralysis on the 10th of January, 1896, and died ten days later, while Mr. Roof survived until the 8th of August, 1899. At some time he took her pass book and said paper to the bank, when the entry was changed by the paying teller, who added the name of John C. Roof as one of the depositors, so that it read: "Jefferson County Savings Bank, in account with Sarah Ann Roof and John C. Roof." Both accounts were changed on the ledger of the bank so as to read in the same way, but no change was made in the pass book of Mr. Roof, which was not produced for the purpose. Whether said changes were made before or after the death of Mrs. Roof was a question upon which there was a conflict in the evidence. When the plaintiff rested the defendant moved for a nonsuit, which was granted, although counsel asked to go to the jury "on the question as to whether there was an intent on the part of Sarah Ann Roof to transfer her interest in this fund to her husband," and also "upon all the questions of fact in the case." Each request was denied separately, and a separate exception was taken in each ruling.

The instrument of January 8, 1896, was a letter of instructions to the bank, directing that the two accounts should be merged into one, running to the two depositors severally, or to the survivor. The object of the merger, as expressly stated in the paper, was to enable the survivor to draw the whole amount upon the death of the other. The question at once arises, why did these two old people desire to confer authority upon the longest liver of them to draw the entire sum on deposit to the credit of each separately? They were husband and wife, so that the object may have been a gift. They had mutual wills, so that the object may have been convenience both of administration and enjoyment under the wills, which gave a life use.

The letter of instructions was not literally complied with by the bank, which changed the account in question so as to make it joint in form, whereas the direction was to make it several. The two names should have been separated by the word "or," but, instead, they were united by the word "and." What the bank did, however, is not very important, but what Mr. and Mrs. Roof wrote is of the highest importance. As the account was to be several in form, either could draw during the lifetime of both, which would tend to show that a gift inter vivos was not intended. Gannon v. McGuire, 160 N. Y. 476, 481, 55 N. E. 7, 73 Am. St. Rep. 694; Beaver v. Beaver, 117 N. Y. 421, 428, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. The fact that neither of the parties was at the time laboring under the apprehension of death from some disease then existing would tend to show that a gift causa mortis was not intended. Ridden v. Thrall, 125 N. Y. 572, 579, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758; Williams v. Guile, 117 N. Y. 343, 349, 32 N. E. 1071, 6 L. R. A. 366.

When a donor receives as much as he gives, a consideration is suggested, and a consideration suggests a contract. Each of these parties had the same chance of benefit as the other, and the question is presented whether there was an agreement underlying the letter of instructions, of which the letter, as the means of carrying it into effect, was some evidence.

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Considering that the relation of husband and wife existed between these persons, that they had no near relatives, that they had made mutual wills, that they had both reached extreme old age, and that their bank accounts were substantially equal in amount, and reading the letter of instructions in the light of these facts, I think that the question of fact arose whether each had transferred to the survivor his or her bank account, or what should be left of it upon the death of the shortest liver. While the letter of instructions was not a transfer, it was evidence from which, in connection with the other facts, a jury might infer, not necessarily, but in the exercise of their sound judgment, that such a transfer as would fit the letter had been made. Since the letter is adapted to carrying a particular form of transfer into effect, it is some evidence that a transfer of the kind had been made. It may have been drawn for some other purpose, such as mere convenience, but it was for the jury to say, under all the circumstances. While Mr. Roof was named as the executor of his wife's will, she was not named as the executrix of his will, so that convenience of administration would not necessarily have been promoted by the letter.

A contract by which each of two owners of a fund, as tenants in common, transfers his interest therein to the other if he survives him, is supported by a good consideration, and I see no reason why the intention of the parties should not be enforced by the courts. While such an agreement cannot be performed until after the death of one of the parties, it is complete and irrevocable, for neither can withdraw therefrom without the consent of the other. It is not testamentary in character, because it is founded on a valuable consideration, and is not subject to revocation. It is as absolute as a deed, " which is to take effect so as to pass the title at " the death of the grantor. Worth v. Case, 42 N. Y. 362, 366; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424. When a husband takes securities payable to himself or his wife, they become hers if she survives him, and the delivery thereof to her by him is not necessary to perfect the gift. Sanford v. Sanford, 45 N. Y. 723; Fowler v. Butterly, 78 N. Y. 68, 72, 34 Am. St. Rep. 507. This is upon the theory of a gift where there is no consideration, but where there is a contract between husband and wife, resting upon a mutual and equal consideration, providing that the security created by both and standing in their names severally shall belong to the survivor, effect must be given to it, or the law of contracts is violated.

Without prolonging the discussion, I am of the opinion that there was a question of fact, other than that discussed in the prevailing opinion, which should have been sent to the jury, and I therefore concur in the result.

CULLEN, C. J., and GRAY and O'BRIEN, JJ., agree with HAIGHT, J., BARTLETT, J., agrees with VANN, J., WERNER, J., absent.

Judgment reversed.

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Decision No. 841.

AEBI v. BANK OF EVANSVILLE.

102 N. W. 329.

(Supreme Court of Wisconsin. Jan. 31, 1905.)

BANK CHECK — DELAY IN PRESENTMENT — EFFECT ON INDORSER — LOSS OF CHECK — RENEWING OBLIGATION.

1. Where the payee of a check on another bank indorses and deposits the same with his bank, receives credit of the amount as cash in his general account, to be checked against, with nothing to qualify the effect of such acts, the bank becomes the owner of the check, and not a mere agent to collect the same for the payee.

2. The indorsee of a bank check must present the same for payment within a reasonable time in order to render the indorser liable thereon; that being the duty, under Laws 1899, p. 746, c. 356, § 1684–2, of the holder of any check.

3. On September 21st plaintiff indorsed and deposited with defendant bank, as cash, a check on a bank seventeen miles away. Defendant forwarded the check to the bank on which it was drawn for payment, but the check was lost. Defendant did not make inquiry as to the check for more than ten days. Plaintiff was not notified until October 19th that the check had not been paid, when he procured a duplicate, and on October 25th indorsed same, and gave it to defendant, but payment was refused on the following day by the bank on which it was drawn, the drawer having absconded without leaving sufficient funds to meet it. During the time between September 21st and October 26th the drawer had a balance at the bank, except on one or two days, and seemed to have been in good credit. Held, that defendant did not use such diligence as required by Laws 1899, p. 717, c. 356, § 1678–11, to excuse the delay, and plaintiff was discharged from liability on his indorsement of the original check.

4. Where the drawee of a check has been discharged from liability on his indorsement by delay of the indorsee in presentment until the check is lost, the drawee does not waive the indorsee's delay and renew his obligation as indorser by procuring and indorsing a duplicate check.

Appeal from Circuit Court, Rock county; B. F. Dunwiddie, Judge.

Action by Albert Aebi against the Bank of Evansville. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, a farmer residing about five miles from Evansville, kept account in defendant bank. It was accustomed to receive checks payable to his order upon the faith of his indorsement, and credit them to him as cash, and collect them without charge, and in case of dishonor to charge the checks back to him on his account. On September 14, 1901, plaintiff received a check dated August 31, 1901, from one Speich, a cheese dealer at Brodhead, upon the bank at that city, seventeen miles distant from Evansville, with daily mail between these places. This check, on September 21st, he indorsed and deposited with the bank, and was given credit for it as cash. The defendant on the same day mailed it to the Brodhead Bank for payment and remittance; heard nothing from it, and gave no further attention to it for about ten days, when a card of inquiry was sent, to which no reply was received. After waiting several days longer, defendant's cashier telephoned to the Brodhead

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Bank, and learned that no such check had been received; and plaintiff still several days, and telephoned again, receiving the same information. It was proposed that the Brodhead cashier ask Speich for a duplicate. Not until October 19th did defendant notify the plaintiff that the check was not paid. Then the assistant cashier asked him to apply to Speich for a duplicate, which he consented to do when opportunity presented. He accordingly saw Speich on the 21st of October, who wrote out a duplicate check, payable to plaintiff, dated same as former, marked "Duplicate," and with notation, "Original not payable," and mailed it to defendant. On the following day the defendant wrote to plaintiff "to call and sign check when in town." On October 25th he called, and, at the request of the defendant, wrote his name on the back of the duplicate check. The check was then sent to the Brodhead Bank, reaching there October 26th, and was refused, Speich having about that time absconded, leaving a bank balance of about $400, which was absorbed by the Brodhead Bank by charging up a note to him. During the time from September 21st to October 26th Speich persistently had a balance at the Brodhead Bank, except for a day or two, when there was a few dollars overdraft, and seems to have been in good credit in that bank, for they discounted his note on one or more occasions. The balance was usually less than the amount of his check, but frequently only by a few dollars. On several days, however, between September 21st and October 19th, the balance exceeded the amount of the check, to wit, on October 1, 3, 9, 10, 14, and 17th. During that interval, to wit, on September 28th and October 25th, the defendant twice balanced up plaintiff's pass book containing the credit for this check, and showing a balance in his favor made up in part thereof; but on the 28th of October wrote plaintiff that the check was dishonored, and Speich had run away, saying, "Please call at bank and attend to same." On November 12th defendant charged up in plaintiff's account and on his pass book the amount of said check. On the following day plaintiff presented a check for the exact balance which would be to his credit without charging up said Speich check, and demanded payment thereof, which the bank refused, offering to pay him the balance after deducting the Speich check. This action was brought to recover such entire balance. The court found the facts substantially as stated, and, as conclusions of law, that the check upon its deposit became the property of the defendant, and that the failure of the bank to present for payment and notify plaintiff had discharged him as indorser. The court seems to have refused to pass on the effect by way of waiver, of plaintiff's indorsing the duplicate check on October 25th, for the reason that no waiver was pleaded. Judgment was entered for plaintiff for the amount demanded, from which the defendant brings this appeal.

Richmond & Richmond and F. J. Lamb, for appellant. Thomas Luchsinger and J. L. Sherron, for respondent.

DODGE, J. (after stating the facts). We have no doubt of the correctness of the court's finding of fact that by the general indorsement of the check in question its acceptance by the bank, and the credit of the amount as cash to the plaintiff in his general account to be checked against as he saw fit, with nothing to qualify the effect of such acts, the bank became the owner of the check, as distinguished from a mere agent to collect the same on behalf of the plaintiff. All of the acts above

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recited prima facie indicate the discount and completed transfer of the check. 2 Morse, Banks & B. § 573; Shawmut Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Taft v. Bank, 172 Mass. 363, 52 N. E. 387. Only by clear evidence could a contrary significance be accorded them. There is no such evidence sufficient to constitute a clear preponderance such as would be necessary to warrant us in disagreeing with this finding. Such being the transaction, the right of the defendant to charge back the amount of this check or to collect from the plaintiff, is only that resulting from the relation of indorsee and indorser. The rules governing that relation are familiar, and largely now codified in our Negotiable Instrument Law of 1899, p. 681, c. 356. In order to charge indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes to his possession. Section 1684–2. Such reasonable time is not fixed by statute, but by consensus of authority, in absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment. Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130. The check in question never was presented for payment until October 25th or 26th, and clearly, by such delay, the indorser was discharged, unless such delay was excused. The only excuse suggested is the loss of the check. If it be conceded that the defendant was guilty of no negligence in adopting the United States mails as a method of transmission, nor in sending the check direct to the bank upon which it was drawn, thus taking chances of acquiring prompt knowledge whether it was honored or dishonored when it reached the payee, nevertheless it is excused from making presentment and demand only so long as, consistently with reasonable diligence, it was prevented by the loss of the check. Section 1678–11 Negotiable Instrument Law. It would seem extremely doubtful whether defendant could claim, in the exercise of due care, to have been so prevented, even during the ten days which it waited after mailing the check before making any inquiry about it and before learning of its loss. By ordinary course of mail the check should have reached the Brodhead Bank as early as the 23d,, and, unless there was some difficulty, plaintiff should have been notified of its payment or refusal at least as early as the 24th of September. We shall not deem it necessary to decide whether it was not the duty of the defendant to make inquiry immediately upon failure to receive such notification in such ordinary course of mail. Even if that were not so, it did receive notice of the failure of the check to reach its destination some time about the 1st of October. Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of immediate presentment, defendant had the opportunity and owed the duty to at once make substitution, presentment, and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser. 1 Parsons on Bills, pp. 368, 448, 530; 2 Id. 260, 261; 2 Ewards, Bills & Notes, §§ 672, 697; Smith v. Rockwell, 2 Hill, 482; Hinsdale v. Miles, 5 Conn. 331; Negotiable Instrument Law, supra, § 1681–17. Surely reasonable diligence would have enabled presentation long before Octo-

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ber 19th. While the effect of the failure to present for payment and to give notice of dishonor within a reasonable time absolutely discharges the indorser without proof of damage or injury to him, it may be pointed out that in this case damage is quite obvious. The defendant having affirmatively learned of the loss of the check somewhere about October 1st, it appears that on the 1st, the morning of the 2d, and on the 3d of October Speich had a bank balance more than sufficient to meet this check; hence a prompt presentment at any one of those times would in all probability have secured its payment. But, if that were not so, Speich was in active business, and in apparent credit to an amount more than sufficient to satisfy such demand up to about October 23d, and, had plaintiff been promptly notified on or about October 1st, of either the loss or the dishonor of the check, he would have had opportunity to make demand, and probably to secure payment from the maker. See Shipsey v. Bank, 59 N. Y. 485.

From the foregoing no conclusion is possible save that long prior to October 19th, when defendant informed him of the loss of the check, plaintiff had been discharged from liability thereon as indorser. But it is urged that by co-operating at the request of the defendant in obtaining a duplicate in order that the same might be used in lieu of the original he waived the previous omissions on the part of the defendant, and renewed his liability. Having been entirely discharged, any renewal of his liability must be by new contract. Tebbetts v. Dowd, 23 Wend. 379; Knapp v. Runals, 37 Wis. 135. The question therefore arises whether the transaction detailed in the evidence, about which there is no substantial dispute, amounted to a contract on the part of the plaintiff to assume a new liability as indorser on Speich's new check. Doubtless, when a check has been lost or destroyed, so that the payee or his assigns has not received the money thereby ordered paid, the drawer may give a new and independent check, treating the old transaction as canceled, and in that case the rights and liabilities of all parties may be as if the new check were given upon any other consideration. Equally, however, the parties may proceed on the purpose of merely supplying written evidence of the former transaction, to take the place of that lost, simply to facilitate proceedings or perfect records. In that case no new contract is made. All rights grow out of the original transaction or contract, and are exactly the same as if such transaction were proved orally, instead of by the new or duplicate written evidence which the parties have supplied. In the latter case the equitable assignment worked by a check under Wisconsin decisions prior to the new statute would be complete from the original date — just as in the case of a lost deed the making of a duplicate would not change the time of transfer of title nor make any new covenants of warranty. Hence the giving of a new check after loss or destruction of a former one is of itself alone ambiguous, and may evince intent to enter into new relations, or merely supply evidence of those already existing, according to the surrounding circumstances. The dating back of the new check to correspond with the lost one and marking it "Duplicate" tend to indicate the latter purpose, for they are wholly immaterial to the mere purpose of enabling the holder to obtain the money which he failed to get on the first check, and, being unusual, are significant. In Benton v. Martin, 31 N. Y. 382, it was held that the extrinsic facts accompanying the giving of a duplicate draft indicated an intent to assume new liabilities. Later, in the same case,

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other extrinsic facts were shown, and held to establish the contrary intent, and the drawer was held discharged by omission to seasonably present the original. 40 N. Y. 345; 52 N. Y. 570. In these latter decisions it is strongly suggested that the word "Duplicate" upon the second instrument tended to refute any purpose to make a new contract, and some other evidence of such purpose would be necessary. In Moody v. Mack, 43 Mo. 210, the obtaining and inclosing a duplicate was held ineffective to excuse failure to notify an indorser. In the case at bar there is certainly nothing, except the obtaining and indorsing of the new check, to prove an intent on part of either plaintiff or defendant that the latter should assume any additional responsibility. All the evidence indicates that the duplicate was deemed to be needed by the bank, rather than by defendant, for the first attempt to obtain it was through its correspondent at Brodhead; and when it did request plaintiff to communicate with Speich it apparently conveyed the impression that it was asking of him a favor in its own behalf. He did not understand that he was interested, or that his credit for the amount was subject to be lost, upon any contingency. Speich also evidently had the same idea, for he mailed the duplicate direct to the bank instead of giving it to the plaintiff, as would have been natural had either of them supposed his interest was to be affected or convenienced by the transaction. Of course, plaintiff's indorsement was just as essential to make the paper a duplicate of that which had been lost as to give formal rights upon the new instrument, if such it were. No entry was made on the bankbooks to indicate any change in plaintiff's liability. We cannot escape the conviction that the new paper was intended by all parties to be what it was so industriously marked, namely, a fac simile and duplicate of the former, identical in essence, operation, and legal effect (State ex rel. v. Graffam, 74 Wis. 643, 647, 43 N. W. 727); that when the bank obtained it, all parties were placed in exactly the same situation in fact and in law as if the original had that day come back to it through return of the lost letter, and therefore that no new promise or waiver of past neglect was made.

Another consideration which obstructs any implication of waiver or new promise by plaintiff is absence of knowledge on his part of the facts upon which his discharge from liability rested. No information was given him as to when the loss of the check was discovered, or whether a due presentment had been made or refused. Only when an indorser is informed of all the material facts is a new promise of liability to be implied from acts which otherwise might justify it. Low v. Howard, 10 Cush. 159; Hamilton v. Lumber Co., 95 Mich. 436, 54 N. W. 903.

From the foregoing discussion must result the conclusion that plaintiff was fully discharged from any liability to defendant upon the check in question, and was entitled to recover his deposit balance without deduction of the amount of that instrument.

Judgment affirmed.

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DECISIONS.

Decision No. 843.

BANK OF AMERICA v. WAYDELL et al.

92 N. Y. Supp. 666.

(Supreme Court Appellate Division, First Dept. March 10, 1905.)

BILLS AND NOTES — TITLE OF HOLDER — AGENT FOR COLLECTION — REVOCATION OF AUTHORITY — BONA FIDE HOLDERS — VALUABLE CONSIDERATION.

1. Where a draft was forwarded to a bank for "collection and credit," the bank became a mere agent of the forwarder for its collection, with authority only to present the draft for acceptance, collect the same when due, and credit the amount thereof to the forwarder; and it could not claim any rights in the draft higher than those possessed by the forwarder.

2. The true owner of a draft which has been sent to a bank for collection is entitled to revoke the bank's authority to collect the same, and demand a return of the draft, at any time prior to its collection, and a refusal to comply with such demand operates as a conversion of the draft.

3. An indebtedness existing in favor of a bank against the forwarder of a draft for collection does not constitute the bank a holder of the draft for value, under Negotiable Instrument Law (Laws 1897, p. 727, c. 612), § 51, providing that an antecedent debt constitutes value, in such sense as to entitle the bank to retain the draft as against the true owner, where the bank does not discharge or deal with the indebtedness in any way on the faith of the draft, and the draft is not yet due, and cannot be credited to the forwarder or applied on his indebtedness.

Appeal from trial term, New York county.

Action by the Bank of America against John H. Waydell and another. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before VAN BRUNT, P. J., and HATCH, McLAUGHLIN, INGRAHAM, and LAUGHLIN, JJ.

Eldon Bisbee, for appellant. Lemuel E. Quigg, for respondents.

HATCH, J. The complaint avers that upon the 11th day of August, 1900, at the city of Detroit, in the State of Michigan, for value received, the firm of J. F. Hasty & Sons made their draft or bill of exchange, dated on that day, whereby they directed the defendants to pay to the order of A. Ives & Sons, sixty days after the date of said draft, the sum of $1,500, and to charge the same to the account of J. F. Hasty & Sons; that thereafter the said firm of A.

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Ives & Sons, for value received, indorsed the draft and delivered it to the plaintiff, who then became, and now is, the lawful owner and holder thereof; that the said draft was duly presented to the defendants herein for acceptance, and the defendants duly accepted the same by writing across the face thereof the following: "Accepted — payable at the New York Produce Exchange Bank — $1,500.00 — Due Oct. 10th, 1900 — Fifteen hundred dollars — No. 15" — and signed said acceptance in their firm name of Waydell & Co.; that on the 10th day of October, 1900, the day the said draft became due, it was duly presented for payment, and payment was refused, whereupon the same was duly protested for nonpayment, all of which presentment, demand, refusal, nonpayment, and protest the defendant had due notice. The complaint demanded judgment for the face of the draft, together with interest and protest fees. The defendants, by way of an affirmative defense, averred that the said draft was delivered to Ives & Sons for the purpose of collection only, and that Ives & Sons delivered it to the plaintiffs without value, and solely for the purpose of collecting the same; that the plaintiffs never became the owners and holders thereof; and that the plaintiffs were also notified before said draft became payable that Ives & Sons never were the owners and holders thereof, and that they held the said draft solely as agents of J. F. Hasty & Sons for the purpose of collection. Upon the trial it was conceded by the defendants that they accepted payment of the draft; that it was presented for payment at the place where payment was due, and payment demanded and refused; and that the draft was duly protested. The defendants then proved that the draft was given to Ives & Sons for the purpose of collection only; that they paid nothing therefor, and that for the purpose of having said draft collected, Ives & Sons indorsed the same, and sent it to these plaintiffs, inclosed with the following letter, addressed to plaintiffs' cashier: ". . . We inclose for collection and credit Waydell & Co., $1,500. No protest for nonacceptance. Yours truly, A. Ives & Sons." It further appeared that Ives & Sons had had a deposit account with the plaintiffs for many years, and that the words, "We enclose for collection and credit," meant that when collected the proceeds of the draft were to be placed to the credit of Ives & Sons. Before the said draft became due, and on the 10th day of September, 1900, Ives & Sons went into bankruptcy. On the 4th day of September, Ives & Sons were indebted to the plaintiffs in the sum of $7,500 upon a collateral note given to secure a loan of $25,000, in which note, among other things, Ives & Sons agreed to and they — "Hereby give to the said bank a lien for the amount of all the liability aforesaid, upon all the property or securities at any time given unto or left in the possession of the said bank by the undersigned, and also upon any balance of the deposit account of the undersigned with the said bank. . . . The undersigned do hereby further authorize the said bank at its option, at any time, to appropriate and apply to the payment of any of the said liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said bank on deposit, or otherwise, to the credit of or belonging to the undersigned, whether the said liabilities are then due or not due."

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Upon the 4th day of September, 1900, Ives & Sons had a credit balance in the plaintiff bank of $1,767.75. The bank on that day credited the collateral note account with the sum of $2,500, and charged the deposit account with the same sum; thereby reducing the collateral note account to $5,000, and creating an overdraft in the deposit account of $732.25. The amount of this overdraft was increased thereafter, and on said September 10, 1900, when Ives & Sons went into bankruptcy, it amounted to $1,796.10. The credit upon the collateral note and the charge to the deposit account were made without any direction from Ives & Sons. Before the draft became due, but after the bankruptcy of Ives & Sons, Hasty & Sons and Ives & Sons notified the plaintiff of the true state of affairs concerning the draft — that it was delivered to Ives & Sons by Hasty & Sons for collection, and Ives & Sons demanded that the bank immediately return the draft to them. Compliance with this demand by the bank was refused; it claiming that, under its agreement with Ives & Sons, it had a right to hold and to appropriate the proceeds of the draft in extinguishment of its claim against Ives & Sons. By this action it is sought to enforce by legal remedy the claim thus asserted.

We deem it to be settled law that the legal effect of the transaction between Ives & Sons and the plaintiff was to make the latter the agent of the former for the purpose of the collection of this draft. The notice which accompanied the draft established beyond question the authority and right under which the bank held the draft. That was to collect and credit the account of Ives & Sons with the proceeds of the draft when collected. The bank was authorized to present the draft to the drawees for acceptance. Having done that act and procured the acceptance, it could take no further steps, save to collect the draft when due, when it was authorized to credit the amount to Ives & Sons. In Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455, the following rule was established:

"Where persons in the business of banking and collecting send to their correspondents or agents, in the regular course of business of receiving and sending notes between them for collection for mutual account, business paper received from customers for collection, the agent or correspondent acquires no better title to it or to its proceeds than was owned by the one transmitting it, unless there is a bona fide purchase of it for value, or advances made upon it in good faith, without notice of any defect in the title."

This rule is precise in its application to this case. Ives & Sons were not holders of the draft for value, but were mere agents for its collection. It was received by the bank, accompanied by a notice of the character of the title of Ives & Sons; and the bank, in express terms, was directed to collect and credit it. The bank's title was not higher than the title of Ives & Sons, and of such title the bank had notice, as matter of fact, in consequence of which its rights and obligations were measured by the title which it acquired. The rule announced in the Dickerson Case was reiterated and applied in Bank of Clarke Co. v. Gilman, 81 Hun, 486, 30 N. Y. Supp. 1111, by the general term of this court, and the decision therein was affirmed by the Court of Appeals (152 N. Y. 634, 46 N. E. 1145)

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on the opinion below. That was an action brought to recover the proceeds of a check drawn upon the National Bank of the Republic of New York city by the plaintiff bank, located at Berryville in the State of Virginia. It was indorsed: "For collection and credit of Bank of Clarke County. J. R. Nunn, Cashier." It was sent by the plaintiff to J. J. Nicholson & Sons, bankers, at Baltimore, without any special instruction or any previous agreement varying the legal effect of the indorsement. The latter indorsed it, "Collect for J. J. Nicholson & Sons," and sent it to the defendant Gilman. The latter, instead of presenting it for payment when received to the National Bank of the Republic, deposited it in the Manhattan Company, and added the indorsement, "For deposit in the Manhattan Company to the credit of Gilman, Son & Co." The next day the Manhattan Company presented the check to the National Bank of the Republic. It was paid and charged to the account of the maker on January 15th. On January 14th J. J. Nicholson & Sons failed, and notice of the failure came to the defendant some time during the day. The plaintiff claimed to recover the proceeds of the check. The claim was upheld and a recovery permitted upon the ground that Gilman, Son & Co. obtained no title to the check or its proceeds; that the indorsement upon the check was notice to all agents dealing with it of the purpose to be accomplished by it, to wit, the collection of the check, and the remittance of the proceeds to the plaintiff; that the defendant was not entitled to credit the proceeds based upon an indebtedness of J. J. Nicholson & Sons to it, even though they were indebted to it at the time when the check came to their hands. The court also held that the power of revocation continually existed in the owner of the check; that he could follow it into any person's hands, and recover the same or its proceeds as against any person, save he who was a bona fide purchaser for value, or had made advances upon it in good faith, without notice of any defect in the title. In principle, that case is decisive of the present question. As we have seen, the bank had notice of the limitation of Ives & Sons' title, as it had notice that it was sent for collection and credit. The true owner of the draft was J. F. Hasty & Sons, and they had the right at any time prior to the collection of the money to revoke the authority to collect, and demand a return of the draft. They exercised this right by demanding its return, and the refusal of the bank to comply with that demand operated in law as a conversion of the draft, and subjected them to an action therefor in the right of the true owner.

It is claimed, however, by the appellant that two cases in the Court of Appeals announce a different doctrine. The first is Hutchinson v. Manhattan Company, 150 N. Y. 250, 44 N. E. 775. Therein a draft was drawn by the Interstate Mortgage Trust Company of Greenfield Mass., on the Packard National Bank, of the same place, payable to the order of G. H. Kaulback. This draft was deposited with Patton & Co., a firm of brokers in the city of New York. When deposited, it was indorsed: "Pay to the order of L. B. Hutchinson. G. H. Kaulback." Also: "Pay W. L. Patton & Co., or order. L. B. Hutchinson." Patton & Co. deposited the draft with the Manhattan Company, adding the indorsement: "For deposit to the credit of W. L. Patton & Co." In fact, the draft was delivered by

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Hutchinson to Patton & Co. for collection only. At the time of the deposit of the draft by the latter with the Manhattan Company, it had no notice that Patton & Co. had received the same for collection, nor did it have any other notice that such as the indorsement thereon conveyed. The defendant bank forwarded the draft on May 4th to Massachusetts for collection. It was collected on the 5th day of May, and the proceeds remitted to the defendant bank, which received it on the next day. On the 5th of May, Patton & Co., being insolvent, made a general assignment for the benefit of their creditors, and filed it in the office of the clerk of the city and county of New York at 3:16 o'clock of that afternoon. Patton & Co. were indebted to the defendant bank upon two promissory notes, and the bank, by virtue of a contract in all respects similar to the one held by the plaintiff in this case, acquired a lien upon all of the securities or money in its hands for the payment of such promissory notes. Hutchinson, who delivered the draft to Patton & Co., sought to recover its proceeds. His claim was defeated upon the ground that, when the money was collected in Massachusetts, it was received for and on account of the defendant bank, and that, as such collection was made prior to the assignment by Patton & Co., the bank was authorized to receive and apply the money upon its indebtedness; that Hutchinson having indorsed the draft generally, and the bank having no notice that it was for purposes of collection, either from the indorsements contained upon it, or from any other source, it acquired title to the proceeds of the draft; that, if Hutchinson desired to limit the rights of Patton & Co., he should have made his indorsement express the restricted sense in which the draft was delivered, and, not having done so, he had no claim upon the bank for its proceeds. It is apparent from the discussion which was had in that case that, had the defendant bank had notice of the limited character of Patton & Co.'s title — that it was delivered only for purposes of collection — the holding would have been in Hutchinson's favor. A clear distinction is made between such a case and the one which the court considered, and the effect of the decision is to bring it into harmony with the case of Bank of Clarke County v. Gilman, supra. The second case relied upon is that of Hatch v. National Bank, 147 N. Y. 184, 41 N. E. 403. It is in principle the same, although its facts are somewhat different. Therein a firm of brokers had diverted certain securities which had been left with them upon deposit, pledging them for a loan. The lenders gave to the brokers a check, which the brokers deposited with the defendant bank. The latter collected the same, and deposited the proceeds thereof to the credit of the brokers. In an action brought by the owner of the securities to recover of the bank, it was held that they were not entitled to recover; that the check which was received and collected conveyed no notice of the transaction, and that the bank was justified in receiving and acting upon its faith and credit the same as though it had been money brought by the brokers and deposited with it; and that this was so, even though the transaction could be traced. The court, however, in that case held that the owner might have followed and recovered the converted securities, or their avails, but, as the bank had no notice or knowledge of the larceny of the securities, it was

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not chargeable with that wrongful act, but had the right to act upon the faith of the check. These cases are all in harmony. The holding proceeds upon the theory that there was no notice, either upon the paper itself or otherwise, of the limited character of the ownership of the property, in making the indorsement and delivering the paper. In this case there was, and this difference operates to protect the title of the true owner of the draft, in consequence of which the contract executed by Ives & Sons to the bank did not become operative upon this paper. It is not necessary that we refer to all of the cases upon this subject cited and relied upon by the learned counsel for the appellant. In all of them where the right of the bank has been upheld to apply the proceeds, it arose upon instruments due and payable upon presentation, in either checks or drafts which currently pass as evidence of money. Nothing appeared therein which put the party upon notice. In the main, they were general indorsements, carrying perfect title, and no knowledge of the limited title of the person making the transfer was brought home to the party or bank receiving it. The transactions thus assumed the form of dealing with instruments payable upon presentation, without notice of any limitation or defect in the title. Under such circumstances the courts have supported the transaction in favor of the party dealing upon the faith of the instrument, mainly upon the ground that it was essential to protect such right in order to give stability to business methods, as a necessary element of commercial law. But where the transfer is restricted and accompanied by actual notice before anything of value has been parted with, or right secured, the same law protects the true owner of the paper, and he may intervene at any time and enforce his rights therein. The existence of the indebtedness upon the part of A. Ives & Sons did not constitute the plaintiff a holder of the draft for value. It is conceded that such was the rule under the authority of Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342. The claim, however, is now made that section 51 of the Negotiable Instruments Law (Laws 1897, p. 727, c. 612) has changed the rule in this respect, and that such indebtedness made the bank a holder of this draft for value. Upon such proposition this court has decided otherwise (Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504), and also the Second Department (Roseman v. Mahony, 86 App. Div. 377, 83 N. Y. Supp. 749). It is not needful that we extend the discussion of this subject beyond that contained in the cases to which reference is made. In the present case nothing was discharged, nor did the bank have the power to make use of the draft prior to collection, either by crediting it to Ives & Sons, or making application of it upon their indebtedness. The mere possession of it in their hands under this limited right could not constitute the indebtedness of Ives & Sons a valuable consideration, so as to enable the bank to retain it as against the true owner. Until there is some discharge or dealing with the pre-existing indebtedness, it cannot become a consideration for the retention or enforcement of commercial paper, as against the true owner. But entirely outside of the Negotiable Instruments Law, it is apparent that under the general rules of commercial law the bank cannot in this instance be permitted to recover upon the paper as against the drawees of the draft, because all of the rights

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which it had as holder have been revoked by the owner of the draft. In no view of this case, therefore, is the plaintiff entitled to maintain this action.

The judgment should, therefore, be affirmed, with costs. All concur.

Decision No. 844.

UNION TRUST CO. v. WEBBER-SEELEY HARDWARE CO.

84 S. W. 784.

(Supreme Court of Arkansas. Jan. 14, 1905.)

SALE — CONTRACT — DELIVERY — PAYMENT — UNAVOIDABLE CONTINGENCY — BREACH.

1. Failure to deliver goods ordered is not due to "unavoidable contingencies," subject to which the order is taken, where they could have been furnished in a time satisfactory to the purchaser if it would have accepted them in small shipments from time to time, instead of insisting on its right to have them in a single shipment.

2. Even if a contract for sale of goods does not clearly require them to be sent by a single shipment, but is ambiguous on that point, yet the seller having for several months, during which the buyer was insisting on its right to a single shipment, offered small shipments, but always promised a car later, it cannot thereafter claim that the contract does not require a car-load shipment.

3. Under an accepted order for a certain quantity of axes at a certain price, settlement to be made within a certain number of days from shipment by note payable a certain time from date of shipment, the seller cannot require payment for axes shipped till all of them are shipped; and its refusal to ship the balance till such payment is made is a breach of the contract.

Appeal from Circuit Court, Sebastian county, Ft. Smith district; Styles T. Rowe, Judge.

Action by the Union Trust Company against the Webber-Seeley Hardware Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The appellant, representing the Kelley Ax Manufacturing Company, sued appellee in a justice court at Ft. Smith on an account for axes delivered for $132.50. The appellee answered, admitting indebtedness for the axes, but alleged that the ax company was indebted to it in the sum of $300 for breach of a contract of sale of 450 dozen axes, the account sued on being for 25 dozen of them, and asked judgment over for the difference. After judgment in the justice court the case was tried in Circuit Court before the judge sitting as a jury, and resulted in judgment for defendant hardware company against the ax company's receiver and the surety on its appeal bond in the sum of $187.00, after offsetting the amount due for the axes delivered, The ax company appealed to this court. The contract in question resulted from correspondence, and is embraced in a letter of the hardware company to the ax company dated May 26, 1899, ordering 450 dozen axes therein described at prices previously quoted, which order was accepted May 28, 1899. Four hundred dozen weigh

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about 24,000 pounds. Until a short time before this order was made, under railroad rules, a car of axes was 24,000 pounds, but prior to to the making of the contract the rule was changed to 30,000 pounds. The effect of this would be to require payment of freight at rate of 30,000 pounds, although 24,000 pounds, or any less weight, actually made the car load. The material parts of the contract bearing on this controversy are these (contained in letter quoting prices and terms): "Terms. All axes f. o. b. cars, factory; settlement to be made within thirty days from date of shipment by four months note from date of shipment, or cash, less 3 per cent." Axes not warranted. Quotations subject to change without notice. Prices guaranteed against ourselves only, and up to date of shipment only. Orders accepted subject to strikes, fire and unavoidable contingencies." Evidence was introduced to the effect that under this contract the usage of the trade would permit the ax company to ship in less quantities than car load. The trial court heard this evidence, but held it incompetent to explain the contract. Evidence was introduced that there was a great scarcity of ax material, and great difficulty in securing labor to manufacture axes, in the year 1899, beginning after the date of this contract, and continuing till past the fall of 1899, producing an unprecedented condition in the manufacture of axes. The effect of it was that the demand for axes was greater than the capacity of the ax manufacturers to supply it, thereby producing scarcity of material, high prices therefor, and difficulty in procuring sufficient workmen. On June 14th the ax company shipped 25 dozen axes by local freight to the hardware company. The latter wrote the ax company on the 19th of June saying they presumed the car load was delayed, and that they had sent this quantity for immediate use. Replying to this, on June 21st, the ax company writes that they are so overwhelmed with orders that it will be impossible to get off a solid car load for some time, and therefore take it for granted that the hardware company would prefer that they kept shipping small lots, rather than wait, and asking if this was satisfactory. On the 22d of June the hardware company replied that they could make no profit on the axes if they had to pay local freight (as would be the case in less than car-load lots). They say if the ax company will pay the difference between the local and car rate it will enable the hardware company to make their profit, and in conclusion ask for a full car load. Replying to this on the 26th of June the ax company gives a full account of the unprecedented condition of the business, and then says of this order that it will be impossible to ship all these goods in one lot "until towards fall," and the only way to keep the hardware company supplied would be to send them forward in local shipments from time to time during the summer. Replying to this on June 28th, the hardware company reiterates that it cannot pay local freight, and asks the ax company to write when it could make up a car of axes and ship it. Replying on July 1st, the ax company says it will be utterly impossible to get off the entire car load of axes before fall, and repeats its offer to forward small shipments. On July 8th the hardware company asked the ax company if it could forward the car load by last of August or first of September. On July 10th the ax company replied it could not be done by either of those dates. On

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July 12th the hardware company asked if the car of axes could be shipped before October 1st, and on July 15th the ax company relied stating how far it and other ax concerns were behind with their orders. These letters contained other matters immaterial to the issues. The next letter was one from the hardware company to the ax company dated March 4, 1899, referring to several statements sent of the bill for the 25 dozen axes delivered in June amounting to $132.50. It says that it declines to pay it, as the ax company had failed to perform its part of the contract; and that it was waiting for its car of axes, and was ready to pay the bill, with interest for the overtime when it got its car, and demanded immediate shipment. More correspondence followed, the hardware company demanding the car load of axes, and claiming that this bill was not due till balance was shipped, and offering to deposit the amount of it in bank, with interest to be paid on receipt of bill of lading for the car, and the ax company demanding payment of its past-due bill as it claims before proceeding further with any shipments. Finally, on November 21st, the ax company takes the position that it did not agree to deliver a car load at any one time, and that it took the order subject to the conditions of "unavoidable contingencies," and offered, if the hardware company would pay this account, that it would go ahead and ship in local shipments the balance of the axes, and it thought within two months the order could be all filled. The prices of axes had greatly advanced from the time of the contract to this culmination of the controversy. In the testimony of the president of the ax company he was asked why the ax company could not have taken out the axes for the hardware company and put them aside till a car accumulated, and then ship it, and he replied that they could have done so if the hardware company had requested it, but they never requested them to do anything of the kind, but asked for the goods at once. He also testified that his works were closed for six weeks, from April 15 to June 1, 1899, for enlargement and improvement of the plant. The president further said that, had the hardware company permitted the shipments to have been made in small lots, they would probably have filled the order before the end of the year.

Winchester & Martin, for appellant. Mechem & Bryant, for appellee.

HILL, C. J. (after stating the facts). 1. It is contended that the "unavoidable contingency" clause relieved the ax company from an earlier fulfillment of the order. The evidence of the ax company, however, showed that it could have furnished the axes within a time satisfactory to the hardware company if the hardware company had accepted them in small shipments from time to time. Therefore the failure to have the goods delivered was due to the difference between the companies as to how shipments should be made, and not to the stress in the manufacturing of the goods.

2. Should the shipment have been in a car load or in smaller lots from time to time? The contract itself is silent, and as it is an entire contract, naturally it would be expected to be an entire delivery, if practicable. The ax company proved that in the trade such an order gave the manufacturer the right to ship from time to time.

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Conceding, without deciding, that the contract was sufficiently ambiguous or technical to let in a usage to explain it, the result is not affected. The price of axes was increasing, and the hardware company naturally wanted the contract fulfilled, but did not want to pay the additional freight required by reason of these small shipments. It insisted that it was entitled to a car load, and would not receive the goods otherwise. The ax company frequently offered the small shipments, but always promised a car later, and urged that small shipments be accepted as there would be so much delay in the car being furnished; indicating first early in the fall and then late in the fall before the car would be ready. Just as fall was about to turn into winter, the ax company discovers it never agreed to furnish the goods in a car-load lot. All of this time the hardware company was refusing small shipments to save freights, and waiting for the car load. The market had then risen. Clearly, the ax company could not at that late date change its course of conduct.

3. The order was an entire one for the amount of goods therein specified at the prices therein named. The shipment, the settlement, the payment each refer to the order as a whole, and not to fractions thereof. The hardware company had a right to exact a fulfillment of the ax company's contract to deliver these goods before it made settlement therefor. If the ax company elected to deliver in various amounts and at various times, that could not affect the question of payment. The method of shipment in car load or smaller shipments only reached to manner of delivery, not to the question of payment. Only after complying with its contract to deliver the goods bought could the ax company call upon the hardware company for payment. It called for payment of a part delivered, and refused to deliver the balance until this was paid. In this the ax company violated the contract. The Court of Appeals of New York placed the same construction on a similar contract. Nightingale v. Eiseman, 121 N. Y. 288, 24 N. E. 475.

It results from these views that the judgment should be affirmed, and it is so ordered.

Decision No. 845.

GREAT WESTERN MFG. CO. v. BATHGATE et al.

79 Pac. 903.

(Supreme Court of Oklahoma. January 11, 1905.)

FIXTURES — MORTGAGES — MACHINERY — CONDITIONAL BILL OF SALE.

1. Chattels attached to the realty after the execution of a mortgage of it become a part of the mortgaged property, if they are attached by the owner of the realty, and as a permanent improvement of the estate, and not for mere temporary purposes.

2. Machinery adapted to and suitable for the purpose of running a grist mill, purchased on condition that the same shall remain the property of the vendor until the purchase price is fully paid, and where such condition is evidenced by a conditional bill of sale drawn up and signed, but not at the time recorded as provided by the

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laws of this territory, and where the premises in which such machinery is to be used are mortgaged to a third party, and where, subsequent to the execution, acknowledgment, and recording of such real estate mortgage, the machinery purchased as aforesaid is placed in the mill covered by said real estate mortgage, and is used as a part of said mill, and is attached to the same by nails, screws, bolts, and cleats, and is used for carrying out the general purposes of said mill, and as a permanent fixture, and where such conditional bill of sale is not recorded until after the signing, acknowledging, and recording of the real estate mortgage, and after said machinery is so placed in the mill and becomes a fixture therein, the lien of the real estate mortgage as to such machinery will be superior to and prevail as against the rights of the vendor under such conditional bill of sale.

(Syllabus by the Court.)

Error from District Court, Logan county; before Justice Jno. H. Burford.

Action by Thomas Bathgate against the Great Western Manufacturing Company and others. Judgment for plaintiff, and defendant company brings error. Affirmed.

This was an action commenced by Thomas Bathgate by filing a petition in the District Court of Logan county on the 15th day of August, 1902. His first cause of action was upon a promissory note in the sum of $5,173.43, dated April 1, 1899, due and payable April 1, 1902, with interest at eight per cent. per annum. The second cause of action set up a real estate mortgage of concurrent date with the above note, to secure the payment of the said sum of $5,173.43. This mortgage covered property described as follows: "Beginning at a stake in the western limits of Southern Kansas Railroad right of way, one hundred thirty-one (131) feet, two (2) inches south 17 degrees, 16 minutes west from the northwest corner of the Santa Fé addition to the town site of Mulhall; thence south 17 degrees and 16 minutes West, three hundred (300) feet to a stake; thence 72 deg., 44 min. west one hundred fifty (150) feet to a stake; thence south 44 min. east one hundred fifty (150) feet to the place of beginning, containing one acre more or less, and being a part of the northeast one-quarter (¼) of section 4 (4) in Township 18 of range two (2) west of the Indian Meridian, being the same premises conveyed by Abel Champion by warranty deed on March 14, 1899, to James Tait, Sr., and said warranty deed is recorded in the Recorder's office of Logan county, Territory of Oklahoma, on the 16th day of March, 1899, in book 16, on page 531; and also all the buildings and appurtenances added to or affixed or which may have been added to or affixed to the above described realty, including one steam flouring mill of sixty (60) barrels daily capacity; boiler room; all the mill machinery including steam engine No. 7502, and all the connections and fixtures of the boiler, together with all the belts, pipes and fixtures, whether fastened to said mill or movable, of every kind and nature together with all machinery that may hereafter be placed in said mill, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining thereto."

It was alleged in the petition that the mortgage to all of the above property had become absolute by reason of the nonpayment of the principal and interest above mentioned, and the failure to pay taxes

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assessed against the property for the year 1902. The plaintiff in error, the Great Western Manufacturing Company, was brought in as a party to the original suit because it appeared from the records on file in the register of deed's office of Logan county that this company had an interest as mortgagee in the above real property, by virtue of a real estate mortgage entered into between the principal defendants, James Tait, Sr., and Mary A. Tait, his wife, and the Great Western Manufacturing Company, dated the 6th day of October, 1899; and it was asked in the petition that whatever lien might be possessed by the defendant the Great Western Company should be decreed to be a subsequent lien to that of the plaintiff, Thomas Bathgate. The other defendants, James Tait, Sr., and Mary A. Tait, his wife, were at all times in default for want of answer, and judgment was obtained by the plaintiff below against them by default.

On the 15th day of August, 1902, the Great Western Manufacturing Company filed its answer. This answer sets up the real estate mortgage mentioned above, which was given by Tait to the Great Western Manufacturing Company. This mortgage, it appears by the recitals of this answer, was executed on the 6th day of October, 1899, and was for the principal sum of $1,463.10, with interest at eight per cent. The property covered by this mortgage is described exactly as follows: "Beginning at a stake in West limits of Southern Kansas Railway right of way (131) one hundred thirty-one feet, two (2) inches south; 17 degrees, 16 min. West from Northwest corner of Santa Fé addition to town site of Mulhall, thence South 17 deg., 16 min. West 300 feet to a stake, thence North 72 deg. 44 min. West 150 feet to a stake, thence North 17 deg., 16 min. East 300 feet to a stake, thence south 44 deg. east 150 feet to a point of commencement; containing one acre, more or less, and being a part of the Northeast one fourth (¼) of Section No. four (4) in Township (18) eighteen, Range Two (2) West, Indian Meridian. To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or, in other wise appertaining forever." By this answer it is denied that plaintiff has a mortgage on certain of the machinery set forth in Exhibit B attached to said answer, for the reason that this machinery was furnished subsequent to the date of Bathgate's mortgage above mentioned, and it is claimed that this machinery is covered by the mortgage to the Great Western Manufacturing Company. It is conceded in said answer of the Great Western Manufacturing Company that Thomas Bathgate, the plaintiff in the court below, has a first and superior lien upon all of the property, including the mill and machinery, with the exception of the mill machinery described in Exhibit B, and which was sold by the said the Great Western Manufacturing Company to Tait. Subsequent to the filing of this answer, leave of court first having been obtained, the Great Western Manufacturing Company filed an amended answer and cross-petition. In this amended answer and cross-petition it is claimed that the plaintiff in error, the Great Western Manufacturing Company, claims possession of the machinery described in Exhibit B by virtue of a conditional bill of sale. This was for the sum of $1,846.05, and was executed, as claimed by the Great Western Manufacturing Company, on the 28th day of December, 1898, and the said bill of sale was for the same

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consideration as the second real estate mortgage — that is, the one given to the Great Western Manufacturing Company — and the consideration for both was the machinery bought at that time from the Great Western Manufacturing Company. The difference between the sum named as the consideration in the mortgage and the sum named in the bill of sale — something like $400 — having been a payment of cash by James Tait, Sr., and by the return of some old machinery in trade for new received from the company. It is alleged in this answer that the real estate mortgage to the Great Western Manufacturing Company was given on the 6th day of October, 1899, and was recorded on the 29th day of October, 1899. The conditional bill of sale was executed on the 28th day of December, 1898, and was recorded in the office of the register of deeds of Logan county on the 6th day of August, 1902. The language of the conditional bill of sale, after omitting the caption, is as follows: "And it is hereby stipulated and it is the express condition of this agreement of sale and purchase, that until full and complete payment of the purchase money herein mentioned, and the interest thereon, whether such purchase money or any part of it is evidenced by said promissory notes, or any renewals thereof, is made, the title, ownership and right of possession of said machinery does not pass from the party of the first part; and said first party may, at any time after default of any payment and agreement heretofore mentioned, reduce the same to its possession, and for the purpose may with or without legal process, enter upon any premises where the same, or any part thereof, may be, and may sever, and detach the same or any part thereof, from any freehold, land, tenement, appurtenances or fixtures to which the same may be attached, whether the same has become a part thereof or not, because of such attachment, and may remove the same, and have, hold, and retain possession thereof, with the full right thereafter to use, sell or dispose of the same for its sole use and benefit; and upon the taking of such possession, all or any claim to or upon, or interest in, or right of possession of the said machinery or any part thereof, by the said party of the second part, or his assigns, shall cease, end, and determine, and any part of the purchase money which shall have been paid, shall be forfeited to the party of the first part, and no claim therefor shall be made or maintained by the party of the second part. This contract is subject to the approval of the Great Western Manufacturing Company, at its office in Leavenworth, Kansas." (Executed by both parties.)

Plaintiff filed his reply to the second amended answer, in the form of a general denial. The property in controversy was sold under order of the court, and the funds are now held subject to the decision of this court as to its proper distribution.

Afterwards, and on the 31st day of March, 1903, the above cause came on for trial, a jury being waived by both parties, and the cause was submitted to the court for decision. After hearing the evidence and arguments of counsel, and being fully advised, the court on said day found the issues in favor of the plaintiff and against the defendant and cross-petitioner. The court further found that the defendant and cross-petitioner is not entitled to the possession and return of the property claimed to have been conditionally sold and delivered by it to the defendant James Tait, Sr., being the machinery placed in

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the flour mill in Mulhall, Okl.; that the said property became a part of the fixtures when placed in said mill, and said defendant and cross-petitioner is not entitled to recover the value thereof, or any part of said property or its value, and is not entitled to the recovery or payment of any part of the funds now in court, realized from the sale of the real estate and mill and mill property and machinery and plant heretofore sold by the receiver in this action; and that judgment should be rendered accordingly. To which judgment the plaintiff in error, the Great Western Manufacturing Company, excepted. Motion for new trial was regularly made and filed, which was overruled by the court and exceptions saved, and plaintiff in error now brings the case here for review.

R. N. McConnell and Cotteral & Hornor, for plaintiff in error. Charles H. Woods, for defendant in error Bathgate.

IRWIN, J. (after stating the facts). The decision of this case depended in the court below, and a reversal or affirmance of the decision of the District Court depends in this court, upon the question as to whether the mortgage of the defendant in error Bathgate was a prior and superior lien upon the mill machinery purchased by the defendant Tait of the Great Western Manufacturing Company, and placed in the mill subsequent to the signing and execution of the mortgage, as against the rights of the plaintiff in error, the Great Western Manufacturing Company, under their second mortgage and conditional bill of sale executed at the time of the purchase of the mill machinery described in the record in Exhibit B. It is disclosed by the record that the mortgage of the defendant in error Bathgate was dated April 1, 1899; that the mortgage of the Great Western Manufacturing Company was dated October 6, 1899; that the conditional bill of sale from the Great Western Manufacturing Company to Tait was executed on the 28th day of December, 1898, but was not recorded in the office of the register of deeds of Logan county until the 6th day of August, 1902, being executed prior to the mortgage from Tait to Bathgate, but not recorded until long subsequent thereto. This mortgage from Tait to Bathgate was a real estate mortgage, and the decision of the District Court was based upon the finding that the property in controversy, to wit, the mill machinery described in Exhibit B of the record, was a fixture, and had become a part of the real estate, and consequently was subject to the real estate mortgage.

This leads us to the first proposition to be considered; that is, was the mill machinery in question affixed to the real estate, and did the evidence show that fact? We take it that the question of whether property of this character is of a chattel nature, or whether it is a part of real estate, is a mixed question of law and fact, largely determined in each case by the evidence. Whether machinery such as that in controversy in this case is or is not fixtures should be determined by the following tests: First, by determining whether the machinery has been actually annexed to the realty, or something appurtenant to the realty; second, whether the machinery is applicable to the use or purpose to which that part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent annexation to the freehold.

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In the case of Stockwell v. Campbell, 39 Conn. 362, 364, 12 Am. Rep. 393, the Supreme Court of that State said: "This rule, which requires a physical annexation of the article to the building, we consider well settled, but the annexation need not be such as to require any actual disruption for its removal. It may be attached to the building by mere adjustment of construction and putting in place, as in case of doors and window blinds, which are obviously a part of the building, though attached only by hinges, or it may be held in a place prepared to receive it, by its mere size and weight, as in the present case." In the same opinion the same court said, on page 365 of 39 Conn. (12 Am. Rep. 393): "In all these cases the article is applied to the building in such a way as to show an intent to annex it permanently to the freehold; the annexation, whether by means of nails of screws or hinges, or mere weight, being still a physical annexation. The precise manner in which the article is kept in place is not important, except as it may often throw some light upon the question, in a doubtful case, whether a permanent annexation was intended. In the present case the intent to make the annexation permanent is very clearly shown by the preparation of the house for the reception of the furnaces."

In addition to the three tests given above, we think that in the case of mills and mill machinery a special rule has been adopted by most of the courts passing upon this question, and we believe the true rule in this class of cases is that laid down by the Supreme Court of Pennsylvania in the case of Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490, the syllabus of which is as follows: "The criterion of a fixture in a mansion house or dwelling is actual and permanent fastening to the freehold, but this is not the criterion of a fixture in a manufactory or a mill. Machinery which is a constituent part of the manufactory to the purposes of which the building has been adopted, without which it would cease to be such manufactory, is part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution creditor, but not between tenant and landlord and remainderman. Ruled, therefore, that a mortgage and sale of a lot and iron-rolling mill, with the buildings, apparatus, steam engine, boilers, and bellows attached to the same, passed the entire set of rolls used in the mill, whether actually in place, or temporarily detached to make room for such as were, and that such rolls could not be seized and sold as chattels on a fieri facias against the mortgagor."

In the case of Christian v. Dripps, 28 Pa. 271, which was a case where the machinery in question consisted of a planing machine, lathes, and vises, in a machine shop or car factory, the manner of their annexation was differently testified to by various witnesses. There was testimony to show that the joist lathe stood on blocks, and that the lathe and blocks were fastened to the floor by screw bolts, and that the countershaft for running the lathe, and which was part of it, was fastened by bolts to the ceiling. And all the other lathes were fastened to the floor by driving staples across the feet into the floor, and the countershafts to the ceiling. All the lathes were run by steam power, but one was rigged for foot power, and partly worked with a treadle. One witness said that the lathes were not fastened

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to the floor in any manner. On this state of facts, the court said: "But the question was not whether these lathes were bolted and strapped to the floor and ceiling, for, if they were a necessary part of the machinery for carrying on the business of the machine shop, they belonged to the manufactory, whether bolted to the floor or not. That a machine shop for manufacturing railroad cars would be incomplete, if not useless, without lathes, is almost a self-evident proposition."

In the case of Ege v. Kille, 84 Pa. 340, the court said: "The criterion of a fixture depends on the business for which the premises are used. A fixture in a manufactory, mill, or colliery may have no adaptation to many other kinds of business. Although not attached, yet, if it be designated for the convenience of trade on the premises, and be so used, or subject to be called into use at any time, it becomes a fixture. If the article is indispensable in carrying on the specific business, it becomes a part of the realty. Voorhis v. Freeman, 2 Watts & S. 116 [37 Am. Dec. 490]; Pyle v. Pennock, 2 Watts & S. 390 [37 Am. Dec. 517]. This rule, however, does not prevent a tenant who erects fixtures for the benefit of his trade or business from removing them from the demised premises within his term. The question here is between persons who were hostile claimants to the land. As between them, all the machinery and implments necessarily used in working the mines became a part of the realty. There was therefore no error in the court charging: 'Whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such, and without which it would not be an ore bank, equipped and ready for use as such, are a part of the freehold; and the recovery of the land by the plaintiffs in the action of ejectment gave to them the ore banks on it, with all the machinery, whether fast or loose, necessary to constitute them such, equipped and ready for use.' That some machinery was essentially necessary to raise the ore and prepare it for market is very manifest. It was therefore proper to show what machinery was actually used for that purpose, and to submit its necessity and value to the jury. The evidence was rightfully received."

In the case of Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719, the steam engine, boiler, whistle, pump and all its attachments and belts, connecting it directly with the other machinery, fulling mill and its attachments and belts, main shaft and pulleys thereon, and the belts connecting the countershafting, and all other machinery necessary to make a complete woolen mill, as a whole, were held to be real property. The machinery was connected with the motive power, and was fastened to the floor by screws in the feet; the carders, however, being kept in position by their own weight. The spinning jacks were fastened and held in position by cleats nailed to the floor, and by iron rods running up through the floor above. It was argued that this machinery was equally well adapted to any other building; that they were manufactured with a view of being used in any woolen mill in which they might be placed; that they were entire and complete machines in and of themselves; and that the physical attachments were such that they might be readily removed to any other building; and that there was nothing in the character of the machine or mode of annexation denoting that they were

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intended as permanent annexations to the realty, and, because of the above considerations, such machinery was personalty. In answering this argument, the court said, at page 64 of 44 Iowa (24 Am. Rep. 719): "It being conceded by all the cases that the engine, boiler, and attachments, being the motive power, are fixtures, and that the stones or burrs of a grist mill, with the attachments, are likewise fixtures, it is not easy to understand why any dividing line should be made at the point where the belting attaches to the other machinery. Is there anything in the whole record of this case tending to show that the machinery in question was intended to be any less permanent than the engine, shafting, or belt? The fair presumption is that the whole machinery, including that now in question, was placed in the building with the intention that they should remain there as a part of the manufactory until worn out or displaced by others. This assumption is as strong and controlling as to the carding machines, spinning jackets, etc., as it is as to the engine, shafting and belts. Our conclusion is that all of the machinery which was propelled by the engine was part of the real estate, and passed with the foreclosure and sheriff's deed."

In the case of Hopewell Mills v. Taunton Savings Bank, 150 Mass. 521, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235, which was a case of machinery placed in a cotton mill after the date of a real estate mortgage, it was brought up for decision on an agreed statement of facts. A description of each machine was given, the character of its annexation, and how it is run. The attention of the court is directed to the statement to the effect that these machines were not especially built for use in this particular mill, and all could equally well have been used for the same purpose in any other cotton mill having the ordinary room to hold it and power to operate it. The court in that case said: "The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position, but such a contract cannot affect the rights of a mortgagee or of an innocent purchaser without notice of it. . . . The building mortgaged was a cotton mill, and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy, and there is much to indicate that, while there were changes in the kind of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building, until they should be worn out, or until, for some unforeseen cause, the real estate should be changed and put to a different use. Of most of them it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use, but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence." The same doctrine is laid down by the Massachusetts Supreme Court in the cases of Thompson v. Vinton, 121 Mass. 139; Hunt v. Iron Co., 97 Mass. 279; Pierce v. George, 108 Mass, 78, 11 Am. Rep. 310; Bank v. Machine Works, 127 Mass. 542.

In the Appellate Court of Illinois, in the case of Fifield & Morris v. Farmers' National Bank, 47 Ill. App., at page 19, it is held: "The intention of the parties has much to do with the question whether

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certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts." The facts of the above case are so closely similar to the facts at bar as to make it almost a remarkable coincidence. On July 1, 1891, certain citizens of the village of Winonette entered into a written agreement with one Richard Day by which they agreed to convey to said Day certain real property in said village and pay him $6,000. Day agreed, on his part, to erect on said lots a shoe factory building, and to put in the necessary machinery and equip the same for a shoe factory. By way of complying with his part of the contract, Day purchased of Fifield & Morse machinery for the shoe factory, a list of which is given in the report (pages 119 and 120). The weight of the machinery (it being all that was necessary for the fitting out of a complete shoe factory) varied from 20 pounds to 1,100 pounds, part of it fastened to the floor, or planks fastened to the floor by lag screws, and also bolted to the shafting overhead. Part of the machines were fastened to benches by wood screws, and bolted to the shafting, such benches being nailed to the floor. The machinery was all placed in the building under Day's direction, and was put in the building for the purpose of manufacturing shoes, and was all used for that purpose, and increased the value of the plant. The record showed in that case, as it did in the case at bar, that this machinery was essential to the plant, and was especially adapted for manufacturing shoes, and necessary for that purpose; and, when it was placed in the building, it was not with the purpose of taking it out. Fifield & Morse, the vendors of the machinery, knew for what purpose the machines were sold, and that they would be attached to the factory building in the manner in which they were. The machinery was sold on thirty, sixty, and ninety days' time, with the proviso that the machinery should remain their property until paid for. Day having failed, on the 23d of November, 1891, gave a trust deed or mortgage to the lots, describing the lots by number, but without making any reference in the mortgage to the machinery. On the 24th of November the Fifield-Morse Company started a replevin suit for the machinery which they had sold. Under an agreement among all the parties, the property was sold, and the receiver was ordered to keep out a certain sum, to be distributed as ordered by the court. Under this state of facts, the court said: "The sole question for our decision in this case is whether or not the machinery in question, placed in and attached to the manufacturing building in the manner shown by the testimony, and under all the circumstances, became fixtures to the real estate and passed by the trust deed of Day to appellee. The question is one not entirely free from doubt, and the authorities, as might be expected, are not altogether in harmony. In consideration of the case, we will first notice the nature of appellant's contract with Day in regard to the sale of the machinery. They undertook to retain title in themselves, secret to all the world save to the parties to the contract, and thereby give an appearance of ownership in Day to the machines, when in fact he had none. Contracts of this nature are disapproved by courts and judges, and held void as to third parties. The Supreme Court of this State has often passed on the question, so holding them void as to third parties. Jennings v. Gage, 13 Ill. 610, 56 Am. Dec. 476; Brundage v. Camp, 21 Ill. 330; Murch

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v. Wright, 46 Ill. 488, 95 Am. Dec. 455; Hervey v. R. I. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309. But in addition to this, appellants allowed the machines to be attached to the freehold, and used in the building as a part of the plant; and this, too, under a deed to Day that required the machinery not to be removed within five years. We think, under those circumstances, the appellants, in equity, ought to be held as having waived the secret lien, and consented to the machinery being used as a part of the manufacturing plant. If this should not be so, then Day would be placed in an appearance of affluence by which he could procure credit and deceive the public. . . . It will be observed that appellants did not place the machinery in the factory building, but it was done by Day, who undoubtedly placed it there with the intention of its becoming a part of the factory, and this was at least impliedly assented to by appellants. The fact, if it be a fact, that appellants claimed these machines before the taking of the real estate mortgage by appellee, can make no difference. Having allowed the machines to be placed in the building, appellants ought not to be allowed to change their attitude when creditors were pressing for security and payment. It is not necessary to consider the question of whether appellants rescinded the contract with Day by tendering to him the check or draft he gave them in payment for the machinery. Feeling satisfied that justice has been done in the case, we will not attempt to review the authorities cited with a view to reconcile them. The decree of the court below is therefore affirmed."

In the case of McRea v. Central National Bank of Troy, 66 N. Y. 489, the Supreme Court of that State reviews all of the cases theretofore decided in the State, and comes to the conclusion that where a building is especially adapted for a mill plant, and for the purpose of holding the machinery used in the business, and where the machines were fastened to the floor by plates, nails, and cleats, and were attached to the gearing, it all constituted one entity, and was real property, and the fact that most of the machines were complete in this, could be removed without material injury to them or to the building, and could be put in any other building having strength to support and power to run them, would not change this character.

In the case of Rogers et al. v. Crow et al., 40 Mo. 91, 93 Am. Dec. 299, the Supreme Court of that State said: "In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands or gearing, which may be thrown off at pleasure and without injury to the freehold. In general, it may be said that, as between vendor and vendee, the purchaser is clearly entitled to everything that has been annexed to the freehold with a view to increasing its value or adapting it to the purposes for which it is used."

In the case of Feeder v. Van Winkle, 33 Atl. 399, 51 Am. St. Rep. 628, the Supreme Court of New Jersey uses this language: "The various appliances were actually annexed to the freehold. They were fitted for and applied to the use to which the real estate was appropriated, all being designed for and necessary to the prosecution of a common purpose. Thus the machinery and land became unified

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and incorporated together as a whole. The business had been carried on for fourteen years, and, save for business disaster, might and probably would have been prosecuted indefinitely. The machinery employed, the mode of its annexation, and manner of its use in connection with the realty as an entirety, indicated not a temporary, but a permanent, accession. The fact that the machines might be removed and utilized elsewhere will not, under the circumstances of this case, serve to sever them, in legal contemplation, from the freehold." In this case the machinery was attached to a mill subsequent to the execution of a mortgage; and in the case of Lee v. Hubschmidt Building & Woodworking Company, (N. J. Ch.) 37 Atl. 769, the syllabus is as follows: "Machines purchased by a corporation, and adapted to the business which it is organized to carry on — a general building and woodworking business — and placed by it in its mill, and fastened to the building to a certain extent, and not moved about from place to place in actual use, are fixtures."

So it may be seen from the above authorities, as well as many more that might be cited to the same effect, that if the facts show that this machinery was intended to be used in the mill, and was attached to the mill for the purpose of carrying on a general milling business, and was done by the owner without any intention of removing the same, but with the intention of constituting the same a part and parcel of one entire grist mill, and that the machinery was properly adapted to that purpose, it becomes a fixture to the real estate. Now the question arises, does the evidence reasonably tend to sustain this finding of fact? We have examined the record containing the evidence, and we find that almost all of the witnesses testified that this machinery in question was fastened in some way to the building occupied and used as a mill. Some of the witnesses, it is true, say it was only fastened to keep it in place, and to prevent it from being jarred and shaken to pieces by vibrations, but they all admit that the fastening was for the purpose of using the same as mill machinery; and we think, from an examination of the entire record, and all of the evidence contained therein, that there is evidence which clearly tends to support the finding of the trial court that this machinery was attached to the real estate, and became a part thereof as fixtures. And this being true, under the oft-repeated, well-understood, and universally followed rule of this court, the finding of the trial court on this question of fact will not be disturbed.

This brings us to the sole remaining question: That, if this machinery is a fixture, does it pass with the mortgage of the defendant in error on the real estate, or is it subject to the lien created by the subsequent real estate mortgage of the plaintiff in error, and their conditional bill of sale? It will be observed from the record that, while this conditional bill of sale was executed long prior to the real estate mortgage of the defendant in error, it was not placed of record until long after the debt evidenced by the note to defendant in error, and secured by the mortgage, had been contracted, so that there is nothing in the record by which we can presume that the defendant in error, at the time he took this mortgage, or at any time prior to the commencement of this suit, had knowledge, either actual or constructive, of the existence of this contract. So the defendant in error would stand in this record as a subsequent mortgagee without notice

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of any rights saved to the plaintiff in error by its conditional bill of sale. A strong appeal is made to us by counsel for plaintiff in error to reverse this cause on the ground that the action of the defendant in error in applying the proceeds of the sale of this machinery to satisfy his debt, to the exclusion of the rights of the plaintiff in error, is unconscionable, and not in keeping with honest and fair dealing. Let us look at the transaction a moment, and see if this position is tenable. The mortgage of defendant in error was a matter of record at the time this machinery was placed in the mill by Tait, and an examination of the records would have shown to plaintiff in error that, under and by virtue of the terms of that mortgage, this machinery, on which they were seeking to preserve a lien for the purchase money, might reasonably be expected at some time to become subject to the lien of the mortgage of Bathgate. With this knowledge, the plaintiff in error, without any protest, allowed this machinery to be placed in that mill, nailed or fastened to the real estate, and used as a part thereof, while, on the other hand, any arrangement which the plaintiff in error may have had with Tait, whereby the title was not to pass from them to Tait until the purchase money was paid, was a secret arrangement, which was not made known until long subsequent to the time when the rights of Bathgate attached. He made his mortgage without any knowledge of any such arrangement, and, in his mortgage, made it a lien not only on the real estate and the mill property, and fixtures then upon the real estate, but added the additional clause that it was to cover all subsequently acquired machinery or fixtures. Now, if the position of the plaintiff in error is unfortunate, they have gone into that position with their eyes open. There was record evidence that would have warned them of the condition that did exist, and might reasonably follow from allowing the machinery to be placed in the mill under this situation and with the mortgage of Bathgate of record. The conduct of the plaintiff in error, as shown by this record, was that when they sold this machinery in question, they took a conditional bill of sale, by the terms of which they expected to protect their title to the property sold, until such time as the purchase price was fully paid. Now, it seems to us that if this was done for an honest purpose, and with the desire to act in accordance with fair dealings to all parties, their proper course would have been to have placed this conditional bill of sale on record as a notice to any persons who might thereafter deal with the vendee of such machinery of the condition of the title. But they did not do this, but secretly put the bill of sale in their inside pocket, buttoned up their coat, and said nothing about it, and allowed the public to deal with the vendee of such machinery as though no such condition attached to the same, and as though he was the absolute owner of the same. Not only this, but, in further deception as to the ownership of this property, the plaintiff in error took a second mortgage on the mill property to secure the payment for this machinery. In fact, at all stages of this proceeding the plaintiff in error seems to have relied upon its mortgage as security for the payment of this debt, as in their first answer they only set up this mortgage, and made no claim of a conditional bill of sale; and it is only when it is made apparent by the report of the receiver that the property had deteriorated in value so that the entire premises, including the machin-

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ery claimed by the Great Western Manufacturing Company, was worth only $4,000, which was considerably less than the claim of Bathgate, that the Great Western Manufacturing Company, plaintiff in error herein, saw that there was going to be a surplus after satisfying Bathgate's mortgage sufficient to satisfy their mortgage, they then bring forth and make public this conditional bill of sale, which up to that time has remained a secret in their own breast. Hence we think that the decision of the District Court was not only in keeping with honesty, justice, and fair dealing, but, as a legal proposition, is in line with the great weight of authority.

Mr. Jones, in his work on Chattel Mortgages (3d Ed.), vol. 1, p. 338, § 436, says: "Fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for permanent improvement of the estate, and not for a temporary purpose."

In the case of Winslow v. Insurance Company, 4 Metc. 306, 38 Am. Dec. 368, a mortgage was given by one Pond on the 25th day of February, 1836, covering a lot and a block. The building was constructed for a machine shop, and the principal business done in it was the manufacture of steam engines and boilers, and other heavy iron work. There was a steam engine therein which carried the whole machinery in the several stories of the building, by means of connecting bands, or otherwise. The frame of the engine was placed upon a wooden block, which stood upon a stone on the ground in the basement, and the engine itself stood upon two columns of iron, which were connected by bolts with the timbers of the floor above. The blowing cylinder was in a frame of two wooden columns that were fastened by spikes to the same floor timbers, and the pipes from the cylinder passed underground. The trip hammer rested on a heavy timber placed on a stone, and was secured by its own weight. The boilers were set in brick work, and were connected with the steam engine by a pipe bolted to the engine and to the boilers, and the whole power of the engine was exerted by means of this pipe. The brickwork was connected with the building only by resting on the ground, and on a small flue. The said steam engine, boilers, cylinder, and trip hammer, and also many of the tools, etc., which are enumerated in the plaintiff's writ and mortgage, were made and placed in said building after the execution of the mortgage. Under this state of facts, the court said: "The court are of opinion that the steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands, or other gearing, as between mortgagor and mortgagee, are fixtures, or in the nature of fixtures, and constituted a part of the realty; and that, as all these fixtures were annexed to and made part of the realty by the mortgagor, they are part of the mortgaged premises, and passed by the first mortgage to the defendants. . . . Supposing the point to be clear, on the one side, as between heir and executor, and, on the other, as between tenant and landlord, how does it stand as between mortgagor and mortgagee? . . . The question is, what is the reasonable and legal construction of a deed granting an estate in mortgage, in the usual terms, where there is no stipulation on the subject? Such a deed must, of course, include all additions which become de facto part of the realty, and which are

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not in their nature equivocal, because a title to the whole includes every part. In regard to articles doubtful in their nature, we have already stated as our opinion that, if added by the mortgagor, it is to be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment. Hunt v. Hunt, 14 Pick. 386, 25 Am. Dec. 400. One of the objects, and, indeed, one of the most usual purposes, of mortgaging real estate, is to enable the owner to raise money to be expended on its improvement. If such improvements consist in actual fixtures, not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee, by increasing the value of the pledge. The expectation of such improvement and such increased value oftens enters into the considerations of the parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. And we think the same rule must apply to those articles which in their own nature are doubtful, whether actual fixtures or not, on the ground of the presumed intention of the parties. A presumption arises from the relation in which they stand that such improvements are intended to be permanent, and not temporary, and that the freehold and the improvements intended to be made upon it are not to be severed, but to constitute one entire security. . . . The latter therefore may be presumed to have intended to annex the improvements to the freehold and make them permanent fixtures, whilst the former must be presumed, from his obvious interest, to erect the improvements for his own temporary accommodation during his term, intending to remove them before its expiration. . . . As to what shall be deemed fixtures and part of the realtv, when the question does not arise as between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. . . . The difficulty is somewhat increased when the question arises in respect to a mill of manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the water works or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment. In the present case we are of opinion, upon the evidence submitted to the court, that the engines and boilers, and the machines for working iron, upon which they operated, considering the manner in which they were fitted and adapted to the mill, were fixtures, and part of the realty, and were, of course, covered by a mortgage of the real estate." This court cites in support of this doctrine Powell v. Monson & Brimfield Manufacturing Co., 3 Mason, 466, Fed. Cas. No. 11,357; Farrar v. Stackpole, 6 Greenl. 154; Gray v. Holdship, 17 Serg. & R. 415, 17 Am. Dec. 680; Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490.

In Gardner v. Finley, 19 Barb. 317, the court say: "There is no relaxation, as between a mortgagor who has erected fixtures on the

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land subsequent to the mortgage and the mortgagee, of the general rule of the common law which prevails between vendor and vendee — that whatever is fixed to the freehold thereby becomes part of it. Therefore, where a mortgagor, subsequent to the execution of the mortgage, puts machinery and other fixtures into a mill upon the mortgaged premises, the purchaser of the premises at a foreclosure sale will acquire title to the fixtures, as being a part of the real estate."

In Rice v. Dewey, 54 Barb. 457, the syllabus is as follows: "When lands sold and conveyed by a mortgagor are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of the mortgage as the land upon which they are made." In this case counsel for the defendants claimed that the rule was otherwise where the improvements were made by third parties, or under an arrangement that the same was not to become a part of the realty; and the court, in answer to this contention, on page 472, say: "No such rule has ever been applied between mortgagees and purchasers from the mortgagors in this State. The reverse is the law. I regret that in this case the operation of the rule may be somewhat harsh upon some of the plaintiffs, but the court has no more power to change or modify the established rules in equity than in cases of legal cognizance. Improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of a mortgage as the land upon which they are made."

In McFadden v. Allen, 32 N. E. 21, 19 L. R. A. 446, the Supreme Court of New York say: "In determining, as between mortgagor and mortgagee, whether articles are or are not fixtures, the same rules prevail which are applicable to cases arising between grantors and grantees. And as between mortgagor and mortgagee, the same rules are applicable to articles placed on the mortgaged premises by the mortgagor after the execution of the mortgage."

In the case of Roberts v. Dauphin Deposit Bank, 19 Pa. 71, the third paragraph of the syllabus is as follows: "Though the engine and boilers were put up after the mortgage to the plaintiff was given, they constituted a part of the mortgage security, and they were not liable to removal by the mortgagor or her assigns, if such removal was injurious to the mortgagee, who has a right to benefit from any appreciation of the mortgaged premises arising from any cause." And in the body of the opinion the same court, at page 76, said: "It is insisted, however, that because the engine, etc., were put up after the giving of the mortgage, therefore they constituted no part of the mortgage security, and might be removed without doing any wrong to the mortgagee. But this is not so. As the mortgagee may suffer by the depreciation of the property arising from fluctuations in value, from accident, and from neglect, so he may be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property or from any other cause. No other rule could be at all practical."

The Supreme Court of Illinois, in the case of Wood et al. v. Whelen, 93 Ill. 155, in paragraph 10 of the syllabus, used the following language: "Additions of a permanent character, by way of improvements, on mortgaged premises, made by the owner or mortgagor,

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are regarded as a part of the mortgaged estate, and may be sold with it. If the owner of the land during the existence of the mortgage shall affix any property to it by way of additions or otherwise, such property will become a fixture, in the general sense of that term, and such additions will pass with the estate on foreclosure." The same court, in paragraph 11 of the syllabus, used the following language: "Here the Elgin Gas Company made a mortgage upon its real estate, 'together with the gas works thereon, with all the appurtenances thereto belonging and now situated and being thereon, together with all machinery, tools, implements, materials, fixtures in and about the same, and in any wise appertaining; and also the gas mains, pipes and service pipes connected with said gas works and now laid under ground in the said city, and all the gas meters now on hand and in use in connection with said pipes; together with the office, office fixtures, and furniture now in the said city and used by the said company.' It was held that the lien of the mortgage was not necessarily restricted to the property in the condition it was at the time the mortgage was executed, but any enlargement of the original works, or an extension of mains in streets and under land not owned by the company, upon license granted for that purpose, and all additional machinery attached to and supplied for the use of the works, would be regarded as but additional to and a part of the original mortgaged property, and would pass with the estate under a sale upon foreclosure."

In the case of Bank of Louisville v. Baumeister, 7 S. W. 173, the Supreme Court of Kentucky, said: "The rule by which to determine whether the warehouse is to be regarded embraced by the mortgage of Olds is 'that fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate, and not for a temporary purpose, or if they are such as is regarded as permanent in their nature, or if they are so fastened or attached to the realty as that the removal of them would be an injury to it.' Although Spalding at the time he commenced the erection of the warehouse was not the owner of the lot, nor had in fact openly made his election to purchase it, yet, considering the character and cost of the building, the option to purchase the lot which he had secured by his contract with Mrs. Bullitt, and the special mention of the warehouse in the mortgage to Olds, it is evident it was intended by him to be attached as a permanent improvement of the estate which he subsequently purchased; and as the liability of Olds was incurred to enable him to erect the building, and upon the faith that it, as part of the realty would constitute a security against loss, we think it was properly adjudged subject to his mortgage." The reasoning of this case is of peculiar force in the case at bar, as there is a strong similarity in the two cases, in principle, as it is apparent from the record in the case at bar that it was well understood by both mortgagor and mortgagee at the time of making the Bathgate mortgage not only that Tait, the mortgagor, was to put in new machinery, but that such new machinery was absolutely essential and necessary to the successful working of the mill; that, as testified to by the son, James Tait, Jr., "it would not have been a mill if new machinery had not been put in." In other words, Thomas Bathgate would have had no mortgage

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upon a mill if this additional machinery, the purchase of which was at the time of giving the mortgage contemplated, had not been put in, and upon the strength of which the mortgage and loan was made and executed.

In the case of Dutro v. Kennedy, 22 Pac. 763, the Supreme Court of Montana say in the syllabus: "Where, in an action to foreclose a mortgage which has been destroyed, no issue is raised as to the right of the mortgagee to sell fixtures which were attached to the realty after the execution of the mortgage, and the decree is silent as to that question, the right must be governed by the general rule that the mortgagee may sell such fixtures. If the mortgagor endeavors to remove the fixtures on the mortgaged land, he may be enjoined, or the mortgagee may sue for damages, or bring an action of claim and delivery, after he has purchased the property at sheriff's sale."

The case of Cooper v. Harvey et al., (Sup.) 16 N. Y. Supp. 660, was one where the plaintiff conveyed a certain mill property to the defendant Harvey and others, and a mortgage was given back by the defendants for the purchase price. At the same time a bill of sale for the machinery in the mill was given by Cooper to the purchaser, and a chattel mortgage given back for the sale at the time of the conveyance of the real estate. Certain machinery, it appears, was added to the mill after the giving of the mortgage by the purchaser. A question arose in the case as to what property passed under the mortgage. After laying down the rule that fixtures made by the mortgagor after the execution of a mortgage upon lands conveyed by it become part of the mortgaged premises, the effect of bill of sale and chattel mortgage upon this general rule was discussed, and the court said: "The remaining question raised on this appeal is as to the ruling and decision of the referee upon the question as to what passed under the mortgage. Upon this question, the defendants insist that the machinery used in this mill was personal property, and did not pass to the mortgagee under the real estate mortgage. It is a familiar principle that the same rule obtains between mortgagor and mortgagee of real estate as exists between grantor and grantee. Ordinarily the character of property, whether real or personal, is determined by the application of these tests: (1) Actual annexation, which must be of a permanent character, except in case of those articles which are not themselves annexed, but are deemed to be freehold from their use and character; (2) adaptability to the use of the freehold; (3) the intention of the parties at the time of making the annexation. In this case the machinery that was in the mill at the time of the sale, as between the grantor and grantee, constituted one of the chief features of the property for manufacturing purposes, for which it had been used, and for which manifestly it was to be used by the purchasers. For the grantor to have removed it after the purchase, on the ground that it was personal property, would practically have destroyed all that was valuable, in contemplation of the purchasers, for the purpose of manufacturing knit goods. Such machinery was therefore deemed to be part of the realty from its use and character. It must also be deemed to be a part of the realty from its adaptability to the use of the freehold. As to the machinery put in the mill after the purchase by the defendant and after the

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execution of the mortgage, its character must be determined by the intention of the parties. That intention, we think, is clearly indicated by the manner in which the machinery was placed in the buildings and attached to the same by the owner of the fee of the mortgaged premises after the mortgage was given, and while it remained in force against the premises. Permanent erections and fixtures made by a mortgagor after the execution of the mortgage, upon lands conveyed by it, become part of the mortgaged premises. Snedeker v. Warring, 12 N. Y. 170. And this case also holds that the same rule exists between mortgagors and mortgagees as would prevail between grantor and grantee. Tested, therefore, by the rule that would prevail in case of a sale of these premises, there seems little doubt that this added machinery, boiler, and engine became a part of the real estate by being placed upon and attached to it, as shown in this case, unless the legal effect of their annexation was changed by the execution of the chattel mortgage, and the statement of Cooper, as found by the referee, that the real estate mortgage did not cover the boiler, engine, and machinery, and a bill of sale and chattel mortgage were executed by the parties, respectively, conveying the same. It seems to be conceded by the defendants that, but for the bill of sale and chattel mortgage, this property would have passed by the deed and real estate mortgage, so far, at least, as it was in the mill at the time of the sale, but, as to that placed therein after the execution of the deed and mortgage, a different rule is claimed to exist; but we have shown, upon the authority above cited, that fixtures which would pass by the mortgage, if on the premises before its execution, would, as between the mortgagee and mortgagor, in like manner, pass if placed on the premises after the execution of the mortgage. Snedeker v. Warring, supra. What, then, was the effect of the bill of sale and chattel mortgage as changing the character of this machinery from real to personal property? In Voorhees v. McGinnis, 48 N. Y. 278, the owner of a saw and grist mill erected a substantial building, and placed therein a steam engine, boiler, shafting, and gearing, which were constructed with especial reference to the place in which they were to be used, but without any intent on the part of the person making the improvement either of making them a part of the freehold, or of removing them in the future, and gave a real estate mortgage upon the property. Subsequently the boiler and machinery were removed for the purpose of having them replaced by a new boiler and new machinery, and while the new boiler and machinery were at the shop for repair the owner of the mill gave a chattel mortgage upon them; and, after the repairs were completed and the mill was in running order, he gave another mortgage upon them and other machinery. After the repairs, and before the last chattel mortgage, he gave a real estate mortgage on the premises, and the plaintiff acquired title under the foreclosure and sale on the two real estate mortgages. The holders of the chattel mortgages removed the machinery covered by these mortgages. Held that, although the mortgagor had no special intent upon the subject, the facts disclosed that the boiler, engine, shafting, and gearing were permanent accessions to the freehold. Applying the principle of that case to the facts in this, there seems to be a much stronger reason for holding that this machinery and fixtures covered by the chattel mortgage were a part of the realty,

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and passed under the real estate mortgage. In this case the right of no third party is involved. The object of the parties manifestly was to confer upon the purchaser a valid title to all of this property, whether classed as real or personal, and a like object on the part of the mortgagor and mortgagee to create a valid security for the entire debt upon all of the property sold. Their misapprehension as to the legal effect of the annexation of and adaptability to the uses of this mill of the machinery did not change the law or legal effect of the physical annexation of the same to this real estate. It follows, therefore, that the real estate mortgage attached to all the real estate and fixtures of which the property covered by the chattel mortgage was a part. On the whole case, we see no error for which this judgment should be reversed. Judgment affirmed, with costs."

Mr. Cobbey, in his work on Chattel Mortgages, § 206, says: "Where the personal property is so incorporated with the realty as to become a part of it, it will not be considered as personal property afterwards, to the prejudice of third parties. Thus, as between a mortgagee of the machinery of a cotton mill, permanently attached to the realty, and used with it, and a subsequent mortgage of the realty, the title of the latter will prevail." Also, in section 207 of the same work, we find the following language: "Where machinery is put into a factory, and attached thereto, with the intention of using it permanently as part of the same, and it is adapted to such use, it becomes a fixture and a part of the homestead, and is not subject to mortgage as a chattel." And in the same section we find this language: "A mortgage on a woolen mill passes, as a part of the realty, the engine furnishing the power, the shafting, belts, carders, spinning jacks. looms, and other machinery, although only attached to the building by cleats, etc., to keep them in place." In section 212 the author says: "The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understanding whenever the rights of third parties will not be prejudiced." Also, in section 216, we find this language: "Machinery placed in a calico factory, subject to a mortgage, by the mortgagor, intended for use in the business, and to permanently increase the value of the factory, will pass by a mortgage of the realty, although not so attached to the building as to injure the building by removal; and it cannot be taken away without the mortgagee's consent."

For the reasons above stated, and from the authorities cited herein, we have arrived at the conclusion that the decision of the District Court was right, and the same is hereby affirmed, at the costs of the plaintiff in error.

All the justices concurring, except BURFORD, C. J., who, having tried the case before, took no part in the decision.

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Decision No. 846.

MERSICK v. ALDERMAN et al.

60 Atl. 109.

(Supreme Court of Errors of Connecticut. March 9, 1905.)

PROMISSORY NOTES — ACCOMMODATION NOTE — TRANSFER BY PAYEE TO SECURE CONTINUING INDEBTEDNESS — DEFENSE — WANT OF CONSIDERATION — COMPLAINT IN ACTION BY HOLDER OF NOTE AS COLLATERAL — ALLEGATIONS — SUFFICIENCY.

1. The payee of an accommodation note transferred it before maturity to a third person, in order to establish with him a credit for purchases of goods to be made forthwith and in the future. The third person furnished the payee with goods before and after maturity of the note, and in reliance on its security. Held, that the maker, in an action on the note by one who had purchased it, together with the claims due to the third person from the payee, could not set up the defense of want of consideration, and thereby defeat the recovery of the indebtedness incurred by the payee subsequent to the maturity of the note.

2. One suing on a note held as collateral may in his complaint set forth such facts as disclose his right prima facie to recover the amount of the note, and leave it to defendant to set up in the answer facts limiting the right of recovery to the amount of the debt for which it was given to secure, and a judgment for the amount of the debt is authorized.

Appeal from Superior Court, New Haven county; William S. Case, Judge.

Action by Charles S. Mersick against Samuel A. Alderman and others. There was a judgment for one of the defendants, and for plaintiff against the other defendants, and the latter appeal. Affirmed.

One Freedman desired to purchase lumber of the W. A. Beckley Company, lumber dealers, and to establish with the company a present and continuing credit for purchases to be made forthwith and in the future. The company demanded references. Instead Freedman proposed to indorse over a good note as collateral security for any indebtedness he might incur. This being acceptable to the company, Freedman indorsed and delivered to it the negotiable promissory note of the four defendants now in suit. It was for the sum of $2,000, and payable to Freedman six months after date. It was not then due. The company thereupon furnished Freedman lumber to the amount of between $700 and $800, and continued for a period of years thereafter to supply him with lumber, all in reliance upon the security of said note, which it continued to hold until January, 1902, when a receiver for said company was appointed. The company took the note and continued to hold it without knowledge or notice of any claim that it was accommodation paper, or that there was any claimed defenses to it, either legal or equitable, as between Freedman and the makers. At the time of the appointment of the receiver the indebtedness from Freedman to the company, which had for a long time been represented by notes re-

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newed from time to time, was represented by two notes under dates of September 14, and 24, 1901, respectively, amounting in their principal sums to $786.40. The plaintiff was the purchaser from said receiver and under an order of court of said note for $2,000 and of all claim the Beckley Company had against Freedman by reason of its said transactions with him, and is now the indorsee and holder of said note and the owner of said claim, neither of which have been paid. The defendants claimed that said $2,000 note was signed by them without consideration, and as an accommodation to Freedman. The court did not so find. Freedman and Weinick, one of the makers, have since the giving of the note been adjudicated bankrupts, and received discharges in bankruptcy.' The court rendered judgment in favor of Weinick and in favor of the plaintiff against the other three makers to recover $891.69.

Benjamin Slade, for appellants. Harry W. Asher and J. Birney Tuttle, for appellee.

PRENTICE, J. (after stating the facts). The plaintiff is the indorsee and holder of the note in suit, of which the defendants are the makers. He is also the owner of the indebtedness which it was indorsed to secure. As such holder of the note, whether in due course or not, and such owner of the indebtedness, he has all the rights of the Beckley Company, through whom he holds. Gen. St. 1902, § 4228. The Beckley Company held the note as collateral security for such indebtedness to it as the payee thereof might incur upon a continuing credit extended to him. It was therefore a lienholder, and as such was both originally and at the maturity of the note a holder for value to the extent of the lien, and to that extent a holder in due course. Gen. St. 1902, §§ 4197, 4222. This is conceded. It is contended, however, that as to any indebtedness incurred by the payee subsequent to the maturity of the note the Beckley Company was not in the position of a holder in due course, and that, therefore, as to such indebtedness, the note in its hands was subject to the defense on the part of the makers that it was given for the accommodation of the payee, and was without consideration. This contention rests upon two assumptions of fact which are not supported by the finding, to wit: (1) That the note was made for the accommodation of the payee; and (2) that some part of his indebtedness to the Beckley Company arose susequent to the maturity of the note. It rests also upon the assumption of law that the want of consideration, which is the peculiar characteristic of accommodation paper, is one of the equities or defenses to which such paper in the hands of one who is a holder for value after maturity is, under all circumstances, subject, save as otherwise controlled by section 4228 of the General Statutes of 1902. The courts of England and of many of our States have adopted, and the text-writers with general unanimity have approved of, a contrary doctrine, which declares that, unless the paper is shown to have been misappropriated by the accommodated party to some purpose other than that for which it was given, the accommodation makers may not set up the want of consideration in an action by one who has acquired it in good faith, in the ordinary course of business, and for value, although after maturity. Sturtevant v. Ford, 4 Man. & G. 102; Stein v. Yglesias, 1 Cromp. M. & R. 565; Charles

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v. Marsden, 1 Taunt. 223; Carruthers v. West, 11 Q. B. 143; Atwood v. Crowdie, 1 Starkie 485; Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310; Seyfert v. Edison, 45 N. J. Law, 393; Miller v. Larned, 103 Ill. 570; Davis v. Miller, 14 Grat. 1; East River Bank v. Butterworth, 45 Barb. 476; Harrington v. Dorr, 3 Robertson (N. Y.) 275; Maitland v. Bank, 40 Md. 540, 17 Am. Rep. 620; Daniels on Negotiable Instruments, §§ 726, 786, 790; Story on Promissory Notes, 194; Chitty on Bills, 218; 2 Parsons on Notes & Bills, 28; Byles on Bills, 285; Eaton & Gilbert on Commercial Paper; Redfield & Bigelow's Leading Cases, 216. The cases holding otherwise, in so far, at least, as the rule laid down by them is made to embrace situations where, as here, the the holder for value parted with the considerations without notice of the accommodation character of the paper, do not have the support of sound reason or safe policy. We are not prepared to introduce into the law commercial a principal so repugnant to its spirit, and so fraught with danger. The defendants have shown no misappropriation by the accommodated party. Their defense must therefore fail, and it would not change the result if the finding should be so corrected as to establish the two facts assumed by them as hereinbefore stated.

The defendants claim that the complaint was inappropriate, in that it was in the ordinary form of one on behalf of an indorsee of a negotiable note against the maker, and that the judgment did not conform to the complaint in that it was rendered for the amount of the indebtedness which it was given to secure. It is well settled that the payee or indorsee of a note held as collateral may sue upon it, and such is the plain implication of our statutes. Gen. St. 1902, §§ 4222–4227; Daniels on Negotiable Instruments, § 833; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Whitteker v. Charleston Gas Co., 16 W. Va. 717; Reed v. First National Bank, 23 Colo. 380, 48 Pac. 507. The fact that judgment is not in such cases rendered for the full amount of the note, but for the amount of the indebtedness secured thereby, does not establish that the recovery is not upon the note. True it is that, generally speaking, a holder in due course of negotiable instruments is entitled to recover the full amount thereof. Gen. St. 1902, § 4227. But it has long been an accepted principle limiting the operation of the general rule, but not repugnant to it, that one who takes such paper as collateral security for a debt will be limited in his recovery to the amount of that debt. Cromwell v. County of Sac, 96 U. S. 60, 24 L. Ed. 681; Duncan v. Gilbert, 29 N. J. Law, 521; Fisher v. Fisher, 98 Mass. 303; Youngs v. Lee, 12 N. Y. 551. The recovery, however, is none the less upon the paper. The plaintiff was justified in confining his allegations to such as disclosed his right prima facie to recover the amount of the note, and in leaving to the defendants to set up in their answer, as they did, the facts which served to limit that right. Vanliew v. Bank, 21 Ill. App. 126; Curtis v. Mohr, 18 Wis. 615; Duncan v. Gilbert, 29 N. J. Law, 521. The exceptions to the finding need not be considered.

There is no error. All concur.

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Decision No. 847.

UPSON v. MT. MORRIS BANK.

92 N. Y. Supp. 1101.

(Supreme Court, Appellate Division, First Dept. April 7, 1905.)

PAYMENT BY CHECK — TIME OF PAYMENT — BANKRUPTCY — INSOLVENCY — QUESTION FOR JURY.

1. Where a debtor's attorney gave the creditor the attorney's personal check, and the creditor surrendered the client's note, and the attorney requested the creditor to refrain from depositing the check for collection for a day or two, although he did not make it a condition of the delivery of the check, and the request was complied with, payment of the client's indebtedness by such check took place when the check was given and the note surrendered.

2. On an issue as to whether a debtor was insolvent, within the meaning of the Bankrupt Act, at the time that he gave a certain transfer, the fact that late in the afternoon of the same day he conveyed nearly all his remaining property, thereby rendering himself insolvent within the meaning of the Bankrupt Act, did not, on the theory that fractions of a day are not to be considered, render him insolvent at the time of the former transfer.

3. On an issue as to whether one to whom a transfer was made by a debtor had reasonable cause for believing that the debtor was insolvent, within the meaning of the Bankrupt Act, at the time, evidence considered, and held that the question was one for the jury.

Appeal from trial term.

Action by William F. Upson, as trustee of James F. Welch, against the Mt. Morris Bank. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, INGRAHAM, and LAUGHLIN, JJ.

C. H. Payne for appellant. Jesse Stearns for respondent.

LAUGHLIN, J. The action is by a trustee in bankruptcy of one Welch to recover a payment of $5,000, alleged to have been made by the bankrupt of the defendant within four months of the filing of the petition, upon the ground that it constitutes an unlawful preference. The verdict was directed upon the theory that at the time the payment was made Welch was insolvent within the meaning of that term as used in the Bankruptcy Act (section 1, Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and that the effect of the transfer was to pay a greater part of the indebtedness owing to the defendant than his remaining assets would enable him to pay the remaining creditors (section 60a, Bankr. Act July 1, 1892, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and that the defendant or its agents had reasonable cause to believe that the payment was intended as preference (section 60b, Bankr. Act 1898). The defendant excepted to the direction of the verdict, and asked leave to go to the jury upon the questions as to whether Welch was insolvent, and whether the defendant knew of the insolvency, and

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that the payment would constitute a preference. Unless the facts established these propositions as matter of law, the court erred in directing a verdict. Section 1 of the Bankruptcy Act provides that a person shall be deemed insolvent, within the provisions thereof, "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 60 declares, among other things, that a person shall be deemed to have given a preference, "if, being insolvent," he has "made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Section 60b provides that, if a bankrupt shall have given a preference within four months before the filing of the petition or thereafter, and before the adjudication, "and the person receiving it or to be benefited thereby, or his agent acting thereunder, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property, or its value, from such person." Under these provisions it is clear that a person is not insolvent merely because he is unable to pay his obligations as they mature, or because actions are pending against him owing to his inability to make present payment of his indebtedness; and such facts, if known to a creditor, would not, as matter of law, constitute reasonable cause for believing that a preference was intended in the case of a payment by a debtor in such circumstances. In re Eggert, 3 Am. Bankr. Rep. 541, 98 Fed. 843; Id., 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1. It is essential for the trustee in an action to recover a preferential payment to show actual insolvency of the bankrupt at the time of the payment, and that the creditor knew, or had reasonable ground for believing, acting as an ordinary prudent man, that a preference was intended; but it is not necessary to show fraud or an intent on the part of the bankrupt to make a preferential payment. In re Eggert, 3 Am. Bankr. Rep. 541, 98 Fed. 843; Id., 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999. Welch had an account with the Mt. Morris Bank, and for a period of about three years it had been accustomed to extend credit to him discounting his paper. He was conducting a lumber yard and planing mill in the city of New York. On the 12th day of January, 1900, he was indebted to the bank on matured notes aggregating $13,000. On that day it commenced two actions against him on these notes, in which he made default, but his attorneys opened negotiations with the attorneys for the bank concerning his business affairs and what he claimed to be temporarily financial embarrassment. His business was interrupted by a fire, from which he sustained a loss of about $10,000. His attorneys had collected part of the insurance moneys and held the same for him. On the 27th day of February, 1900, they gave their personal check to the attorneys for the bank for $5,000 in payment of one note for $5,000, upon which one of the actions had been brought, and this note was thereupon surrendered to the attorneys for Welch. The account of the attorneys for Welch was good for the

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amount of the check, but on account of the fact that they did not hold that amount of their client's money they requested the attorneys for the bank to refrain from depositing the check for collection for a day or so, but did not make it a condition of the delivery of the check. This request was voluntarily complied with. Late in the afternoon of the same day, after the delivery of the check and the surrender of the note, Welch executed and delivered to one Livermore, the vice-president of the bank, a deed of trust of substantially all his property for the benefit of creditors. Livermore thereupon took possession of the property, and continued to operate the mill as trustee. On the 26th day of June — one day less than four months thereafter — an involuntary petition in bankruptcy was filed against Welch, charging as acts of bankruptcy, among other things, that he had, while insolvent, made this payment of $5,000 to the bank and made this transfer to Livermore. On the 5th day of November thereafter, on the trial of the issues in the bankruptcy court, it was adjudicated that, excluding the property which he transferred to Livermore, he was at the time of making that transfer and at all times thereafter insolvent. The trial court held that this decision established conclusively the insolvency of the bankrupt at the time the payment of $5,000 was made to the bank. The check, although dated on the day of its delivery, was not in fact paid until the 2d day of March. If the indebtedness to the bank was not paid until the money was received on the check, that being subsequent to the time of the transfer to Livermore, the decision in this regard would be correct. If the check had been that of the bankrupt, or if it was drawn upon moneys belonging to him, doubtless the transfer would not have taken place until the check was paid. In re Lyon, 7, Am. Bankr. Rep. 412; Id., 10 Am. Bankr. Rep. 25, 121 Fed. 723, 58 C. C. A. 143. But here the check was drawn by the attorneys on that individual account, which may have been increased by a deposit of some of the insurance moneys, but the evidence shows that they did not hold sufficient of this client's funds to pay it. We are of opinion that the bankrupt's indebtedness to the bank on the $5,000 note was canceled when the attorneys gave their check therefor and the note was surrendered. Whitbeck v. Van Ness, 11 Johns. 409, 6 Am. Dec. 383. It is doubtful whether there was any transfer from the bankrupt to the appellant.

It is further urged that the rule that the law takes no notice of the fractions of a day is applicable, and that the decision that the transfer to Livermore left Welch insolvent establishing his insolvency throughout the day which covers the time when the check was delivered to the bank. We are also of opinion that this proposition is untenable. It is clear that it does not follow that because he was insolvent after conveying nearly all his remaining property late in the afternoon that he was likewise insolvent before conveying it and when the note was paid. We are of opinion that this is a case where the time of the transaction, although it involves a consideration of the fractions of a day, must be considered. Westbrook Mfg. Co. v. Grant, 60 Me. 88, 11 Am. Rep. 181. It necessarily follows that the question as to whether Welch was insolvent at the time the check was given was open to inquiry. On the trial the court excluded competent evidence offered by the defendant tending to show his

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solvency, and exceptions were taken by the defendant to these rulings.

Moreover, we think the court erred in excluding evidence offered by the defendant tending to show that it believed, and had reasonable ground for believing, that Welch was solvent at the time the check was delivered in payment of the note. It is true that he was temporarily financially embarrassed, and unable to pay his obligations as they accrued. The defendant, however, was the only creditor who had instituted legal proceedings for the collection of any claim. The defendant was doubtless aware of this financial embarrassment for its attorneys, and one of its officers participated in the negotiations which led to the transfer of the property in trust to the latter. It was apparently confidently represented by Welch, however, that his assets exceeded his liabilities by from $50,000 to $75,000. It is evident that he had, as a basis for obtaining credit, made written representations to the bank only a short time before concerning his assets and liabilities, indicating that he was solvent in a large amount. In these circumstances it could not be said as matter of law that the defendant had reasonable cause for believing that he was insolvent at the time it received the check in payment of the note. That was a question of fact, and should have been presented to the jury, and all evidence tending to show information communicated to the defendant or knowledge on its part indicating his solvency should have been received. Material evidence on this point was offered by the defendant and excluded, and it excepted to the ruling.

It follows, therefore, that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

Decision No. 848.

PATTERSON v. FIRST NAT. BANK OF HUMBOLDT.

102 N. W. 765.

(Supreme Court of Nebraska. March 8, 1905.)

PLEADING — MONEY HAD AND RECEIVED — REPLY — BANKS — DEPOSIT — PAYMENT OF CHECK — TRANSFER OF CREDITS — INSTRUCTIONS.

1. Where a petition is for money had and received, the answer pleads payment by check, and the reply alleges facts negativing and disputing the payment alleged in the answer, the reply is not inconsistent with the petition, and it is error to strike out its allegations. But where proof is admitted of the allegations stricken from the reply, the error is without prejudice.

2. Where a check for $450 was drawn by a depositor in a bank upon her deposit, payable to the same bank or order, its indorsement by the bank, and return to the drawer as paid, is prima facie evidence of the receipt by the bank of the amount evidenced by the check. It is not conclusive, but is open to explanation or denial.

3. Where a depositor draws a check upon a general deposit in a bank, payable to the bank or order — the purpose being, as the depositor claims, to change a general deposit subject to check into a time deposit in the same bank — and the check is returned indorsed "Paid," and the bank seeks to avoid liability by a plea of payment,

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the burden of proof is upon the bank to show that the amount of the check was paid, at the depositor's request, to a third party.

4. Evidence offered as to other transactions held properly rejected, as res inter alios acta.

5. Where the hand to pay is also the hand to receive, payment may be made by a transfer of credits upon the books of a bank.

6. Where a depositor claims that a check for $450, payable to the "First National Bank," was given by her to the same bank for the purpose of changing her general deposit therein into a time deposit, and the only controversy is whether or not a certain "time check," signed by the president of the bank by his individual name alone, was fraudulently delivered to her in exchange for the check, instead of a certificate of deposit, or whether the check was paid, the money loaned by her to the bank president individually, and the time check given by him as evidence of his own debt, it is error to instruct the jury that, before the plaintiff can recover, she must prove "not only that the $450 check was fraudulently procured from her, but that the time checks given her were fraudulent," since the plaintiff does not claim there was fraud in procuring the check.

(Syllabus by the Court.)

Commissioners' opinion. Error to District Court, Richardson county; Babcock, Judge.

Action by Sarah C. Patterson against the First National Bank of Humboldt. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Broady, for the plaintiff in error. F. Martin, E. A. Tucker, and E. Falloon, for defendant in error.

LETTON, C. This action was brought by Sarah E. Paterson, as plaintiff, against the First National Bank of Humboldt, as defendant. The petition alleges that the plaintiff deposited the sum of $450 with the defendant on the 4th day of January, 1902; that the plaintiff requested its repayment about February 1, 1903, which request was refused; and that the defendant is indebted to the plaintiff for money had and received to that amount. The defendant pleaded payment. The plaintiff's reply was a general denial. Afterwards the plaintiff asked leave to file an amended reply, alleging in substance that on the 5th day of January, 1902, plaintiff and defendant agreed that $450 of the money on deposit should be changed from open account to time deposit for one year at 5 per cent.; that the money was transferred, and that defendant pretended to give plaintiff the usual certificate of deposit for that amount, but that the paper was merely signed by F. W. Samuelson, who was the president of the bank; that the transaction was conducted on the part of the defendant by F. W. Samuelson, as president; that she was ignorant of the form of certificate of time deposits, and believed that she was dealing with the bank, and getting a proper certificate, or she would not have given the check for $450; that she did not discover the fraud until about July 1, 1903, when she offered to return the paper, and demanded her money, which was refused. A motion was made by the defendant to strike all that part of the amended reply which in substance set forth fraud upon the part of the defendant, which motion was sustained. The only issue therefore presented by the pleadings was whether or not the $450 had ever been paid. It appears that in

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December, 1901, the plaintiff, Mrs. Patterson, received a draft for $500 from her father's estate, and deposited the same in the bank; that at that time she had some conversation with Mr. Liggett, the cashier of the bank, with reference to the rate of interest the bank would pay upon a time deposit; that he told her that for a six-months' deposit the bank would pay 3 per cent. per annum, and if left for a year, it would pay 4 per cent. per annum. She was dissatisfied with this rate of interest, and did nothing with regard to the matter at that time; saying she would see Mr. Samuelson, president of the bank. Some time between that and the 4th of January, 1902, she came to the bank again, saw Mr. Samuelson, and talked with him. What was said in this conversation is in dispute. An offer to pay 5 per cent. was made to her; she claiming it was made by Samuelson as president of the bank, while defendant claims her transaction was with Samuelson individually. She then returned home, but afterwards, on the 4th day of January, she sent her husband to the bank with a check for $450, payable to the First National Bank. Mr. Patterson saw Mr. Samuelson, handed him the check, and received in return a time check in form as follows:

"F. W. Samuelson, Loans. $450. Humboldt, Neb., Jany 5th 1902. Pay to the order of Mrs. Sarah E. Patterson, $450.00 Four Hundred Fifty & no/100 Dollars. Due in 12 mos at 5% Int. F. W. Samuelson.

"To the First National Bank, Humboldt, Neb."

Her account was at once charged with the amount of the check, and the individual account of Samuelson was credited with it. A year after this time, Mrs. Patterson took this time check to the bank, saw Mr. Samuelson, and received from him $22.50 interest, together with a new time check, in substance in the same form, payable January 5, 1904. In July, 1903, Mr. Samuelson, who was largely engaged in enterprises outside of his banking interests, became financially embarrassed, and was unable to pay his obligations. He sent a letter to each of his creditors, notifying them of this fact, and asking them to meet at the office of Francis Martin, in Falls City, Neb., for the purpose of arranging his affairs so that his assets could be preserved for his creditors. A meeting was held on the 6th day of August, 1903. Mrs. Patterson received one of these letters, and Mr. Patterson attended the meeting — apparently taking no part therein, except to listen to the conversation — and after his return home a demand was made upon the bank for the payment of the $450, which was refused. The question is whether the money was a time deposit, or a loan to Samuelson individually. There is a sharp conflict in the testimony with regard to the transaction at the bank. If the story of Mr. Liggett, the cashier, Butterfield, the assistant cashier, and Mr. Samuelson, is true, it is clear that the transaction was not with the bank, but with Samuelson as an individual, while, if Mrs. Patterson and her husband are to be believed, the giving of the time check by Samuelson was a fraud upon her, and the bank is liable for the amount, as a time deposit.

The first assignment of error is that the court erred in sustaining the motion to strike out part of the plaintiff's reply. The petition was for money had and received. The defendant admitted the receipt of the money, and pleaded payment. The amended reply, in sub-

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stance, admitted that the check for $450 was drawn upon the fund by the plaintiff, as alleged in the answer, but further alleged that the check was given to transfer the $450 from an open deposit account in the defendant's bank to that of a time deposit in the defendant's bank, and that the time deposit had never been paid. The reply contained a number of other allegations, setting forth that the president of the bank, at the time the $450 check was drawn, gave plaintiff a paper signed by him individually, which she believed was a certificate of deposit, and thus perpetrated a fraud upon her. We can see no departures in this reply from the cause of action stated in the petition. The subject-matter of the action is the money which was deposited in the bank, which the plaintiff claims has never been paid to her. When the bank set up payment by a check, this was new matter, and the plaintiff was entitled, in her reply, to allege any facts which might exist, negativing and disproving the payment by check alleged in the answer. The reply is not in any manner inconsistent with the petition. In Hoover v. Missouri Pacific Ry. Co., (Mo.) 16 S. W. 480, the facts were that a copartnership brought an action in the firm name; the answer set forth a release of the obligation; and the reply alleged that the release was a fraudulent contrivance collusively made between one of the partners and the defendant for the purpose of throwing the burden of the firm's indebtedness against the other partner. This was held to be a good plea to the release, and properly set up in the reply. While the amended reply is not a model pleading, by any means, we think that is was error upon the part of the learned trial judge to strike out all its allegations. It is apparent, however, from a consideration of the evidence and the rulings of the court thereupon, that the case was actually tried in the same manner as it would have been if the matter had not been stricken out. The court permitted the fullest investigation into all the facts and circumstances attending the transaction, and allowed the plaintiff to testify as to her understanding of the nature of the dealing between her and Samuelson, and to her reliance upon his official position as president of the bank when she accepted the time check and the renewal thereof. This being the case, the plaintiff was in no wise prejudiced by the order striking out part of the reply. The court properly laid the burden upon the bank to show by a preponderance of the evidence that it had paid her the amount of her deposit.

It is contended that the verdict is against the weight of evidence. Mrs. Patterson's own testimony shows that she had known Mr. Samuelson for 20 years, and that she reposed great confidence in his honesty and integrity. It was left to the jury to say whether or not the plaintiff dealt with Samuelson in his individual capacity, or whether she dealt with him as president of the bank. The evidence might have supported a verdict for either plaintiff or defendant. It is in the determination of such matters as this that the peculiar benefit of the jury system lies. Experience has shown that the accumulated experience and wisdom of 12 unbiased and impartial men, applied to the testimony in such a case as this, is the best touchstone to discover the truth. It would be an invasion of the province of the jury to set aside the verdict as being against the weight of evidence.

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Evidence was offered by the plaintiff to show that one Jacob Auch went to the bank some time in 1897 with money, and asked for a time deposit; that he was given by Mr. Samuelson a paper signed by him in his private capacity, in substance like the paper offered in evidence in this case; that he took it home before he noticed the character of the paper; that after he noticed this he took it back to the bank; and that, Samuelson not being present in the bank, the cashier cashed the paper. This evidence was excluded by the court, upon defendant's objection, as tending to prove no issue in the case. This evidence was apparently offered by the plaintiff either upon the theory that it tended to show a fradulent intent by Samuelson in the transaction with the plaintiff, or that it tended to show that the bank had been in the habit, custom, or course of dealing of issuing paper signed by Mr. Samuelson in his individual capacity, and of paying the same when it was presented. We are clear that it was not admissible under either theory. Evidence of other transactions than that under investigation is sometimes admissible. In cases of fraud, where the knowledge or intent of the person charged is in issue, such evidence, within certain limits, may be adduced. The extent to which this may be done, however, varies widely in different States. In this State, in actions for relief upon the ground of fraudulent representations, it is not necessary to prove scienter or fraudulent intent at the time of the making of such representations, and, therefore, evidence proving that the person to whom fraud has been imputed has dealt fraudulently at other times, and in transactions wholly disconnected with that which is being inquired into, is not competent, since it only tends to throw light upon the intention. Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629. But even where such evidence is admissible, it is usually confined to transactions at or near the time at which the principal event occurred, and which are part of a general plan or scheme to defraud. The evidence tendered was that in 1897, two years before the transaction with Mrs. Patterson, a similar transaction was had with Mr. Auch. This evidence, standing alone, we think, is too far removed from the transactions now being considered to be admissible, even under a more liberal rule than obtained in this State.

The deposition of M. D. Ulmer, offered by the plaintiff and excluded by the court, showed that about the month of January, 1902, he had a time deposit in the bank; that he received a paper signed only by Mr. Samuelson; that the next time he went to town he drew the money out of the bank and was paid either by Samuelson or Liggett — he could not say which. The testimony of the witness was too vague, indefinite, and obscure to be admissible, even if it fell within the rule admitting evidence tending to show a course of dealing by the bank. Tis evidence as to the contents of the paper was clearly incompetent, and was properly rejected.

The court gave the following instruction, which is assigned as error: "The court instructs the jury that it is an elementary principle of law that fraud is never presumed, but must be clearly and distinctly proved by the party alleging it. In the case at bar the plaintiff alleges that the giving of her check for $450 to Samuelson, the charging of her account for a like amount, and the crediting of Samuelson's account for $450, together with the two time checks

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given to her, each for one year, by Samuelson, were fraudulent. The law presumes that this transaction was in all respects fair and honest, and, before the plaintiff would be entitled to recover, she must prove to you, by a preponderance of the evidence, not only that the check drawn on the bank for $450 was fraudulently procured from her, but that the time check for $450 given her by F. W. Samuelson, due in one year, as well as the renewal of the same, due in one year, were both fraudulent." This instruction is clearly erroneous. It tells the jury that, before the plaintiff would be entitled to recover, she must prove by a preponderance of the evidence that the $450 check given by her to the bank was fraudulently procured, and must also prove that the time check for $450, and its renewal, given her by Samuelson, were fraudulent. This is a misstatement of the issue in the case, and places the burden of proof upon the wrong party. Under the evidence of the plaintiff was entitled to recover unless the bank showed by a preponderance of the evidence that she intended by the transaction in question to change her deposit in the bank to a loan to Samuelson individually. The check drawn by her was payable to the bank, and the burden of proof was upon the bank to show that the transaction by which her money was paid to Samuelson, instead of being placed as a time deposit, for which purpose she says the check was given, was had with her knowledge and consent, and the money thus paid at her request; and it was error to state otherwise. Ziegler v. First National Bank, 93 Pa. 393; Steckel v. First Nat. Bank, 93 Pa. 376, 39 Am. Rep. 758; Resh v. First Nat. Bank, 93 Pa. 397.

Complaint is made of instruction No. 2 given on the court's own motion, but the plaintiff's instruction No. 8, requested and given, as well as No. 2 given by the court, are alike subject to criticism as confusing the issue; hence she cannot well complain of No. 2. In a new trial upon the same issues, neither of these instruction should be given in the same form as now.

The court refused to instruct that the check given by plaintiff, payable to the First National Bank, was a receipt. In the absence of other evidence, a paid check drawn to payee or order is prima facie a receipt from the payee to the drawer. It is not conclusive, but is open to explanation or denial. It is a circumstance to be considered, however, and the plaintiff is entitled to the full weight of the presumption. On its face, the check bore out the plaintiff's theory of the case. Unexplained, it was evidence of the payment of $450 from Mrs. Patterson to the First National Bank. The bank was entitled to explain or contradict its purport, but the plaintiff also had the right to ask that the jury be instructed as to the legal presumptions arising from the paper.

We do not agree with plaintiff's contention that the facts, even if found to be as claimed by defendant, do not show payment. If the jury believed the testimony of the bank officers, the debt of the bank was paid as effectually as if Samuelson, in his capacity as president of the bank, had paid the money over the counter to Mrs. Patterson, and she had returned it to him in specie as a loan. It is a familiar rule that, when the hand to pay is also the hand to receive, the law does not require a useless formality, but the payment is made when the accounts are credited and debited, and the transaction closed.

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For the errors set forth, we recommend that the judgment be reversed, and the cause remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

Decision No. 849.

LOWRY NAT. BANK v. FICKETT et al.

50 S. E. 396.

(Supreme Court of Georgia. March 25, 1905.)

EVIDENCE — BOOKS OF BANKRUPT CORPORATION — CONTRACT OF GUARANTY — RENEWAL NOTES — NONSUIT.

1. Books of a corporation which has been adjudciated a bankrupt under the Bankrupt Act of 1898, produced in court by the trustee and appearing upon their face to be the books of such corporation, and to be free from suspicion of fraud, are prima facie identified as the books of the corporation, and are admissible in evidence in favor of one seeking to establish a right against it.

2. The plaintiff, having elected in its petition to treat the transaction on account of which it sought to hold the defendants liable as a renewal of existing indebtedness to the plaintiff, cannot recover if it appears that such transaction was not in law a renewal.

3. The term "renewal," as applied to promissory notes, means "the re-establishment of the particular contract for another period of time."

4. An undertaking to be liable only in the event that another person fails to pay cannot, in law, be a renewal of an obligation to pay absolutely and at all events, without reference to the liability of another.

5. Whether the case be considered in the light of the evidence admitted or in the light of that admitted and rejected, the allegations of the petition were not supported, and there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid Judge.

Action by the Lowry National Bank against R. N. Fickett and others. Judgment for defendants, and plaintiff brings error. Affrmed.

The Lowry National Bank sued Fickett and others as guarantors to recover $1,333.34 principal, besides interest. The contract of guaranty declared on recited that the defendants were stockholders in the R. N. Fickett Paper Company, a corporation; that that company was indebted to the plaintiff in a large sum, evidenced by its promissory notes; that the company might desire to increase its indebtedness; and that the plaintiff was unwilling to extend further credit, unless the defendant would guaranty the payment of the present indebtedness and the repayment of all advances made thereafter. The contract then provided that the defendants would "guaranty the said bank the repayment in full in accordance with

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the tenor and evidence of the notes now in existence or any renewal of same and notes or evidences of indebtedness as may be taken to represent any and all advances which the said Lowry National Bank shall hereafter make to the said R. N. Fickett Paper Company from time to time as long as this agreement shall be in force, including all renewals or extensions which may be made for any advance so made," and that the bank might "grant any extension for all renewals for advances" without notice to or the consent of the defendants.

The corporate name of the paper company was afterwards changed to the Georgia Paper Company. After the execution of the contract above referred to, the bank discounted a non-negotiable note, payable to the Georgia Paper Company, for $1,333.34, principal. This note was indorsed: "Georgia Paper Company, per Jno. B. Richards, Jr." The petition alleged that this note and two others of like amount were "taken in renewal of the four thousand dollars ($4,000) balance of indebtedness due by said paper company to petitioner." There was evidence from which it might have been inferred either that the note was taken in settlement of an existing indebtedness, or, possibly, that the amount of the note was paid to the company as an advance; and one of the officers of the bank testified that the note was given to it "in renewal" of indebtedness then existing. The court granted a nonsuit, and the plaintiff excepted, assigning error upon the order granting the nonsuit, upon the rejection of the note above referred to, and upon the rejection of certain books which it was claimed were the books of the Georgia Paper Company, in the custody of the trustee in bankruptcy for that corporation.

Anderson, Anderson & Thomas, for plaintiff in error. Candler & Thomson, W. D. Thomson, Felder & Rountree, and J. C. Tapp, for defendants in error.

COBB, J. 1. As a general rule, the books of a corporation cannot be received to establish a right in the corporation against third persons, but they may be used for the purpose of showing the regularity and legality of corporate proceedings, and thereby establish a right against one of the members, and of course may be used to establish a right against the corporation itself. Hall v. Carey, 5 Ga. 243; 5 Encyc. Ev. 609, 610. Such books being required by law to be kept, and the entries therein being of public interest, and being made under the sanction of a legal duty, are recognized by law as evidence in certain cases. Their admission in evidence is, however, dependent upon their being properly identified as the books of the corporation. They may be so identified in various ways. The books do not prove themselves, but when they are produced by an officer of the corporation, who is shown to be the proper custodian of the books, and who testifies that they are the original books, and the court by inspection becomes satisfied that there is nothing in the books to raise a suspicion of fraud, the identification is sufficient to admit them in evidence. Mere proof that the entries therein are in the handwriting of an officer of the corporation does not seem to be sufficient identification, unless it appears that it was the duty of such officer to make the entries. If the books are shown to come from the proper custody — that is, the custody of the officer whose duty it is to keep and preserve them, or the custody of any person upon whom such duty

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is imposed, even temporarily by the corporation — and the books appear to be the corporate books, and free from suspicion of fraud, this is sufficient to show prima facie that they are the books of the corporation. In each case the question to be determined is whether the books are the books of the corporation. Direct proof by the official custodian to this effect, or proof that they came from the proper custody, and an inspection by the judge sufficient to satisfy him that they appear to be corporate books and free from suspicion of fraud, is all that could be reasonably required to make a prima facie case of identification. See Merchants' Bank v. Rawls, 7 Ga. 198, 50 Am. Dec. 394; Columbus v. Ogletree, 102 Ga. 294, 29 S. E. 749, (7); 3 Encyc. Ev. 610; 9 Am. & Eng. Encyc of Law (2d Ed.) 897. When a corporation has been adjudicated a bankrupt, and a trustee appointed under the provisions of the Bankrupt Law, he is not only entitled to the possession of the books of the corporation, but it is his duty to take them into his possession. The trustee is therefore the lawful and proper custodian of the corporate books of a bankrupt corporation; and when such trustee produces in court the books which came into his possession as the books of the corporation the books come from the proper custody, and if they appear from inspection to be the books of such corporation and to be free from suspicion of fraud, they are admissible, and it is immaterial whether it be directly shown that the books were received by the trustee from the proper custodian of the corporation. After being admitted, if it should be shown that they are in reality not the books of the corporation, of course the books would avail nothing. But coming from the custody of the trustee, with all of the appearances of genuineness, renders them admissible.

2–5. The guaranty covered renewals of the obligations of the Georgia Paper Company and advances that might be made by the bank to it. In the present case the plaintiff, in its petition, has seen fit to plant its case upon the allegation that the nonnegotiable note was a renewal of an existing obligation of the paper company, and does not seek to hold that corporation liable upon the theory that any money was advanced to it upon the faith of the note. Neither does it seek to hold the corporation liable upon the original indebtedness. It is therefore unnecessary to determine whether an advance has been shown, or whether the failure to realize upon the nonnegotiable note reinstates the indebtedness of the bank to that amount at the date the nonnegotiable note was accepted. The plaintiff has laid its case upon an allegation of renewal, and upon that it must stand. A renewal, in its broadest sense, means that which is made anew or re-established. In law it has been defined to be "an obligation on which time of payment is extended." English's Law Dict. It has also been said that it is not a word of art, and has no legal or technical signification; has in one instance been defined to be the substitution of a new right or obligation for another of the same nature, and in another instance as a change of something old to something new. 24 Am. & Eng. Encyc. of Law (2d Ed.) 465. As applied to promissory notes, the term "renewal" has been held to mean "the re-establishment of the particular contract for another period of time." Kedey v. Petty, 153 Ind. 179, 54 N. E. 798. It has also been held that there might be such a thing as a renewal where the

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party was different, provided the obligation was of the same nature; as in a case where a widow gave her note in lieu of the note of her deceased husband for the same amount. Sponhaur v. Malloy, 21 Ind. App. 287, 52 N. E. 245. It has also been said that whether a new note is a renewal of another note depends upon the intention of the parties. Flanagin v. Hambleton, 54 Md. 227. Not only the definition of renewal, but also its application in the cases cited and in similar cases, carries the idea that an obligation is renewed when the same obligation is carried forward by the new paper or undertaking, whatever it may be. There may be a change of parties. There may be an increase of security, but there is no renewal unless the obligation is the same. What makes the renewal is an extension of time in which to discharge the obligation. If the obligation changes, there can be no renewal, because there can be no such thing as the re-establishment of an old obligation by the creation of a new obligation different in character. At the time the nonnegotiable note was taken by the bank, the Georgia Paper Company was indebted to it in a sum largely in excess of the amount of that note. The note did not represent any part of this obligation at all. It was the obligation of other parties to the Georgia Paper Company, a new and distinct obligation; while the indorsement of that company (treating the paper, for the purposes of this argument, as if it had been properly indorsed) was an obligation of one liable only in the event the makers of the note, the primary debtors, failed to pay. It was a new obligation undertaken by it at the time the note was indorsed and delivered. It was in no sense a re-establishment or making anew or renewal of its original obligation to the bank. An undertaking to be liable only in the event that another person cannot pay cannot in law be a renewal of an obligation to pay absolutely and at all events, without reference to the liability of another. The transaction involved in the present case did not re-establish the old contract, but it brought into existence an entirely new contract, in which the terms of the paper company's liability were entirely changed, being in one instance that of a primary debtor and in the other that of a debtor only secondarily liable. It follows that, even if the books of the Georgia Paper Company had been admitted in evidence, and had shown that the indorsement was that of the Georgia Paper Company, and the note itself had been admitted in evidence, the plaintiff would still have failed to support the allegations of its petition. The judgment of nonsuit will therefore not be reversed.

Judgment affirmed. All the justices concur.

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Decision No. 850.

WESTERN GERMAN BANK v. NORVELL.

134 Fed. 724.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1905.)

No. 1,345.

BANKS — COLLECTION OF DRAFT WHEN INSOLVENT — RECOVERY OF PROCEEDS FROM RECEIVER — EQUITY PLEADING — ALLEGATION OF INSOLVENCY — SUFFICIENCY.

1. A bank which, although known by its officers to be insolvent, received a draft for collection without disclosing its insolvency to the owner, collected the same and mingled the proceeds with its own funds, remitting to the owner its own draft, which was not received until after the bank was placed in the hands of a receiver, was guilty of fraud, and the proceeds of the draft, when collected, remained the property of the sender, and may be recovered from the receiver, where they can be traced into his hands; and such right is not affected by the fact that the sender gave directions that the remittance should be made in New York exchange, which was done; the exchange being protested and never paid.

2. When a bank, known by its officers to be insolvent, collects money for a customer and mingles the same with its own funds, which to an amount larger than the sum so received go into the hands of its receiver, it is not essential to the right of the customer to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount so collected.

3. Allegations in a bill of the insolvency of a bank at the time it received and collected a draft held sufficient.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This is a suit in equity by the Western German Bank, a corporation under the laws of the State of Ohio, against the First National Bank of Florida, a corporation under the laws of the United States, having its place of business in Jacksonville, Fla., and Joseph W. Norvell, receiver of the latter bank. The demurrer having been sustained to the original bill, the complainant amended the bill, and a demurrer was interposed to the amended bill, which the court sustained. The complainant having declined to amend further, the bill was dismissed. The complainant thereupon appealed to this court, and assigns as error the decrees of the court sustaining the demurrers and dismissing the bill.

To make plain the questions involved, it is necessary to state the material averments of the bill and the grounds of demurrer. It is alleged that the complainant, the Western German Bank, received as a deposit from a customer a draft, signed F. T. Watson, in favor of Edward Holder, for the sum of $4,000, drawn on the Commercial Bank of Jacksonville, Fla. The complainant, on the 10th of March, 1903, forwarded the draft to the First National Bank of Florida for collection by letter, saying: "Please remit New York exchange." The First National Bank of Florida presented the draft to the Commercial bank for payment, and the same was promptly paid. The

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First National Bank of Florida then sent by mail to the complainant bank its draft, dated March 13, 1903, for the sum of $3,995, on the Chemical National Bank of New York, payable to the order of the complainant, which draft was received by the complainant bank on the 16th of March, 1903, after the failure of the First National Bank of Florida, and after the defendant Norvell had been appointed receiver of the First National Bank of Florida by the Comptroller of the Currency of the United States. The complainant presented this draft to the Chemical National Bank for payment on the 17th of March, 1903, and payment was refused, because of the failure of the First National Bank of Florida, and the draft was duly protested. The First National Bank of Florida was closed on March 14, 1903, and the receiver took possession on that date, which was before the complainant had received the draft of the Chemical National Bank. The receiver immediately instructed the Chemical National Bank not to pay the draft and other drafts of like character, and the draft has never been paid.

The following allegation is made in reference to the insolvency of the First National Bank of Florida and the title to the money sued for: "And that on the said date above mentioned, on which your orator sent the draft for collection to the said First National Bank of Florida, and at the time that the said bank collected the same, the said bank was insolvent, and that it was well known to the said bank and to its said officers that it was insolvent, and, well knowing the said facts, the said bank and the said officers neglected to disclose the same, or to inform your orator of the same, and by continuing as a bank, with open doors and otherwise, the said bank represented to your orator and all other persons dealing with it that the said bank was solvent, and that on the faith of such representations your orator believed the said bank to be solvent, and had no knowledge or suspicion or means of knowing that it was insolvent, or in danger of becoming so, and that, acting upon said representations and relying on your orator's belief in the said solvency of the said bank as so represented, your orator so delivered the said draft to the said First National Bank of Florida, and it received the same for collection for your orator as aforesaid. And your orator further alleges that it is advised, and so charges, that by reason of the matters and premises alleged in your orator's original bill, and hereinabove alleged, the said draft, when delivered as aforesaid by the said First National Bank of Florida, did not become the property of the said bank, and that your orator did not part with the title and interest of the said draft, and that it remained the property of your orator, and that the proceeds for collection of the said draft, when so collected as aforesaid, never did become the property of the said bank, or defendant as receiver thereof, but remained always and still are the property of your orator. . . ." It is then alleged that the sum of $3,995, collected by the defendant bank from the Commercial Bank on the draft forwarded to it by the complainant, is a trust fund, and that the same was held in trust by the defendant bank, and that the receiver now holds possession of the same as part of the assets of the First National Bank of Florida, and that the general creditors of the First National Bank of Florida have no interest in said sum, and that the same should be paid by the receiver to the complainant. The bill

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concludes with a prayer that the receiver may be decreed to pay the said sum, with interest, to the complainant as a trust fund, and for general relief.

A demurrer was filed by the defendant, and among the grounds of demurrer alleged are the following: "(1) That it appears by the said amended bill that the First National Bank of Florida was given specific directions regarding the collection and remittance of the proceeds of said draft, and that the said First National Bank of Florida complied fully with such instructions. (2) It appears by said bill that the proceeds of said collection were mingled with the funds of said First National Bank of Florida, and were not kept separate and distinct, and were not held in trust for the benefit of the plaintiff, and were not impressed with any trust character whatever. (3) That the amended bill shows that said First National Bank of Florida was regularly doing business when said draft was received and when the same was collected, and continued to do business thereafter, to wit, to the end of March 14, 1903, and to receive and pay out moneys in due course, and there is no allegation or showing that said bank was not in position to remit in cash or other regular way, and the presumption necessarily follows that it would have done so, rather than close its doors, but for the positive instructions of complainant as to the manner of remitting, and the facts to show fraud are not sufficiently set forth."

C. M. Cooper and J. C. Cooper, for appellant. Duncan U. Flecher, for appellee.

Before PARDEE, M'CORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. It is alleged in the bill that the defendant bank was insolvent when it received the draft for collection, and when it collected it, and when it remitted the New York exchange. The New York exchange is dated March 13, 1903, and on the next day the defendant bank and its assets were in the hands of a receiver appointed by the Comptroller. Its insolvent condition was known to the officers of the bank, and they wrongfully neglected to disclose the fact to the complainant. On the facts averred in the bill, it was a fraud on the part of the defendant bank for it to receive the draft for collection, intending to collect it and mingle the proceeds of the collection with its general assets. The draft, therefore, and the proceeds of its collection, remained the property of the complainant bank. Richardson v. New Orleans Deb. Red. Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67. The fact that the complainant gave directions to the defendant to remit the proceeds of the collection in New York exchange does not alter the case. These directions were given, because the complainant bank was led to believe that the defendant bank was solvent, and was doing businss honestly and in good faith. It was not supposed that the defendant bank, when its officers knew it to be insolvent, would receive drafts for collection, collect them, and mingle the proceeds with its general assets, so as to knowingly subject the owners of the drafts to loss. It appears from the bill that, with knowledge of its insolvency, it received and collected this draft, mingled the proceeds

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of its collection with its other funds, and followed the complainant's direction as to remitting in New York exchange; but the defendant bank was placed in the hands of a receiver before the complainant received the exchange, and the exchange was protested. As the exchange was not paid to the complainant, and did not diminish the funds in the bank, or create and liability against it affecting the general creditors, it does not have any effect upon the equitable rights of the complainant. Richardson v. New Orleans Coffee Company, 102 Fed. 785, 43 C. C. A. 583.

2. The fact that the proceeds of the draft, when collected, were mingled with the other funds in the bank, does not defeat the complainant's right of recovery. When a bank receives money, it being known to its officers to be insolvent, and mingles the money with its own funds, which, to an amount larger than the sum so received from its client, goes into the hands of its receiver, it is not essential to the right of its client to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount which the bank received of its client. Richardson v. New Orleans Deb. Red. Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67, and cases there cited.

3. In support of the third ground of demurrer, it is argued that the bill does not allege that the defendant bank was "hopelessly" insolvent. It is true that the bill does not aver in plain words the hopeless insolvency of the defendant bank. It is alleged, however, that it was insolvent, and that its insolvency was known to its officers, and that they wrongfully neglected to disclose its insolvency to the complainant, and that it received the draft for collection, collected it, and, while so insolvent, sent the New York exchange, which was dated March 13, 1903, and that on March 14, 1903, the defendant bank was placed in the hands of a receiver. These averments of the insolvency of the bank, we think, are sufficient. See St. Louis, etc., R'y Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, reversing the decree of the Circuit Court, 27 Fed. 243.

The decree of the Circuit Court, dismissing the bill, is reversed, and the case remanded, with instructions to overrule the demurrer.

Decision No. 851.

In re KLENKE'S ESTATE. (No. 1.)

80 Atl. 166.

(Supreme Court of Pennsylvania. January 30, 1905.)

GIFT — PRESUMPTION — DEPOSIT IN BANK — RIGHTS OF SURVIVOR — EFFECT OF WILL.

1. Where a husband deposits with his wife's earnings certain money of his own in a bank in his wife's name, and the wife subsequently makes additional deposits, and the husband never claims the money, the presumption is that it was a gift to the wife.

2. Where a deposit in a bank stands in the joint names of a husband and his wife, they hold by the entireties, and, on the death of either, the survivor takes the whole.

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3. Where a deposit stands in the name of the wife, creating the presumption that it was a gift to her, the fact that, on the death of the husband, he leaves a will containing a large money legacy, without leaving an estate to pay it, will not defeat the right of the wife to the money deposited.

Appeal from Orphans' Court, Allegheny county.

In the matter of the estate of Henry Klenke, deceased. From a decree dismissing exceptions to adjudication, Mary Merritt appeals. Affirmed.

Henry Klenke died on October 8, 1902, leaving a will by which he gave to Henry Clatty $1,500. He specifically devised certain stock of corporations, but there was no money to pay the legacy to Clatty. At the time of decedent's death there was deposited in the Dollar Savings Bank $500 in the name of decedent's wife, Catherine Klenke. There was also a balance in the names of Kate or Henry Klenke in the First National Bank of Birmingham of $725, which was paid after decedent's death to the widow; in the German Savings & Deposit Bank, in the names of Henry and Kate Klenke, $1,890.25; and in the Iron & Glass Dollar Savings Bank, in the names of Henry and Catherine Klenke, $2,600. At the time the account was opened, they signed the following agreement: "The undersigned, who have made deposits in their joint names in the Iron & Glass Dollar Savings Bank, hereby direct the bank to honor and pay all checks and deposits that we or either of us may draw upon the bank during the continuance of said account; and also authorize the bank to pay out to both or either of us any and all moneys to our joint credit upon both or either of us receipting for the same in our joint or individual names. This authority to continue to the survivor in case of the death of either."

The following is the opinion of the court below (OVER, J.):

"Mrs Klenke had no separate estate when she married the decedent, nor did she acquire any after her marriage; and although a part of the money deposited in the banks was, no doubt, the result of her labor jointly with her husband, yet, as he was entitled to her earnings, all the money deposited was his. If, then, the decedent did not intend to make a gift of the money deposited in the name of his wife in the Dollar Savings Bank to her, she must account for it as assets of the estate. His first intention was to have it deposited in his own name, but be knew that this was not done, made no objections, and thereby ratified and assented to the act of his agent in making the deposit in Mrs. Klenke's name; and, as he never asserted any rights to this money, and she subsequently made additional deposits, the presumption is that he intended it as a gift to her.

"As to the deposit in the German Savings & Deposit Bank in the names of Henry and Kate Klenke, it seems, under the authorities, that they held it by entirety, and that, upon the death of her husband, Mrs. Klenke took the whole fund. In Donnelly's Estate, 7 Pa. Co. Ct. R. 196, it was held that: 'Where a husband and wife made a deposit in a savings fund in their joint names, they hold by entireties, and not by moieties, and, upon the death of either, the survivor takes the whole.' In Parry's Estate, 188 Pa. 33, 41 Atl. 448, 49 L. R. A. 444, 68 Am. St. Rep. 847, where a letter of credit was purchased by

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the husband with his own money, made payable to himself and his wife, and intended to be used in a journey abroad, and the husband died before the letter was exhausted, it was held that the wife was entitled by survivorship to the balance ($12,825.34) due upon it. A tenancy by entireties arises whenever an estate vests in two persons who are at the time when the estate vests husband and wife. It may exist in personalty as well as real property; in choses in actions as well as choses in possession. Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64. A deposit in the names of husband and wife, by reason of their unity, goes to the survivor. 2 Morse on Banking, § 604b.

"It is suggested, however, that as the deposits in the First National Bank of Birmingham and the Iron & Glass Dollar Savings Bank are in the names of Henry or Catherine Klenke, they are not held as entireties. We think, however, the legal effect is the same, as the deposits are both joint and several — in favor of both as well as of each separately. There can be no question that either could check on the account in the lifetime of both, and the right of the survivor would not be defeated by the death of the other. And as the agreement signed by the parties when the deposit was made in the Iron & Glass Dollar Savings Bank expressly authorized the survivor to withdraw the deposit, there can be no question as to Mrs. Klenke's title to that deposit. There is not sufficient cash to pay Henry Clatty his legacy of $1,500, and as the testator, no doubt, thought there would be when he made his will, in 1897, it is argued this shows he did not intend that his wife should take the money deposited in their joint names. But even if this were his intention then, it could not change the legal effect of what had been previously done.

"It is argued by exceptant that the deposits were made in the manner they were as a matter of convenience, because the decedent seldom came to the city after his stroke of paralysis in 1893, and that his wife merely acted as his agent in the matter; but the force of this argument is much weakened by the fact that accounts in the German Savings & Deposit Bank and the First National Bank of Birmingham were opened in their joint names long prior to his incapacity — in the former in 1879, and in the latter in 1887. It is true, the account in the Iron & Glass Dollar Savings Bank was opened in 1893, but as to that deposit the written agreement signed by the decedent fixes their rights.

"As we think the title to this deposit is in Mrs. Klenke, the exceptions must be dismissed."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, and THOMPSON, JJ.

Noah W. Shafer and A. W. Diff, for appellant. William E. Minor and Jesse H. Wise, for appellee.

PER CURIAM. This judgment is affirmed on that portion of the opinion of the auditing judge below which relates to the appellant's claim.

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Decision No. 852.

CUDAHY PACKING CO. v. STATE NAT. BANK OF ST. LOUIS, MO.

134 Fed. 538.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1904.)

No. 2,057.

MORTGAGE — UNSIGNED MEMORANDUM ON BACK — NEGOTIABLE INSTRUMENTS — ATTORNEY'S FEES — CERTAINTY REQUIRED IN NEGOTIABLE PAPER — MORTGAGE — NEGOTIABLE INSTRUMENTS — SECURING NON-NEGOTIABLE DEBT.

1. An unsigned contract printed on the back of a mortgage, and not referred to therein, cannot in any way qualify the terms of the mortgage.

2. A provision for the payment of attorney's fees in case a note is not paid at maturity does not destroy the negotiability of a note otherwise negotiable.

3. The certainty required in commercial paper is commercial certainty, not mathematical. The courts ought not to hold any provision fatal to the negotiability of such paper which by the general usage of the business world does not have that effect.

4. A mortgage securing a negotiable note so far partakes of its character as to pass free from equities between the original parties to a bona fide indorsee of the note.

5. Quære: Whether the mortgagor of a mortgage securing a non-negotiable debt can, after an assignment of the mortgage, by any dealings with the mortgagee short of actual payment, though had in ignorance of the assignment, raise "an equity" as against the assignee.

(Syllabus by the Court.)

In error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 126 Fed. 543.

Edwin A. Krauthoff (Thomas Creagh, J. V. C. Karnes, and Alexander New, on the brief), for plaintiff in error. C. H. Kohler (M. A. Fyke, E. L. Snider, and J. H. Richardson, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. June 5, 1901, Humphrey & Fleming executed and delivered to Tamblyn & Tamblyn, live stock agents and brokers, of Kansas City, Mo., their promissory note for $7,000, payable December 1st of that year, with interest at eight per cent. To secure the payment of this note the makers executed a chattel mortgage of even date upon 300 head of four and five year old steers, which mortgage was duly filed in the proper office June 8th following. June 10th Tamblyn & Tamblyn, for value, indorsed and transferred the note and assigned the mortgage to the defendant in error (the plaintiff below), the State National Bank of St. Louis, Mo. The assignment was not recorded, and was not required to be by law, and no actual notice of the transfer was given to the mortgagors. Before

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the maturity of the note, namely, August 12, 1901, the mortgagors, without the knowledge or consent of the bank, shipped to the mortgagees, Tamblyn & Tamblyn, seventy-eight head of the cattle covered by the mortgage, who sold the same to the plaintiff in error (the defendant below), the Cudahy Packing Company, and received in payment therefor $2,331.11, which they applied in partial extinction of another indebtedness due to them by the mortgagors. This action is brought by the bank against Cudahy & Company for the conversion of the seventy-eight head of cattle. By stipulation it was tried to the court without a jury, and resulted in a general finding and judgment in favor of the plaintiff for $2,331.11.

Two errors of law are assigned, which it is claimed require a reversal of this judgment: (1) It is contended that the mortgage authorize the sale and the payment to the mortgagees, notwithstanding its assignment. (2) It is urged that the note was not negotiable, within the law merchant, and that the sale having been made by the mortgagors, through the original mortgagees, in ignorance of the assignment of the mortgage, the assignee cannot maintain this action.

The first contention is based upon the following language, which is printed on the back of the mortgage:

"All of said cattle, as herein mentioned, are to be held in said pasture and fed by the mortgagor during the term of this mortgage, and at least three days before the maturity of the note herein mentioned they shall be shipped and consigned to Tamblyn & Tamblyn at the stockyards at Kansas City, Missouri, and when sold by them the proceeds thereof shall be applied, first, in payment of the usual commissions to said Tamblyn & Tamblyn for selling the same and the balance, or so much thereof as may be necessary shall be applied to the indebtedness hereinbefore mentioned.

"If said cattle or any part thereof be consigned to or sold by any person except Tamblyn & Tamblyn, then said mortgagee shall be paid the proceeds of said sale and a commission of fifty cents per head on all the above described cattle so sold."

This instrument was not signed by the mortgagors nor is it in any way referred to in the mortgage. It could not, therefore, be treated as a binding contract between the mortgagor and mortgagee. It is a mere blank paper, with no force whatever. The fact that it is printed upon the back of the mortgage, but not executed, might properly indicate that the mortgagors intentionally refused to be bound by its terms. A more natural interpretation would be that the mortgage was executed by the mortgagors without any knowledge whatever of this printed indorsement on the back of the instrument, and it would be a wholly unjustified interpretation to hold that they were bound by terms to which they never subscribed. For these reasons, we consider that this indorsement was not binding even as between the original parties. Much less could it be held to be binding upon an assignee of the mortgage, or to qualify in any way his rights under the mortgage itself. But even if the instrument were binding as between the original parties, a fair construction of its language would limit it to the time during which the mortgagees continued to be the owners of the mortgage. Its primary object was to secure to the commission merchants their commissions on the sale of the cattle. It was never intended to destroy the mortgage itself. This, however, would be the result of a construction that would leave this indorsement binding notwithstanding a transfer of the mortgage. The as-

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signee would really have no security whatever, under such an arrangement. He would be dependent upon the fidelity of the commission merchants. If the contention of counsel for the plaintiff in error is sound, the mortgagor and mortgagee had the right to sell and dispose of the mortgaged property, and whether the assignee of the mortgage would ever derive any benefit from it would be entirely dependent upon the fidelity of Tamblyn & Tamblyn. Instead of having a lien upon the property, the assignee of the mortgage would simply have the personal obligation of the original mortgagees. Neither the instrument nor the nature of the transaction justifies any such interpretation.

The note was payable to the order of Tamblyn & Tamblyn, but it contained the following provision: "And in case legal proceedings are instituted to enforce the collection of this note, we agree to pay ten per cent. of the entire amount due as attorney's fees." It is contended that this language destroyed the negotiability of the note, or, more accurately, made the instrument not a promissory note at all, but a mere chose in action. This is the holding of the Supreme Court of Missouri — the State in which this action arose. First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Samstag v. Conley, 64 Mo. 476; First National Bank v. Marlow, 71 Mo. 618; McCoy v. Green, 83 Mo. 626; Creasy v. Gray, 88 Mo. App. 454. The question, however, is one of general commercial law. The federal courts, in respect of it, are required to exercise an independent judgment. Such has been their uniform practice in regard to all questions affecting negotiable instruments. Swift v. Tyson, 16 Pet. 1, 10 L. Ed, 865. The case of Mercer County v. Hackett, 1 Wall. 83, 17 L. Ed. 548, presented a question very similar to the one now under consideration. The instrument in that case was executed by a corporation, and bore the corporate seal. The case arose in the State of Pennsylvania. The courts of that State had uniformly decided that the presence of a corporate seal destroyed the negotiability of such instruments. The Supreme Court, however, refused to follow this holding, the court saying:

"If this decision of the learned court was founded on the construction of the Constitution of statute law of the State, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow; but we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment."

There is a statute in the State of Missouri which has some bearing on the question. It reads as follows:

"Every promissory note for the payment of money to the payee therein named or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manuner as inland bills of exchange."

The decisions of the Supreme Court of Missouri above referred to are not based upon this statute, but rest upon general considerations of the common law, as defining the essential elements of negotiable paper. The statute is affirmative in its language. It declares what elements must be found in a promissory note, but it does not declare what effect the presence of the incidental provisions, such as the pay-

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ment of attorney's fees, shall have. It is conceded that all the elements mentioned in the statute are present in the note in qustion. It would not be a proper construction of the language which the Legislature has used to hold that every instrument which contained provisions other than those mentioned in the statute should be non-negotiable. It is not correct to say that promissory notes were not negotiable in England at common law. The statute of Anne is declaratory simply of the common law. It has never been construed by the English courts as creating any new rule. It was enacted to remove the doubts created by the decisions of Chief Justice Holt. This whole subject is discussed with remarkable clearness and learning in the case of Dunlop v. Silver, a Circuit Court decision, reported in 1 Cranch, 367, Fed Cas. No. 4,169. See, also, Goodwin v. Robarts, L. R. 10 Ex. 337. The statute of Missouri above quoted seems to have been enacted for the same general purpose as the statute of Anne, namely, to remove any doubt as to the negotiability of promissory notes. We feel at liberty, therefore, to deal with this question as a question of general law, free from statutory restrictions of the State in which the case arose.

Treating it thus, the question at the present time presents little difficulty. There has been considerable conflict in the courts of the different States on the subject, but the clear weight of authority at the present time sustains the doctrine that the incorporation of a provision for the payment of attorney's fees in negotiable paper does not destroy its commercial character. The following States have so held: Alabama (Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 12 L. R. A. 240, 24 Am. St. Rep. 832); Arkansas (Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38); Georgia (Stapleton v. Louisville Banking Company, 95 Ga. 802, 23 S. E. 81); Illinois (Dorsey v. Wolfe, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 106); Inliana (Stoneman v. Pyle, 35 Ind. 104, 9 Am. Rep. 637); Iowa (Shenandoah National Bank v. Marsh, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381); Kansas (Seaton v. Scoville, 18 Kan. 433, 21 Am. Rep, 212, note, 26 Am. Rep. 779); Kentucky (Gaar v. Louisville Banking Company, 11 Bush, 180, 21 Am. Rep. 209); Louisiana (Dietrich v. Bayhi, 23 La. Ann. 767); Mississippi (Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 South 394); Nebraska (Heard v. Bank, 8 Neb. 10, 30 Am. Rep. 811); Oregon (Benn v. Kutzschan, 24 Or. 28, 32 Pac. 763); Tennessee (Oppenheimer v. Farmers' & Merchants' Bank, 36 S. W. 705); Texas (Hamilton Gin & Mill Co. v. Sinker, 74 Tex. 51, 11 S. W. 1056); Washington (Colfax Second National Bank v. Anglin, 6 Wash. 403, 33 Pac. 1056). No decesion has been rendered by the Supreme Court of the United States on this subject, but the question has been frequently before the Circuit Courts, and the negotiablity of the instruments sustained. Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Bank of British North America v. Ellis (C. C.), 2 Fed. 44. The same doctrine has been approved by the Circuit Court of Appeals of the Sixth Circuit. Farmers' National Bank v. Sutton Manufacturing Co., 6 U. S. App. 312, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595.

The following State decisions have held that such a stipulation renders the note non-negotiable: California (Chase v. Whitmore, 68 Cal. 545, 9 Pac. 942); Montana (Stadler v. First Nat. Bank, 22 Mont.

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190, 50 Pac. 111, 74 Am. St. Rep. 582; North Dakota (Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473). These decisions all rest upon a statute — being the same statute that was construed by this court in Second National Bank v. Basuier, 65 Fed. 58, 12 C. C. A. 517. Maryland (Maryland Fertilizing Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750); Michigan (Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341); Minnesota (Jones v. Radatz, 27 Minn. 240, 6 N. W. 800); Missouri (Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430, and other cases above cited); North Carolina (New Windsor First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604); Pennsylvania (Woods v. North, 84 Pa. 407, 24 Am. Rep. 201); South Carolina (Carroll Co. Savings Bank v. Strother, 28 S. C. 505, 6 S. E. 313); Wisconsin (W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100). The deceisions which sustain the negotiability of notes containing a provision for the payment of attorney's fees have, in the main, been justified upon the ground that prior to the maturity of the note, and while it was current in the business world, the provision was inoperative; tat it did not take effect until after the dishonor of the note, so that in any case the transferee would take subject to all the defenses existing between the original parties. This reasoning cannot be applied to provisions for the payment of exchange, and upon that ground notes containing such provisions have by many courts been held to be non-negotiable. Hughitt v. Johnson (C. C.), 28 Fed. 865.

We believe that the whole subject might well be rested on safer and more fundamental grounds. Judge Mitchell, in writing the opinion of the Supreme Court of Minnesota in the case of Hastings v. Thompson, 55 N. W. 968, 21 L. R. A. 178, 40 Am. St. Rep. 315, indicated by the correct doctrine when he said:

"The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it without investigating facts not within the general knowledge of every one and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument."

The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts. The fine phrase of Chief Justice Gibson in the case of overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645, that a negotiable instrument "is a courier without luggage," has been made to do much service in the discussion of this subject. The real question, however, is who shall determine what constitutes "luggage" — the business world, or the judge in his library? In no branch of the law has the sound judgment of the English courts shown itself more conspicuously than in the treatment of this subject. Whenever a new instrument, varying in some of its features from the ordinary promissory note or bill of exchange, has been presented for admission to the class of commercial paper, those courts have called for their guidance men from the actual business world, best qualified to speak on the subject. If, from their evidence, it has appeared

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that the instrument in question was by the general custom and practice of the business world treated as a negotiable instrument, the court has given effect to that usage, and adjudged the instrument to be subject to the same law as other negotiable paper. This was true not only in the early and formative periods of the commercial law, coming down to the age of Lord Mansfield, but has been followed with the same freedom from time to time down to the current year. Those courts have never forsaken the business world to pursue a definition. A few of the many cases which might be cited will illustrate this practice. In 1824, in the case of Gorgier v. Mieville, 3 Barnewall & Cresswell, 45, the question was first raised whether bonds issued by a government should be treated as negotiable instruments. The court called for its instruction as witnesses the principal bankers of London, and being advised by them that such instruments were generally treated by the commercial world as negotiable, the court assigned that character to them, and decided the case accordingly. The opinion of Chief Justice Cockburn in Goodwin v. Robarts, L. R. 10 Ex. 337, is not only a striking illustration of the practice which we are considering, but contains a masterly exposition of the whole subject. The instrument there involved was entirely outside of the class of promissory notes or bills of exchange. It was scrip issued by the banking house of Rothschild in London, entitling the holder, upon the making of certain payments, to the delivery of bonds thereafter to be issued by the Russian government. It will therefore be noticed that the instruments did not even provide for the payment of money at all, but simply for the delivery of bonds. By the testimony of bankers and others qualified to speak on the subject, it appeared that for some thirty years such scrip had been treated by the business world as negotiable, passing from hand to hand free of defenses. It was contended, however, that such evidence was not admissible to determine whether an instrument was negotiable, but that it was for the court to declare the law from its general knowledge of the customs of the business world, and the qualities essential to such instruments under previous decisions. Speaking to this question, the Chief Justice said:

"The substance of Mr. Benjamin's argument is that because the scrip does not correspond with any of the forms of securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach. Having given the fullest consideration to this argument, we are of the opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed, stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of in reference to bills of exchange and other negotiable securities, though forming part of the general body lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the

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different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience. By this process, what before was usage only, unsanctioned by legal decision, has become ingrafted upon or incorporated into the common law and may thus be said to form part of it."

The learned judge then proceeds to give instances of cases illustrating this view, and continues:

"It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade, of which, if it were needed, a further confirmation might be found in the fact that according to the old form of declaring on bills of exchange, the declaration always was founded on the 'custom of merchants.' Usage adopted by the courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting up to the principal acted upon by our predecessors, and followed in the precedents they have left to us? Why is to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?"

This decision was affirmed in the House of Lords not only upon the ground of estoppel, but also upon the ground set forth in the opinion of Chief Justice Cockburn. 1 App. Cas. 476. It is quite manifest that if the English court had followed the ordinary definition of commercial paper, instead of having recourse to the business world, the instrument there in question would have been held to be non-negotiable, for it lacked an attribute which is usually regarded as essential to commercial paper, namely, that it shall provide for the payment of money only. The same practice of taking the testimony of business men for the purpose of determining whether an instrument is negotiable or not is illustrated in London Joint Stock Bank v. Simmons, 1892 A. C. 201; also Bechuanaland Exploration Company v. London Trading Bank, 1898, 2 Q. B. 658. This last case arose upon debentures issued by a railroad corporation. Speaking of the character of the instruments, Mr. Justice Kennedy, who delivered the opinion of the court, says:

"Now it is, I think, unquestionable, and it was not disputed at the bar, that such a debenture as this, if viewed according to its tenor, merely, and not with regard to mercantile usage, does not belong to the class of negotiable instruments which the law has recognized as such by virtue either of the ancient law merchant or by virtue of statute (such as bills of exchange, promissory notes, and exchequer bills), and the delivery of which confers a good title to the person who acquires them in good faith and for value, notwithstanding a defect in the title of the transferrer. It is most like a promissory note payable to bearer, but it is prevented from ranking as such by its conditions."

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The instruments contained many conditions rendering them uncertain both as to the time of payment and the manner of payment, but the court, being advised by the leading bankers of London that such instruments had for a long time been treated as negotiable by the business world, held them to be negotiable, within the law merchant. The Supreme Court of the United States, in the case of Mercer County v. Hackett, 1 Wall. 83, 95, 17 L. Ed. 548, approves of the same doctrine. See, also, Rindskoff v. Barrett, 11 Iowa, 172; same case, 14 Iowa, 101; Renner v. The Bank of Columbia, 9 Wheat. 582, 6 L. Ed. 166; Mills v. Bank of United States, 11 Wheat. 431, 6 L. Ed. 512; The Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Cookendorfer v. Preston, 4 How. 317, 11 L. Ed. 992; Kilgore v. Bulkley, 14 Conn. 362.

Now if provisions for the payment of attorney's fees and exchange were dealt with upon this basis of commercial usage, the rule of decision would be entirely plain. We have no evidence in this record on the subject, and need none, for we are informed by a great body of judicial decisions that for at least half a century it has been customary in nearly every State of the Union to incorporate such provisions in negotiable paper. This practice has been so general and so long continued that the court itself may now take judicial notice of it. In the judgment of business men, such provisions do not render promissory notes uncertain, or in any way affect their negotiability. These requirements, it should be remembered, do not offend against any rule of morals or public policy. The whole question is, do they render the instruments so uncertain as to destroy their fitness to pass current in the business world? The business world itself ought to be permitted to answer that question. It should be carefully noted that the question whether a given class of instruments shall be admitted to the category of negotiable paper is distinct from the question of the rights or liabilities of parties to such paper. These, usage could not modify or impair. A general custom of the business world may enlarge, but cannot abrogate, the established rules of law. Goodwin v. Robarts, L. R. 10 Ex. 337; Vermilye & Co. v. Adams Express Co., 21 Wall. 138, 22 L. Ed. 609.

We can learn from another source, in a trustworthy manner, the opinion of the business world as to the effect of provisions for the payment of exchange or attorney's fees upon instruments otherwise negotiable. In 1896 the commissioners appointed by the several States to promote uniformity of laws prepared the Negotiable Instruments Act. It has since been adopted in twenty-seven States and territories, including the great commercial States of Massachusetts, New Jersey, New York, Pennsylvania, Ohio, and Wisconsin. The concurrent action of the Legislatures of these several States may well be held to fairly represent the judgment and usage of the business world in this country. On the subject of certainty in negotiable paper, this act provides:

"Sec. 21. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

* * * * * * * *

"(4) With exchange, whether at a fixed rate or at the current rate; or

"(5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

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The English Bills of Exchange Act contains similar language in regard to a provision for the payment of exchange. It does not speak to the question of attorney's fees, for the practice of incorporating such provisions in promissory notes seems not to have obtained in that country.

Both upon authority and reason, we are therefore entirely satisfied that the note in question was negotiable, within the law merchant. That being so, the mortgage securing the note partook of its character, and, in the hands of the bank, was free from all equities between the original parties existing at the time of its transfer or arising subsequent thereto. Carpenter v. Longan, 16 Wall. 273, 21 L. Ed. 313; Sawyer v. Prickett, 19 Wall. 147, 22 L. Ed. 105.

We would not wish to be understood as deciding that a different result would have been reached if the indebtedness secured by the mortgage had been a mere chose in action. We leave that question open for decision when it shall arise. The doctrines of estoppel and good-faith purchaser have been steadily narrowing the "equities" of the original mortgagor or debtor, and enlarging the protection granted to a holder in good faith and without notice. Merchants' Bank of Buffalo v. Weill (Sup.), 52 N. Y. Supp. 37; Id., 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605; Ewart on Estoppel, 376 et seq.; Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506. In this last case it was held that the assignee of a recorded mortgage upon real estate which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage has a valid lien against a purchaser of the land from the mortgagee who took without notice of the assignment. The mortgage in that case was given to secure a bond. It is, of course, well established that the mortgagor may pay the mortgagee of a mortgage securing a non-negotiable debt after its assignment if the payment is made in ignorance of such assignment, and the same will have the effect of discharging the mortgage, but whether any transaction less than an actual payment can create an equity as against the assignee is a question which we prefer to leave open for future consideration.

The judgment of the trial court is affirmed.

Decision No. 853.

MANITOBA MORTG. & INVEST. CO., Limited v. WEISS et al.

101 N. W. 37.

(Supreme Court of South Dakota. Oct. 19, 1904.)

PAYMENT BY CHECK OF THIRD PERSON — TRANSMISSION FOR COLLECTION — NEGLIGENCE OF DRAWEE — EFFECT.

1. A creditor received in payment a check of a third person drawn on a bank in another town. The name of the debtor did not appear on the check. The creditor did not attempt to collect it until five days after receiving it, and by reason of the delay the check was not paid, while it would have been if transmitted for collection on the day following its receipt. Held, that the negligence of the creditor in not transmitting the check for collection on the day following its receipt, as required by

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the common law, converted the check into an absolute payment of the debt; Civ. Code 1903, § 2256, exonerating drawers and indorsers of bills of exchange not presented for payment within ten days after they could be transmitted for presentment, not being applicable.

Appeal from Circuit Court, Hutchinson county.

Action by the Manitoba Mortgage & Investment Company against Adam Weiss and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Crawford & Taylor, for appellant. French & Orvis for respondents.

CORSON, P. J. This is an appeal from a judgment in favor of the defendants and order denying a new trial. The case was tried to the court, and a certain special issue was submitted to a jury. The action was brought to foreclose a mortgage on which there was a balance due of $318.50, on August 2, 1890. The defendants were residents of Hutchinson county, near Scotland, and on August 2, 1890, they applied to Lavender & Spannagel, a firm engaged in the mercantile business in Scotland, for the sum necessary to pay their note and mortgage, which had previously been deposited with that firm by one of the defendants, Adam Weiss. Mr. Spannagel informed him that the firm did not have the money just then, and that he would give him a check and send it to the agents at Huron. Spannagel then wrote a check on the Bank of Scotland for the sum above named, in favor of Kelly & Read, the agents of the plaintiff at Huron, and signed the firm name of Lavender & Spannagel. He also wrote a letted to Kelly & Read inclosing this check, addressed to them at Huron. The check and letter were delivered to the defendant Weiss to mail, and defendant Weiss deposited this letter in the post office at Scotland. On the 9th day of August the check was deposited by Kelly & Read in the First National Bank of Huron for collection. This bank forwarded the check for collection on August 11th, through the Sioux National Bank of Sioux City. It was presented for payment at the Bank of Scotland, in Scotland, the bank upon which it was drawn, on August 14th, and payment was refused for want of funds to the credit of the drawers, Lavender & Spannagel having failed on the 12th of the same month. It was protested for nonpayment on the same day. Upon the 9th Kelly & Read, the agents of the plaintiff, wrote to Weiss a letter inclosing the note and mortgage, together with a coupon, a commission note, a junior mortgage, and a discharge of the same, and in the letter says: "Your $318.50 pays up in full. We will forward release in a few days." The defendant Weiss did not sign the check as indorser, maker, or guarantor, and his name did not appear upon the check in any manner.

It was stipulated at the trial: (1) That a latter properly stamped and addressed to a person residing at Huron, S. D., if mailed at Scotland, S. D., during the forenoon of any business day during the month of August, 1890, would, by due course of mail, have reached Huron on the first business day following said mailing; if mailed at Scotland during the afternoon of any business day during the month of August, would by due course of mail have reached Huron on the second business day thereafter. (2) That between the

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2d day of August and the 13th day of August, 1890, the firm of Lavender & Spannagel deposited in the Bank of Scotland the sum of $3,637.41, $217 thereof being deposited on the 12th day of August, 1890. (3) That between the 3d day of August and the 13th day of August, 1890, the firm of Lavender & Spannagel drew checks on said Bank of Scotland, which were paid by said bank, amounting to $3,175.75, $125.50 thereof being paid on the 12th day of August, 1890. (4) That all checks drawn on said bank by said firm of Lavender & Spannagel which were presented for payment between the 2d day of August and 12 o'clock noon on the 12th day of August, 1890, were paid in full by said bank. (5) It is admitted that the firm of Lavender & Spannagel ceased doing business on the afternoon of the 12th day of August, 1890, their entire stock of goods and other property being levied upon that day by the sheriff of Bon Homme county under execution in the case of T. O. Bogart against Lavender & Spannagel. The issue submitted to the jury was, on what day did Kelly & Read receive the letter Exhibit B and check for $318.50 at Huron, S. D.? To which the jury answered that the check was received at Huron, August 4, 1890. This finding of the jury was adopted by the court, and the court further finds that there was no express agreement between plaintiff and defendants that said check should be received in full payment and satisfaction of the indebtedness due and owing on said note and mortgage. From the findings the court concludes that the receipt of said check by Kelly & Read from the defendant Adam Weiss operated at the time of its receipt as a provisional payment only of the note and mortgage described in the foregoing findings of fact that the debt would remain until discharged by the payment of the check, or by such dealing with it by plaintiff or its agents as would, in judgment of law, convert what was originally a provisional payment into an absolute one; that the plaintiff by its agents holding said check from the 4th day of August, 1890, until the 9th day of August, 1890, was guilty of such negligence as would and did, in judgment of law, convert the provisional payment into an absolute payment of said note and mortgage; and that the note and mortgage sued on were fully paid by the defendants before the commencement of this action. It is contended by the plaintiff and appellant that the court erred, in making its conclusions of law, in finding that the receipt of the check by Kelly & Read for $318.50 from the defendant Adam Weiss, and the holding of the same until August 9, 1890, was such negligence as did in judgment of law convert the provisional payment into an absolute payment of said note and mortgage, and in finding that the note and mortgage were fully paid by defendant before the commencement of the suit. It is further contended by the appellant that the case is governed by section 2256, Civ. Code 1903, which reads as follows: "If a bill of exchange payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated unless such presentment is excused" — and that the check in question was in law a bill of exchange, and was in fact presented within the time specified in the above-quoted section. It will be observed that the section provides that the drawers and indorsers are exonerated in case the

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bill shall not be presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment. Lavender & Spannagel were the drawers, and the check was drawn payable to the order of Kelly & Read, and not to the defendant Weiss. We are of the opinion that the respondents are right in their contention, and that the section of the Code above quoted has no application to the case, and that it must be controlled by the rule as established by the common law. Under that rule we are of the opinion that the court was right in its conclusions of law, that it was the duty of Kelly & Read to have forwarded the check on the following day after its receipt for presentment and collection. Had they so forwarded it, presumptively it would have been presented to the bank for payment not later than the 10th or 11th of August, when it seems the checks of Lavender & Spannagel were paid in full by the bank. At common law the drawee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. When drawn on a bank in a different place, the drawee has the same time, and in addition thereto such time as will be required to transmit it to the place of payment by due course of mail. Mohawk Bank v. Broderick, 13 Wend. 133, 27 Am. Dec. 192; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Simpson v. Pacific Mutual Life Ins. Co., 47 Cal. 585. The drawees of a check, in the absence of an express agreement that the same should be received as payment, may still recover the amount therein specified on the drawers in case the check is duly presented and dishonored (Estey v. Birnbaum, 9 S. D. 174, 68 N. W. 290); but, whenever the failure to collect the check results from the negligence of the drawees, the acceptance of the check constitutes payment, and this doctrine is applicable to checks and notes of third parties taken in payment of a debt not signed or indorsed by the debtor (Kilpatrick v. Home Building & Loan Association, 119 Pa. 30, 12 Atl. 754; Anderson v. Gill [Md.] 29 Atl. 527; 25 L. R. A. 200, 47 Am. St. Rep. 402). In the former case the Supreme Court of Pennsylvania, speaking upon this subject, says: "It cannot, of course, be claimed that the receipt of Beeby's check was per se payment of the association's claim. It is well settled that, in the absence of an agreement to the contrary, a check or promissory note of either the debtor or a third person, received for a debt is merely conditional payment — that is, satisfaction of the debt if and when paid — but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc. And if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment." In the latter case the Supreme Court of Maryland used the following language: "But whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment, if accepted as cash (Woodville v. Reed, 26 Md. 190), still, in the absence of an express agreement, the acceptance of a check of either the debtor or a third party is in fact merely conditional payment — that is, satisfaction of the debt if and when paid (Haines v. Pearce, 41 Md. 221); but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received

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sustains loss by want of such diligence it will be held to operate as actual payment." See, also, First National Bank of Meadville v. Fourth Nat'l Bank of N. Y., 77 N. Y. 320, 33 Am. Rep. 618; Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89.

It clearly appears from finding 13 that had the check of Lavender & Spannagel been presented for payment to the bank at Scotland within the time it should htve been presented at common law the check would have been paid. The failure to collect the check was due, therefore, to the negligence of the agents of the plaintiff in retaining it at Huron several days after it should have been forwarded for collection. The court was clearly right, therefore, in its conclusions of law that the plaintiff through its agents, was guilty of such negligence as would in judgment of law "convert the provisional payment into an absolute payment of said note and mortgage."

It is contended by the appellants that the court should have directed the jury to find upon the evidenct of the agent Read that the check was not received at Huron until the 9th day of August, but this contention is untenable. The question was one of fact for the jury and the court. Mut. Reserve Fund Life Ass'n v. Hamlin, 139 U. S. 297, 11 Sup. Ct. 614, 35 L. Ed. 167; Marston v. Bigelow (Mass.), 22 N. E. 71, 5 L. R. A. 43; Pennypacker v. Capital Ins. Co. (Iowa), 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Briggs v. Hervey, 130 Mass. 186; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536.

The finding of the jury and court that the check was received at Huron on the 4th is sustained by preponderance of the evidence, or at least we cannot say that there was a preponderance of evidence against the finding of the court.

Finding no error in the record, the judgment of the Circuit Court and order denying a new trial are affirmed.

Decision No. 854.

IDA COUNTY SAVINGS BANK v. SEIDENSTICKER et al.

102 N. W. 821.

(Supreme Court of Iowa. March 11, 1905.)

SAVINGS BANKS — BOND OF CASHIER — LIABILITY OF SURETIES — ACCOUNT — APPLICATION OF PAYMENT.

1. A bond given by the cashier of a savings bank during the first year of his election to that office, and conditioned that he will perform the duties of the office according to the by-laws of the bank and the laws of the State governing savings banks, is not a continuing bond, and will not bind the sureties thereon for defalcations of the cashier during years subsequent to the first year of his election, where, under the practice of the board of directors, such officer is elected annually.

2. The surety of a bank cashier is not liable for wrongful withdrawals of money during the operation of his official bond, where the items withdrawn were charged to him on the books, and repayments and deposits made after the expiration of the

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period for which the bond was given more than equaled the amounts so withdrawn, since payments on account are to be applied according to priority of time.

Appeal from District Court, Ida county; Z. A. Church, Judge.

Action at law upon a bond given by the defendant Seidensticker for the faithful performance of his duties as cashier of the plaintiff bank. Judgment for plaintiff upon a directed verdict, and the defendant surety appeals. Since the appeal was taken, the surety F. C. Knepper has deceased, and his representatives have been substituted as appellants. Reversed.

See 92 N. W. 862.

M. J. Wade, T. F. Bevington, and J. L. Kennedy, for appellants. Will E. Johnston, Wright & Call, and Hubbard & Burgess, for appellee.

WEAVER, J. In the year 1893 the First National Bank of Ida Grove, Iowa, ceased to do business, and transferred its assets to one J. T. Hallam. Soon thereafter Hallam, who had been conducting a private bank, united with others to organize the plaintiff bank, himself becoming the owner of something more than two-thirds of the capital stock. The defendant C. J. Seidensticker, who had been employed in the national bank, and subsequently by Hallam in his private bank, became the plaintiff's first cashier, and as such gave the bond now in suit, with the defendant F. C. Knepper as his surety. The condition of the bond is in the following words: "The condition of this bond is such that, Whereas, the said Chas J. Seidensticker has been elected cashier of the Ida County Savings Bank, within Ida Grove. Now, if he shall well and truly perform the duties of the office of cashier, according to the by-laws of said bank, and the law of the State of Iowa governing savings banks, and exercise all reasonable care and diligence, and the preservation and lawful disposal of all moneys, books, papers and securities belonging to the bank, then the bond to be void, otherwise of force and effect." At the beginning of each bank year the board of directors re-elected the cashier, and he continued in the position until March, 1897, when he absconded. During all the period of Seidensticker's service in this capacity, Hallam, who has since died, was the president and the active superintendent or managing officer of the bank. On November 20, 1897, the plaintiff brought an action upon said bond, alleging that, in violation of his duties as cashier, Seidensticker had taken, appropriated, and converted to his own use moneys of the bank to the aggregate amount of $7,959.41, for which sum judgment was demanded against him and his surety. The surety denies liability on various grounds, to which reference will be made in the progress of this opinion. A reversal of the judgment entered below upon a directed verdict is claimed upon numerous alleged errors.

1. The first question to be considered is whether the bond sued upon created a continuing obligation upon the surety so long as Seidensticker might be retained as cashier of the bank, or is to be limited in time to the first year of said cashier's service. To properly answer this inquiry, reference to the statute governing savings banks, and to the facts and circumstances attending the giving of the bond, becomes necessary.

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The statute invests savings banks with the power to appoint such officers, agents, and employees as the business transacted by them may require. Code, § 1844. It also provides for the annual election of a board of directors (section 1846), and makes it the duty of such board at their first meeting, and as often thereafter as the by-laws require, to elect from their own number a president and vice-president for the ensuing year, and appoint a treasurer or cashier and such other officers and employees as may be required, who shall hold their office during the pleasure of the board, and give such security for the performance of their duties as may be required of them by the by-laws (section 1845). The by-laws of the plaintiff bank, as offered in evidence, repeat in substance the statutory provision above cited, and provide in general terms that the president, cashier, and employees of the bank shall give bonds in such sums, with sureties, as the board of directors shall approve. The board is also given power by a majority vote to remove at any time any or all of the officers or employees and appoint others in their stead. In actual practice the board adopted the plan of electing or appointing the cashier annually at the time of the regular annual election of president and vice-president. The records of the corporation show that the first regular meeting of the board of directors was held on May 30, 1893, and that Charles J. Seidensticker was "appointed cashier until the next annual election." At the same meeting it was voted that the president be required to give bond in the sum of $50,000, and the cashier in the sum of $10,000, to be approved by the board. The cashier's salary was at the same time fixed at $1,000 per year until further ordered. The second annual meeting occurred on May 31, 1894. The record of this meeting recites that a motion that Charles J. Seidensticker "be elected cashier for the next year" was carried. At the third annual meeting, held June 4, 1895, it is recorded that a motion that "Charles J. Seidensticker be appointed cashier for the ensuing year" was carried, and that his salary was fixed at $840 per year. No record seems to have been preserved of the annual meeting of the year 1896. Seidensticker testifies that such a meeting was held and he was again reappointed for the ensuing year, and this is not disputed. These four successive appointments cover the entire period of the cashier's service. The bond in suit was executed after the first election, and was approved and accepted by the board of directors about June 27, 1893. It was never renewed, nor was any other bond or security for the performance of his duties ever required of the cashier while he remained in the bank's service. It is the contention of the surety that the bond is to be construed with reference to the term of the appointment or election of Seidensticker to the office of cashier. In other words, the proposition is that, Seidensticker having been appointed to serve in that capacity for the period of one year, subject, of course, to the reserved right or power of the board of directors to remove him at an earlier date, the bond given to secure his faithful discharge of the duties of his office will not operate to bind the sureties for defalcations occurring after the expiration of such term and under another and different appointment. The question is one upon which there is some apparent confusion in the cases, but, when closely examined, the want of harmony is apparent rather than real.

It is elementary that a surety, especially one who assumes that

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relation as a mere matter of accommodation to one or both of the principal parties, is entitled to rely upon the strict terms of his contract, and his liability will not be extended or enlarged by implication. Miller v. Stewart, 9 Wheat. 680, 6 L. Ed. 189. It is equally well settled that, in the absence of stipulations making the contrary intention clearly and unequivocally apparent, the obligation of a surety upon an official bond does not extend beyond the term or period of service to which such officer had been appointed or elected when the bond was given. Wapello Co. v. Bigham, 10 Iowa, 40, 74 Am. Dec. 370; Fresno Co. v. Allen, 67 Cal. 505, 8 Pac. 59; So. Car. Soc. v. Johnson, 10 Am. Dec. 644; Chelmsford Co. v. Demarest, 7 Gray, 1; Moss v. State, 10 Mo. 338, 47 Am. Dec. 116; Bigelow v. Bridge, 8 Mass. 275. But there is a class of cases in which the application of the last-mentioned rule has given rise to differences of opinion. They relate generally speaking to officers for whom the law which authorizes their appointment has fixed no definite term of service, and are removable at any time at the pleasure of the appointing power, but are nevertheless appointed and reappointed to successive definite terms, as was done in the case at bar. A line of decisions is to be found which appear to hold with more or less strictness that a bond given by such officer upon his first appointment is a continuing obligation upon the surety, unless the contrary intention is clearly manifest in the terms of the instrument. The case most often cited in support of this holding is Amherst Bank v. Root, 2 Metc. (Mass.) 522, which was an action upon a cashier's bond. The statute of Massachusetts at that time authorized the board of bank directors to appoint a cashier and other officers, who should "retain their places until removed therefrom or others are appointed in their stead." The defendant Root was appointed cashier from year to year for several years, but gave no bond, save the one made to the bank upon his original appointment. That bond recited generally that Root had been appointed cashier, and was conditioned upon his faithful performance of the duties of the position. The sureties were directors of the bank. It was held by a divided court that an action would lie upon the bond for the cashier's default, which occurred in the later years of service. The majority opinion concedes the general rule that the bond of an officer appointed for a fixed or limited term imposes no obligation on the surety for the conduct of his principal under a reappointment, but gives controlling force to the statute providing that a cashier "shall retain his office until removed therefrom," and shall give bond "conditioned for the faithful performance of the duties of his office." "This provision," the opinion says, "regulates the office of cashier, and fixes the term by which it is held," and upon this theory of the effect of the enactment it was decided that the bond must be held to have been given to cover the entire time of the cashier's service until he should be "removed" or another be "appointed in his place."

Even if we accept this construction as correct, we think our statute, which provides that the cashier shall hold his office "at the pleasure of the board," is not the equivalent of the Massachusetts act. A statute which unequivocally gives the cashier the right to retain his office until removed may, without violence to the meaning of these words, be held to imply an absence of authority in the board

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of directors to require an annual appointment or reappointment of a cashier whose services are found to be satisfactory, while a provision that he shall hold his office at "the pleasure of the board" does not have that obvious effect. It is a fair construction of this provision to say that, while retaining the right to remove him at any time, the board may properly pursue the plan of appointing or employing a cashier for a year at a time, and make the annual reappointment a condition precedent to his right to continue in such position. That the majority opinion in Amherst Bank v. Root is made to turn upon the construction of the local statute has been distinctly held by the Massachusetts court in Richardson School Fund v. Dean, 130 Mass. 242. In that case the charter of a corporation provided that its trustees should be chosen for a period of three years, and that other officers should be appointed as the by-laws might provide. No by-laws were adopted, or, at least, none appear in the record; but it was shown that "by the uniform practice" of the corporation its treasurer had been chosen at regular triennial elections "for the ensuing term of three years." Under these circumstances it was held that the bond given by the treasurer under his first appointment, though not containing any express time limit to its operation, was not a continuing obligation, and did not bind the surety for defalcations occurring after the expiration of the first term of three years. The same construction is placed upon Amherst Bank v. Root in Welch v. Seymour, 28 Conn. 394, Chelmsford Co. v. Demarest, 7 Gray, 1, and Bank v. Briggs, 69 Vt. 12, 37 Atl. 231, 37 L. R. A. 845, 60 Am. St. Rep. 922. The case of Exeter Bank v. Rogers, 7 N. H. 21, is somewhat less in point than the Root case. While, under the peculiar circumstances there disclosed, the bond was held to continue through a long series of years, the opinion appears, impliedly at least, to except from the rule there approved cases of the character of the one before us. It say that "when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment." As the cashier in the present case, though holding at the will of the directors, nevertheless held by an "appointment limited to a certain term," it would seem to follow that his bond given upon such appointment is not within the rule of the New Hampshire precedent. Of the other cases cited by the appellee in this connection, we will speak only of Westervelt v. Mohrenstecher, 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477, which was an action upon the bond of the cashier of a national bank. It was there decided that the annuel re-election of the cashier did not operate to terminate the obligation of his bond given at the time of his first appointment. This holding was based in part upon the act of Congress which makes the duration of service of bank officers indefinite and subject to be terminated at the will of the directors, and in part upon the peculiar language of the bond, which was expressly conditioned for the faithful performance of duty by the cashier "for and during all time he shall hold the office of cashier of the said bank." This, it will be noted, is a much broader and more sweeping obligation than is expressed in the bond in suit. It may also be said, with reference to the last-cited case, that it seems, in argument, to carry the idea of the

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continued obligation of the surety upon such bonds beyond the limit expressed in any of the other precedents called to our attention. In an action upon a similar bond the Vermont court carefully reviews the authorities and reaches the opposite conclusion. Speaking of the annual election of an officer who is subject to removal or displacement at the will of the appointing power, the opinion well says: "The provision that an officer may be dismissed at pleasure can apply as well to an appointment limited to a given time as to an appointment to an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminated at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the board of directors, will continue for the period designated and expire by its own limitation. There is nothing in the statute which requires us to hold that this surety contracted with reference to an unlimited period when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors; it was the filling of a vacancy occasioned by the limitation of their previous appointment." It is difficult to avoid the force and justice of this reasoning. It finds support also in the following cases: O'Brien v. Murphy, 175 Mass, 255, 56 N. E. 283, 78 Am. St. Rep. 487; Bigelow v. Bridge, 8 Mass. 275; Union Co. Sav. Inst. v. Ostrander, 163 N. Y. 430, 57 N. E. 627; Moss v. State, 47 Am. Dec. 116; Bank v. Hunt, 72 Mo. 597, 37 Am. Rep. 449; S. Car. Soc. v. Johnson, 10 Am. Dec. 644; Mutual Loan & Building Ass'n v. Price, 16 Fla. 204, 26 Am. Rep. 703; Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688; Citizens' Loan Ass'n v. Nugent, 40 N. J. Law, 215, 29 Am. Rep. 230; Wardens v. Bostwick, 5 B. & P. 175; Kilson v. Julian, 4 E. & B. 853; Liverpool W. Co. v. Atkinson, 6 East, 507; Arlington v. Merrick, 2 Saund. 403; Peppin v. Cooper, 2 B. & A. 431; Theobold on Prin. & Surety, § 82; M. & M. Co. v. O. F. Hall Ass'n, 48 Pa. 446; Curling v. Chalkeen, 3 M. & S. 502.

Few, if any, of these cases are quite parallel in their facts with the one we are considering, but they amply sustain the rule, to which we adhere, that a cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which such cashier holds his office, and, if such appointment be for a definite period, the bond ceases to be effective upon the expiration of the term so designated. The reasoning upon which this rule is based seems to be sound, and the rule itself places an undue burden upon no one. He who is requested to become surety upon the bond of a neighbor or friend who has been made cashier of a bank under an appointment expiring in one year or other short period may willingly do so where he would very reasonably refuse to assume an obligation which might continue for a lifetime. Before assuming the obligation, the surety may reasonably inquire as to the time and terms of his principal's appointment, and rely upon the actions of the corporation in that respect. To hold otherwise is to set a trap for the unwary. Says Chancellor Kent: "It is a well-settled rule, both at law and in equity, that a surety is not bound beyond the present terms of his contract. This rule is founded upon the most cogent and salutary principles of public policy and

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justice. In the complicated transactions of civil life the aid of one friend to another in the character of surety or bail becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his engagement."

Believing, as we do, that the engagement of the surety in this case must be measured by the terms of the appointment under which the cashier was serving at the date of the bond, we are constrained to hold that the appellants cannot be made liable for defalcations of Seidensticker occurring after his first re-election.

2. The plaintiff's itemized statement of the account of moneys alleged to have been converted by Seidensticker begins under date of April 24, 1894, and continues from day to day, or, at least, at very frequent intervals, until the close of his service as cashier in the year 1897. Indeed, there seems to have been little or no concealment of the fact that he was using moneys drawn from the bank, the items being from time to time charged to him on the books of the bank, and the account credited with occasional payments or deposits, and by notes given in settlement of his overdrafts. Under the rule which we have approved in the preceding paragraph of this opinion, the surety upon the bond in suit was not chargeable with liability for any of the alleged wrongful conversions or overdrafts of the cashier after his first re-election, on or about June 1, 1894. During this period of about five weeks the items charged against the cashier aggregate a comparatively small sum. On the other hand, during the time the account set up by the plaintiff was accumulating, Seidensticker became entitled to be and is credited in said itemized statement with considerable sums of money for wages earned and for payments and deposits made, which, if applied to the extinguishment of the claims against him according to priority of time in respect to the dates of their creation, much more than satisfy any demand which otherwise could be rightfully asserted upon the bond. That the payments and credits, in the absence of any agreement or direction for their application elsewhere, should be used for the satisfaction of those items or claims which are earliest in point of time, see Allen v. Brown, 39 Iowa, 330, and the numerous authorities cited in volume 2, Am. & Eng. Encyc. of Law (2d Ed.) 462. Such application being made, and the surety's liability being limited to the term or period for which the cashier was first elected, there is confessedly nothing upon which to base a recovery by the plaintiff.

This conclusion renders it unnecessary for us to enter upon a consideration of the many other interesting questions which have been argued by counsel.

For the reasons stated, the judgment of the District Court is reversed

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